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WOMEN'S RIGHTS AS HUMAN RIGHTS — RULES, REALITIES AND THE ROLE OF CULTURE: A FORMULA FOR REFORM

*Berta Esperanza Hernández-Truyol**

From the first dawn of life unto the grave,
Poor womankind's in every state a slave.

* * *

We will our rights in learning's world maintain;
Wilt's empire now shall know a female reign."

Beijing, China. Tuesday, September 5, 1995. Beijing International Conference Center (BICC). The afternoon plenary of the United Nations Fourth World Conference on Women: Equality, Peace, Development is about to start in a hall too small to seat everyone who wants to be there. Other than places for some of the delegates from each attending State, space is limited and in high demand. A lucky few lined up for hours to get a ticket; many ended up negotiating prime space in front of one of several TV screens strategically located throughout the building. A hushed silence fell in the hall and in the areas surrounding the TV screens. The introduction: Hillary Rodham Clinton, First Lady of the United States of America. She speaks on women, children, poverty, education, health, and economic and political participation. She gets into a rhythm as she softly makes her point: "If there is one message that echoes forth from this conference, it is that human rights are women's rights—And women's rights are human rights." Emphasizing her message, she gives detailed examples—"it is a violation of *human* rights when babies are denied food, or drowned, or suffocated, or their spines broken, simply because they are born girls." She continues — "it is a violation of *human* rights" when women and girls are subject

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** Sarah Egerton, *The Emulation* (1703), quoted in THE OXFORD DICTIONARY OF QUOTATIONS 267 (Angela Partington ed., 4th ed. 1992).

to: violence, even in their own homes; female genital mutilation; bride-burning; girl-killing; rape, sometimes as a tactic or prize of war; forced abortion; forced sterilization and the usual litany of abuses that are, regrettably, all too common and all too well known. The silence is broken, first by nervous and gradually empowered applause which fills the building—inside and outside the hall.”

I. INTRODUCTION

Imagine, as we go into the 21st century, needing support for such a simple statement: that over half of the world, meaning women, are indeed humans and have human rights. This apparently revolutionary concept has resulted in a powerful, emerging movement in the international human rights arena which urges the recognition and acknowledgement of women's rights as human rights. This movement was clearly embraced by First Lady Hillary Rodham Clinton (and many other world leaders) in China in September 1995, with her declaration that “human rights are women's rights . . . [a]nd women's rights are human rights.”¹ The catalysts at the core of this global initiative to recognize and promote women's rights as human rights are the correlative needs to eradicate the institutionalized invisibility of women in the global sphere, to craft a means to implement existing rights to benefit women's lives, and to develop, expand, and transform the content and meaning of such rights to reflect women's realities and compel women's equality. This article explores the roles played by rules of law and by the conflation of economic, social, political, religious, cultural, and historic realities in the marginalization of women in the international, regional, and domestic spheres worldwide.² Its centerpiece is a proposed analytical model

*** See First Lady Hillary Rodham Clinton, Remarks to the United Nations Fourth World Conference on Women Plenary Session 6-7 (Sept. 5-6, 1995) (copy on file with the *Brooklyn Journal of International Law*) [hereinafter Fourth World Conference on Women].

1. *Id.* at 7. Prime Minister Gro Harlem Brundtland of Norway also emphasized the importance of recognizing women's human rights and bettering women's condition world-wide. Significantly, the United Nations Fourth World Conference on Women, *Beijing Declaration and Draft Platform for Action*, U.N. Doc. A/CONF.177/20 (1995) (advance unedited draft) [hereinafter *Beijing Platform*], clearly states women's rights are human rights. *Id.* ¶ 14.

2. This exclusion of women has been a reality in both the public and private

deconstructing and reconfiguring the human rights framework to ensure that women's rights that exist in theory become reality.

The United Nations *Human Development Report 1995* states the shocking, but all-too-well known fact quite plainly: "In no society today do women enjoy the same opportunities as men."³ Recognizing the second-class status of women in societies around the world and the dangers of the marginalization that results, this article, as the title suggests, reviews and analyzes the rules that exist and the realities that persist. It proposes reform in the context of cultural, religious, and traditional norms and practices. Part II describes the general setting that provided the impetus for women around the world to unite and demand their rights as human beings. Part III reviews the international human rights construct to establish that, as a matter of paper rights, women are, or should be, protected under existing norms. Part IV reveals that the reality of the conditions and status of women worldwide is a far cry from the equality mandated by the rules. This section includes an assessment of some gender-specific practices, some of which are justified by culture, history, and tradition, as well as a scrutiny of various substantive provisions of the body of human rights documents to show that women are, indeed, not equal in their enjoyment of, or protection by, established international

spheres. See *infra* notes 4-6, 145-57 and accompanying text; see also FEMINIST LEGAL THEORY FOUNDATIONS 3 (D. Kelly Weisberg ed., 1993) [hereinafter FOUNDATIONS]. "[T]he role of law, which by its absence and unwillingness to regulate the domestic sphere, implicitly has ensured constraints that have relegated women to the private sphere. In this manner law plays a powerful role in shaping and maintaining women's subordination." *Id.*; see also Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993); Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, 15 HUM. RTS. Q. 230, 234 (1993). See generally Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in FOUNDATIONS, *supra*, at 9; UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 1 (1995) [hereinafter UNHDR 1995] ("One of the defining movements of the 20th century has been the relentless struggle for gender equality.").

3. UNHDR 1995, *supra* note 2, at 29. This report recognizes that "a widespread pattern of inequality between women and men—in their access to education, health and nutrition, and even more in their participation in the economic and political sphere." *Id.* "The reality . . . is that women do not share equally with men in the opportunities, benefits and responsibilities of citizenship and development." *Id.* at 99.

norms. In Part V, this piece explores the role of culture in analyzing the nature and obligations of compliance with articulated human rights. Finally, Part VI designs a methodology that reconstructs the existing approach to rights to ensure, facilitate, and safeguard women's enjoyment of the full range of human rights.

To be sure, the analytical methodology proposed is not necessarily limited to a scrutiny of gender issues. Indeed, it cannot be limited to gender because gender is not, and cannot be, a monolithic category. Gender cannot be considered essential or viewed in isolation. Women's personhood is also indivisible from racial, ethnic, cultural, and other aspects of their identity.⁴ Women speak in different tongues and experience life in different ways. It is, thus, with a multiple perspective or multidimensionality analysis that this article addresses women's rights as human rights.

II. THE GLOBAL SETTING

Notwithstanding roadblocks in law and life, women have refused to accept, and indeed have fought strongly against, their imposed invisibility and silence. Throughout time, women have made unrelenting efforts to raise their voices, urge their perspectives, and demand that their needs be met. Women have been at the forefront of this human rights drive, presenting their separate realities and insisting that issues affecting them because of their sex be deemed an integral part of the human rights construct.

The traditional exclusion of women from the articulation, development, implementation, and enforcement of human rights has rendered gender issues invisible, and consequently has shielded gender-based abuses from much needed scrutiny. For example, the flawed public/private dichotomy historically interfered with the recognition of wrongs inflicted on women because of their sex such as domestic violence, which now is acknowledged as a violation of domestic, regional, and international rights,⁵ including, among others, the right to security of

4. Certainly, that perspective is personal—I can no more check my ethnicity at the coat room as I write this article than I can check my gender.

5. For the negative impact of the public/private dichotomy on women's exercise of human rights, see Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL

the person.⁶ This false public/private dichotomy, in the name of the "rule of law," has ghettoized women's interests and conspired to deny equal status to women.

The exclusion of women from the enjoyment of human rights exists in all three of the so-called generations of human rights — first (civil and political), second (economic, social, and cultural), and third (solidarity).⁷ Thus, international norms

FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter FEMINIST PERSPECTIVES]; Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca J. Cook ed., 1994) [hereinafter HUMAN RIGHTS OF WOMEN]; Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUSTL. Y.B. INT'L L. 190 (1992); Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, in FEMINIST PERSPECTIVES, *supra*, at 135. For United States cases discussing the battering of women in the context of the public/private distinction, see BEVERLY BALOS & MARY L. FELLOWS, *LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION* 195-200 (1994).

Since the emergence of women's activism in the international sphere, various international documents have addressed the public/private dichotomy. See *Vienna Declaration and Programme of Action*, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., pt. II, U.N. Doc. A/CONF.157/24 (1993) [hereinafter *Vienna Declaration and Programme of Action*]; *Draft Declaration on the Elimination of Violence Against Women*, U.N. ESCOR, Comm'n on the Status of Women, Annex 1, art. 2(a)-(b), U.N. Doc. E/CN.6/WG.2/1992/L.3 (1993) [hereinafter *DEVAW*].

6. Human rights violations against women frequently go unacknowledged and unpunished simply because private persons, rather than state agents, are the actors. The right to security of the person is one such right often breached, particularly in instances of domestic violence. For documents recognizing the right to security of the person, see *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]; *International Covenant on Civil and Political Rights*, adopted Dec. 19, 1966, art. 9(1), 999 U.N.T.S. 171, 175 [hereinafter *ICCPR*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 5(1), 213 U.N.T.S. 222, 226, amended by Protocol No. 1, Europ. T.S. No. 46, Protocol No. 3, Europ. T.S. No. 45, Protocol No. 5, Europ. T.S. No. 55, Protocol No. 8, Europ. T.S. No. 118 [hereinafter *European Convention*]; *Report of the International Conference on Population and Development*, International Conf. on Population and Dev., ch. II, princ. 1, at 14, U.N. Doc. A/CONF.171/13 (1994) [hereinafter *ICPD*]; *Report of the World Summit for Social Development*, Principles and Goals 26(1), at 10, U.N. Doc. A/CONF.166/9 (1995) [hereinafter *CDPOA*]; *Beijing Platform*, *supra* note 1, ¶ 14.

7. For a description of the evolution of the generational rights, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985) (citing Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 321 (1982)); see also Susana Fried, Panel Session on Economic and Social Rights (June 1994) (pa-

must be reconceptualized to reach issues that concern individuals such as sexual harassment, gender-based violence, reproductive freedom, education, and the right to vote, as well as issues that pertain to states, governments, and intergovernmental organizations, such as economic policies and structural adjustment programs. The incorporation of the multiplicity of women's voices and concerns into the rights discourse is essential to effect this reformulation of rights. Scholars, representatives (at the national, international, intergovernmental, and non-governmental levels), and activists in various fields must work together, utilizing an interdisciplinary approach to the rights construct, to implement existing rights in a fashion that includes and protects women. Only such an approach will develop, expand, and transform the content and meaning of human rights in a manner that will reflect women's realities and include women's diverse perspectives.⁸

The proposed analytical model takes a necessary, and appropriate, multidimensional perspective.⁹ The current con-

per given at the Women's Global Leadership Institute, Center for Women's Global Leadership) (arguing that hierarchy implied by notion of "generations" of rights obstructs recognition of indivisibility and intersectionality of human rights in general, and women's rights in particular).

8. See Berta E. Hernández-Truyol, *Report of the Conference Rapporteur*, 44 AM. U. L. REV. 1389 (1995) (Author proposes multidimensionality approach to evaluate claims, rather than the prevalent, traditional single-issue approach, and notes that in international arena, increasing activism of nongovernmental organizations (NGOs) has secured greater participation by women in human rights discourse. As a result, recent international documents such as the Vienna Declaration and Programme of Action reflect more adequately women's concerns and their perspectives.); see also Gwendolyn Mikell, *African Structural Adjustment: Women and Legal Changes*, 69 ST. JOHN'S L. REV. (forthcoming 1996); Claudio Grossman, *The Inter-American System: Opportunities For Women's Rights*, 44 AM. U. L. REV. 1305 (1995); ICPD, *supra* note 6, at ch. XV.

9. See Hernández-Truyol, *supra* note 8. See *infra* Part VI, for the author's proposal of a woman-centered multidimensional perspective which addresses racial, ethnic, cultural, linguistic, religious, nationality, socioeconomic class, and sexuality issues, recognizing that gender cannot be isolated from any of these categories. See also Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in FEMINIST PERSPECTIVES, *supra* note 5, at 11, 12 ("Gender must also be analyzed in relation to other factors such as nationality, race, and class in order to discuss the multiple forms of human rights abuse that women suffer."); Berta E. Hernández-Truyol, *Building Bridges — Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) [hereinafter Hernández-Truyol, *Building Bridges*] (proposing multidimensional perspective in dealing with Latinas/os as a non-monolithic ethnic group); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in FOUNDA-

struct which defines rights and prohibitions with a single-issue focus is ill-equipped as an analytical tool to evaluate diverse and indivisible women's issues.¹⁰ Further, the multidimensional perspective incorporates a culturally sensitive analysis that embraces the realities and voices of women from different cultures, religions and traditions to ensure that the new international human rights construct is indeed egalitarian in both principle and application.

Although these concerns and issues are not new, it is only now that women have gained access to domestic and international arenas—both formal and informal—that the gender dimensions of human rights norms are being explored and that a feminist critique of international law is emerging.¹¹ Despite

TIONS, *supra* note 2, at 383 (discussing "problematic consequence[s] of the tendency to treat race and gender as mutually exclusive categories of experience and analysis."); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (criticizing notion that "unitary, 'essential' women's experience can be . . . described independently of race, class, sexual orientation, and other realities of experience"); Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23, 24 (1991) ("The feminism . . . which I want to recover in the context of legal theory is that which redefines subjectivity in light of the key variables of subject formation: race, ethnicity, class and gender."). *But see* Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 18 (1991) ("In recent critiques of feminist work for failing to take account of race or class, it is worth noting that the fact that there is such a thing as race and class is assumed, although race and class are generally treated as abstractions to attack gender rather than as concrete realities, if indeed they are treated at all.") (citations omitted).

10. See Hernández-Trujol, *supra* note 8 (noting that human rights discourse must recognize women's roles outside traditional purview including their rights to participate in all aspects of public and private life); *see also* Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887 (1989) (questioning whether law, framed and defined by men, can adequately address "women's experiences of harm"); María C. Lugones et al., *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for 'The Woman's Voice'*, 6 WOMEN'S STUD. INT'L F. 573, 573-76 (1983).

11. The Vienna Conference addressed and incorporated women's concerns into the Vienna Declaration and Programme of Action. *See Vienna Declaration and Programme of Action*, *supra* note 5. *See also* Elisabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in FEMINIST PERSPECTIVES, *supra* note 5, at 18, 30 (commenting that "the most organized and vocal of the NGO participants [at Vienna were] women [promoting] . . . their issues at the NGO Forum and the official meeting"); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991) (Feminist critique of international human rights reaffirms need to reassess and reconstruct traditional paradigm to reflect women's realities); Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1019 (1995) ("The [Vi-

the infancy of this "women's rights are human rights" movement, there are some who have already begun to dispute the need for any focus on international women's human rights. These critics suggest that such discourse is inappropriate and unnecessary because international human rights norms include women as human beings, and sex, meaning female, as a protected class. Thus, the proper emphasis is on *all* people, not just women.¹² Predictably, critics of the feminist methodology take the formalistic, simplistic approach that a focus on women's human rights is misplaced because international,¹³ regional,¹⁴ and domestic¹⁵ instruments facially mandate gender equality.

This analysis is defective for various reasons, not the least of which is that it would be inconceivable to challenge a concern about the rights of people belonging to a racial, religious or indigenous group on the grounds that they are simply people too.¹⁶ Further, such criticisms are problematic as a "reality check" on women's everyday lives empirically and reveal the historic invisibility and silencing of women in the rights discourse and the present global status and condition of women as second-class citizens.

Focusing on women's rights as human rights in the international forum is not only proper but also imperative. The

enna Conference] provided women's groups and nongovernmental organizations [] with an excellent platform for advocating the integration of women's rights as human rights into the Vienna Declaration and Programme of Action.").

12. See, e.g., Fernando R. Tesón, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647 (1993). But see Bunch, *supra* note 9.

13. See *infra* notes 35-36, 38-41, for discussion of international documents.

14. See *infra* notes 42-45, for discussion of regional documents.

15. For a sample of domestic instruments expressly including sex equality, see INTERNATIONAL LABOUR OFFICE, CONSTITUTIONAL PROVISIONS CONCERNING SOCIAL AND ECONOMIC POLICY: AN INTERNATIONAL COLLECTION OF TEXTS COVERING 450 COUNTRIES AND OTHER GOVERNMENTAL UNITS (1944) (enumerating constitutional provisions guaranteeing civil rights based on equality of various nations, including Austria, Paraguay, Romania, Nicaragua, Cuba, and the United States).

16. This analysis fails to accommodate the position of women as political minorities within a system dominated by decidedly patriarchal institutions and inclinations. It also does not take into consideration the fact that many international law documents expressly exclude or routinely ignore women. See *infra* notes 147-59 and accompanying text (detailing how international law documents either expressly exclude or routinely ignore women). See also Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics* (response to Tesón critique delivered at American Association of Law Schools 1994 Annual Meeting, International Law Section, on file with author).

breadth and depth of issues pertinent to women's human rights reflect existing problems in the world at large. Gender is a particularly well-suited point of reference for the reconstruction of the flawed, monocular scheme precisely because it encompasses vital and often ignored issues of race, ethnicity, nationality, culture, language, color, religion, ability (physical and mental), socioeconomic class, and sexuality.

Another reason to concentrate on gender is that it affords a sharp focus within the macrocosm of international law. Virtually every society—and its structural, political, social, cultural, and religious systems—evidences some form of gender discrimination or subjugation.¹⁷ Sex inequality is a global reality. Indeed, its prevalence gives female subordination and marginalization the appearance not only of inevitability but also of normativity.¹⁸

Significantly, a woman-centered analysis will prevent those in the United States, as well as in other western States, from considering gender problems and concerns as existing only in "other places" such as Third World states, or states with non-western-based traditions, perspectives and outlooks. One example of the universality of sex inequality is the feminization of poverty—a global reality that neither can be ignored nor disputed.¹⁹ Other factors that freely interact to perpetuate

17. See Bunch, *supra* note 9, at 11-17; Friedman, *supra* note 11, at 18-35. See generally UNHCR 1995, *supra* note 2.

18. See generally UNHCR 1995, *supra* note 2.

19. See MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS 511 n.3 (1994). A United States census report comparing the incidence of poverty across gender and racial lines indicated that "only 4% of elderly white married women are poor, whereas 24% of elderly white women living alone are poor. Of African American women, 22% of older married women are poor, whereas 60% of older Black women living alone are poor." *Id.* Further, in exploring the socioeconomic basis for this discrepancy, the authors note that women are typically paid less for their services and are less likely to remain in the labor market where pension benefits are often tied to lifetime earnings. *Id.* Moreover, the gender inequity evident in poverty rates provide "the strongest evidence that safety nets protect men better than women (and children). In the United States, two out of three adults in poverty are women; three-quarters of the nation's poor are women and children; 50% of female-headed households—and 75% of homes headed by black women—live below the poverty line; three-quarters of the elderly poor are women." *Id.* at 889 (citing DIANE BALSER, SISTERHOOD & SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES 17 (1987)). See also Mikell, *supra* note 8 (noting disproportionate adverse effects on women of economic and structural adjustment); CDPOA, *supra* note 6, commitment 2(b); UNHCR 1995, *supra* note 2 (women represent 70% of all persons in poverty).

gender subordination and disparity are persistent discriminatory employment practices, inequitable social-structural relationships, and gender-based violence—daily facts of life for women. The concept of “women as wombs” is also a pervasive worldwide phenomenon and is central to the universal failure to recognize the plethora of issues attendant to women’s health, which include, but are not limited to, bearing children. Most important, the concept of women’s health must be redefined beyond “sick” or “medicalized” needs to include matters of well-being such as education (schooling, in general and health, including reproductive issues, in particular), economic self determination, political participation, environmental safety, and personal security, to name a few.

Issues relating to reproductive freedoms highlight the critical importance of approaching rights as indivisible and reveal the weakness of the normative single-right approach as under-inclusive.²⁰ It lends itself to a critique from a feminist perspective,²¹ from a cross-cultural perspective, including considerations of race, ethnicity, and religion,²² as well as from a

20. See Fitnat Naa-Adjeley Adjetei, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351 (1995); Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN, *supra* note 5, at 167; Zulficar, *supra* note 11, at 1017; Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975 (1995) (noting that a single-right perspective has not led to fully satisfactory approaches or results and suggesting a clustering of rights perspective); Reed Boland, *Civil and Political Rights and the Right to Nondiscrimination: Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1263-64 (1995) (commenting that ICCPR guarantees protection of certain reproductive rights when accurately contextualized); REBECCA J. COOK, WOMEN'S HEALTH AND HUMAN RIGHTS: THE PROMOTION AND PROTECTION OF WOMEN'S HEALTH THROUGH INTERNATIONAL HUMAN RIGHTS LAW 16, 23-36 (1994) [hereinafter WOMEN'S HEALTH] (discussing reproductive protections afforded by ICCPR).

21. See Cook, *supra* note 20; see also Mahmoud Fathalla, *The Impact of Reproductive Subordination on Women's Health: Family Planning Services*, 44 AM. U. L. REV. 1179 (1995) (focusing on women's powerlessness as a serious health hazard); Berta E. Hernández, *To Bear Or Not To Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991).

22. For a discussion of the intersection of rights and religion, see Sajeda Amin & Sara Hossain, *Women's Reproductive Rights and the Politics of Fundamentalism: A View From Bangladesh*, 44 AM. U. L. REV. 1319 (1995) (Muslim fundamentalism); Frances Kissling, *The Challenge of Christianity*, 44 AM. U. L. REV. 1345 (1995) (Christianity); Donna J. Sullivan, *Resolving Conflicting Human Rights Standards in International Law*, 85 ASIL PROCEEDINGS 344, 344-49 (1991). For a dis-

wide, we must discipline ourselves to see global concerns from myriad perspectives including not only gender, but also the intersection of gender with, and the indivisibility of gender from, race, ethnicity, nationality, culture, language, color, religion, physical and mental ability, socio-economic class, and sexuality.

It is in this context that this article addresses the notions of international women's human rights. Although women's involvement in this arena is a relative novelty, the success of women already can be felt. The impact of women's voices and perspectives is evident in the changes made concerning reproductive freedom issues,²⁸ issues of domestic violence,²⁹ and issues of gender-based violence in times of armed conflict.³⁰

28. See *Vienna Declaration and Programme of Action*, *supra* note 5, pt. 2, ¶ 38 ("Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response."); *ICPD*, *supra* note 6, ch. II, princ. 8 ("States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health."); *Id.* princ. 4, chs. 4, 6-8, 11, 12; *CDPOA*, *supra* note 6, ¶ 36(h) (government should make "[a]ccessible through the primary health-care system reproductive health to all individuals of appropriate ages"); *Id.* ¶ 73(c) ("Taking specific measures . . . to remove long-standing legal and social barriers to employment, education, productive resources and public services; assist women in becoming aware of and realizing their rights; and to ensure the elimination of intra-family discrimination for the girl child, especially in regard to health, nutrition and education . . ."); *Beijing Platform*, *supra* note 1, ¶ 94 ("The prevalence among women of . . . [the limited power many women have over their sexual and reproductive lives] and lack of influence in decision-making are social realities which have an adverse impact on their health. . . . Good health is essential to leading a productive and fulfilling life [and the right of all women to control their own fertility is basic to their empowerment.]"). See generally *id.* ¶¶ 91-112, 123, 132, 136, 144(d), 216, 223, 232(f) (discussing limitations on women's reproductive freedom and suggesting remedies).

29. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Katharine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 507-61 (1993).

30. See Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 197. Rhonda Copelon stated that "the issue of the rape of women in Bosnia became part of the broader global feminist effort, less influenced by nationalist diplomacies, at the same time that it advanced the feminist campaign by underscoring the gravity of ongoing gender violence just two hundred miles from the conference site." *Id.* at 198; 2 LEON FRIEDAN, *THE LAW OF WAR, A DOCUMENTARY HISTORY* 46 (1972); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmayer

ensure women's visibility in the global sphere at all levels—locally, statewide, and internationally. These efforts significantly have transformed the concept of women's rights as human rights.

The formal notion that sex equality is central to human rights dates to 1945 when the United Nations Charter (U.N. Charter), among other things, "reaffirm[ed] . . . the equal rights of men and women"³⁵ and stated as one of its purposes the achievement of international cooperation "in promoting and encouraging respect for human rights and fundamental freedoms . . . without distinction as to . . . sex"³⁶ In February 1946, after the U.N. Charter's adoption, the Economic and Social Council (ECOSOC) created the Commission on Human Rights (UNCHR).³⁷ The UNCHR's agenda was embodied in a body of human rights documents that constitute the foundation of international human rights norms: the Universal Declaration of Human Rights³⁸ (Declaration or Universal Declaration), adopted in 1948, and two international covenants that were adopted in 1966 and entered into force in 1976—the International Covenant on Civil and Political Rights³⁹(ICCPR) and the International Covenant on Economic, Social and Cul-

35. U.N. CHARTER pmbl.

36. *Id.* art. 1(3). The U.N. Charter expressly provides in Article 1 that one of its stated purposes is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" *Id.*

37. The Human Rights Commission was established by ECOSOC pursuant to the U.N. Charter which reads, in part: "1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters 2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." U.N. CHARTER art. 62(1)-(2). It is presently composed of forty-three Member States elected for three-year terms. The Commission is responsible for making studies, preparing recommendations and drafting documents relating to human rights. *See also* FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 5-6 (1990); 6 ALISON DUNDES RENTELN, *FRONTIERS OF ANTHROPOLOGY: INTERNATIONAL HUMAN RIGHTS* 24 (1990).

38. *See supra* note 6.

39. *Supra* note 6.

The work continues on issues of work, education, and self-determination.

III. THE RULES

Initially, women achieved global visibility not within the formal international system itself, but by creating an informal track running parallel to the formal system. This parallel track was necessary because women were excluded from all aspects and levels of official international structures and policy-making. Grass roots activism by individual women and through the work of non-governmental organizations (NGOs) created a bridge to the formalistic/traditional international framework. This parallel system met with unprecedented success, as evidenced in Rio,³¹ Vienna,³² Cairo,³³ and Beijing.³⁴ Such actions initiated the reconstitution of the rights construct to meet women's real needs, effect women's self-determination, and

ed. & Marion Farber trans., 1994).

31. *Adoption of Agreements on Environment and Development, The Rio Declaration on Environment and Development*, U.N. Conf. on Environment and Development, Annex, Agenda Item 9, U.N. Doc. A/CONF.151/Rev. 1 (1992) [hereinafter *Rio Declaration*]; *Report of the United Nations Conference on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (1992) [hereinafter *Agenda 21*].

32. See *Vienna Declaration and Programme of Action*, *supra* note 5. See Zulficar, *supra* note 11, at 1035 ("Vienna and Cairo stand as milestones on the road to women's empowerment and enjoyment of their full human rights."); Bunch, *supra* note 9, at 17 (noting how many women's issues were placed "squarely on the world's doorstep" by the Vienna Conference).

33. See *supra* note 11 and accompanying text; *CDPOA*, *supra* note 6, ¶¶ 7, 70, 82; see also *DEVAW*, *supra* note 5, arts. 4(o)-¶, 5. See generally, *ICPD*, *supra* note 6, ¶ 14.8, on the role and participation of NGO's in the international human rights sphere.

34. Fourth World Conference on Women, *supra* note 1. Even before the official closing of the conference and the finalizing of the Vienna Declaration and Programme of Action, the developments achieved at this meeting were deemed to be a great success on key issues of equality for women including the reiteration of women's right to decide freely on matters pertaining to their sexuality and child bearing; the condemnation of forced sterilizations and forced abortions; the agreement that systematic rape in war is a crime and perpetrators are war criminals, that domestic violence is a worldwide problem and governments must intervene, and that female genital mutilation (FGM), dowry-based violence, domestic battery and sexual harassment at work are human rights violations; the recognition of global discrimination against girls, and that access to credit is central to women's empowerment; and the acceptance that governments should guarantee women equal rights to inherit (although not equal inheritance). Patrick E. Tyler, *Forum on Women Agrees on Goals*, N.Y. TIMES, Sept. 15, 1995, at A1, A3.

ensure women's visibility in the global sphere at all levels—locally, statewide, and internationally. These efforts significantly have transformed the concept of women's rights as human rights.

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38. *See supra* note 6.

39. *Supra* note 6.

tural Rights⁴⁰ (Economic Covenant). Significantly, all three of these instruments expressly provide for sex equality.⁴¹

It is important to point out that various other instruments, some substantive in perspective and some regional in scope, have expanded and strengthened this human rights founda-

40. 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 *Economic Covenant*]. For a discussion of how the rights contained in the Economic Covenant can be developed, expanded and transformed to protect women's rights, in particular reproductive and sexual health rights, see Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and The Women's Convention*, 44 AM. U. L. REV. 1123 (1995); Audrey R. Chapman, *Monitoring Women's Right to Health Under The International Covenant on Economic, Social and Cultural Rights*, 44 AM. U. L. REV. 1157 (1995); WOMEN'S HEALTH, *supra* note 20, at 30-33, 36, 40-41.

41. The Universal Declaration clearly provides that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." Universal Declaration, *supra* note 6, art. 2 (emphasis added). The ICCPR provides that:

[e]ach state party to the present Covenant, undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 6, art. 2(1), 999 U.N.T.S. at 173 (emphasis added). In addition, the ICCPR, in articulating the rights of individuals, provides that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. art. 26, 999 U.N.T.S. at 179 (emphasis added).

Similarly, the Economic Covenant provides that "[t]he 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 race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Economic Covenant, *supra* note 40, art. 2(2), 993 U.N.T.S. at 5 (emphasis added). In addition, the Economic Covenant provides that "[t]he States Parties to the present Covenant undertake to 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. 3, 993 U.N.T.S. at 5 (emphasis added). Moreover, in addressing the State Parties' obligation to recognize the right of everyone to just and favorable conditions of work, the Covenant specifically obligates States Parties to ensure "(a) remuneration which provides all workers, as a minimum, with: (i) 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 . . .*" *Id.* art. 7 (a)(i), 993 U.N.T.S. at 6 (emphasis added).

tion. For example, three regional instruments aimed at the protection of human rights—the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴² (European Convention), the American Convention on Human Rights⁴³ (American Convention), and the African Charter on Human and Peoples' Rights⁴⁴ (African Charter)—all expressly provide for sex equality.⁴⁵

42. European Convention, *supra* note 6. See Hernández, *supra* note 21, at 325-44 (discussing evolution and expansion of reproductive rights by treaties, custom, and judicial decisions).

43. American Convention on Human Rights: "Pact of San Jose, Costa Rica," adopted Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]. Claudio Grossman addresses the use of regional systems, in particular the Inter-American system, to protect reproductive and sexual health rights and freedoms. See Grossman, *supra* note 8, at 1305. In particular, Dean Grossman suggests that the new democratic environment in the region, with every government (except Cuba's) being democratically elected, indicates there is an evolving entitlement to democracy that should be used to further reproductive and sexual health rights and freedoms. He also suggests that no true democracy can exist without a recognition of women's rights including reproductive and sexual health rights and freedoms. Further, he explains that the Inter-American system can further women's rights in general, and reproductive and sexual health rights in particular, because it imposes a duty upon the states to protect rights and because a victim or anyone on the victim's behalf can file a petition for redress of rights. *Id.* For the ground-breaking work discussing the emergency right of democracy, see THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) [hereinafter Franck, *The Emerging Right*]. See also Hernández, *supra* note 21, at 325-44.

44. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter]; see also Adjetey, *supra* note 20 (discussing use of African Charter to protect and further reproductive and sexual health rights and freedoms).

45. The European Convention provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status." European Convention, *supra* note 6, art. 14, 213 U.N.T.S. at 232. Similarly, the American Convention provides that:

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

American Convention, *supra* note 43, art. 1, 1144 U.N.T.S. at 145. Moreover, the African Charter provides that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, reli-

In addition, two classification-specific instruments, one focusing on race—the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁶ (Race Convention), and the other on sex—the Convention of the Elimination of all Forms of Discrimination against Women⁴⁷ (Women's Convention)—also expressly mandate gender equality. In fact, the Women's Convention throughout expressly articulates the goal of establishing equality for women in all spheres, ranging from the public to the private, including health,⁴⁸ education,⁴⁹ and political participation,⁵⁰ among many others.⁵¹

gion, political or any other opinion, national and social origin, fortune, birth or other status." African Charter, *supra* note 44, art. 2, 21 I.L.M. at 60.

46. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Race Convention]. The Convention notes as its purpose "the achievement of one of the purposes of United Nations which is to promote and encourage universal respect for an observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion" *Id.* pmbl., 660 U.N.T.S. at 212-13.

47. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women's Convention]. In its preamble, the Women's Convention notes the purpose of the U.N. Charter, Universal Declaration, and both the ICCPR and Economic Covenant as obligating states to ensure equality on the basis of sex. *See Id.* pmbl., 1249 U.N.T.S. at 14-16; WOMEN'S HEALTH, *supra* note 20, at 19-43 (discussing reproductive rights and Women's Convention); *see also* Carlota Bustelo, *Reproductive Health and CEDAW*, 44 AM. U. L. REV. 1145 (1995).

48. Women's Convention, *supra* note 47, art. 11(1)(f), 1249 U.N.T.S. at 18 ("The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."). Article 12 states that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 above of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Id. art. 12, 1249 U.N.T.S. at 19; *Id.* art. 14(2)(b), 1249 U.N.T.S. at 19 ("women in rural areas . . . [have a right to] . . . access to adequate health care facilities, including information, counselling and services in family planning").

49. *Id.* art. 10, 1249 U.N.T.S. at 17-18 ("States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education"); *Id.* art. 14(2)(d), 1249 U.N.T.S. at 19 ("women in rural areas [have a right to] . . . obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency").

50. Article 7 states that:

Through activism, women have become a force in the discourse about and development of international norms, and new meaning has been brought to basic notions of sex equality and human rights.

For example, in the reproductive freedom area,⁵² women's rights activists have transformed the concept of reproductive rights from the narrow concept of women's health in maternity and childbirth (which stereotypes "women as wombs"), to a holistic view coalescing a great amalgam of rights including first, second, and third generation human rights.⁵³ These gen-

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life . . . [including rights]

(a) To vote in all elections . . . ;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Id. art. 7, 1249 U.N.T.S. at 17; *Id.* art. 8, 1249 U.N.T.S. at 17 ("States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level")

51. Further, the Women's Convention guarantees the right to information, opinion, and expression. *Id.* art. 10(e), 1249 U.N.T.S. at 18 (Women have the right to "[t]he same opportunities for access to programmes of continuing education"). Women also have the right to health, *id.* art. 14(2)(b), 1249 U.N.T.S. at 19 (Women have right "[t]o have access to adequate health care facilities, including information, counselling and services in family planning"), and to decide on family composition, *id.* art. 16(1)(e), 1249 U.N.T.S. at 20 (Women have the "rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights"). The Women's Convention also guarantees the right to marry and found a family, as well as the right to private and family life. *Id.* art. 16(a)-(b), (d), 1249 U.N.T.S. at 20 (Women have the right "to enter into marriage . . . freely to choose a spouse and to enter into marriage only with their free and full consent . . . same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children").

52. For a discussion of reproductive freedom as an internationally protected human right, see Hernández, *supra* note 21; Cook, *supra* note 20, at 975-1016; Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645 (1992); Sylvia A. Law & Lisa F. Rackner, *Gender Equality and the Mexico City Policy*, 20 N.Y.U. J. INT'L L. & POL. 193, 193 n.1 (1987).

53. See WOMEN'S HEALTH, *supra* note 20, at 20; Sohn, *supra* note 7 (discussing development of generational rights in United Nations); Douglas L. Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 349 n.11 (1991) ("The so-called 'third generation' of human rights are the result of efforts by some human rights advocates to pro-

erations of rights are all promised by, and included in, the documents that constitute the foundation of international human rights norms, i.e., the Universal Declaration,⁵⁴ the ICCPR,⁵⁵ and the Economic Covenant,⁵⁶ as well as various other international, regional, and conference documents such as the Women's Convention,⁵⁷ the Race Convention,⁵⁸ the American Convention,⁵⁹ the African Charter,⁶⁰ the European Convention,⁶¹ the Cairo Programme of Action,⁶² the Social

note some 'collective' rights, such as the rights to development, a clean environment, and to humanitarian assistance."); Tesón, *supra* note 7, at 871 n.14 ("The advocacy of [third generation rights] may represent an attempt to use the favorable emotive connections of human rights language to expand the 'rights' of the state at the expense of individual rights."); see also Fried, *supra* note 7, cf. Phillip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982) (solidarity rights must not abridge existing rights). See generally Phillip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3 (1988).

54. For an example of a first generation right in the Universal Declaration, see Universal Declaration, *supra* note 6, art. 8 (right to effective remedy by competent national tribunal for acts violating fundamental rights guaranteed by constitution or other law); *Id.* art. 27 (third generation right (right to participate in cultural life of community)).

55. See, e.g., ICCPR, *supra* note 6, art. 9(1), 999 U.N.T.S. at 175 (first generation right (liberty and security of person)); *Id.* art. 18, 999 U.N.T.S. at 178 (for example of second generation right (freedom of religion)).

56. See, e.g., Economic Covenant, *supra* note 40, art. 10, 993 U.N.T.S. at 7 (first generation right (right to found a family)); *Id.* art. 15(1)(c), 993 U.N.T.S. at 9 (second generation right (right to benefits of scientific progress)); *Id.* art. 12, 993 U.N.T.S. at 8 (third generation right (right to highest attainable level of physical and mental health)).

57. See, e.g., Women's Convention, *supra* note 47, art. 16(1)(a), 1249 U.N.T.S. at 20 (first generation right (right to marry)); *Id.* art. 13(c), 1249 U.N.T.S. at 19 (third generation right (right to participate in all aspects of cultural life)).

58. See, e.g., Race Convention, *supra* note 46, art. 5(c), 660 U.N.T.S. at 220 (first generation right (right to vote)); *Id.* art. 5(e)(iv), 660 U.N.T.S. at 222 (third generation right (right to health care services)).

59. See, e.g., American Convention, *supra* note 43, art. 23(1)(a), 1144 U.N.T.S. at 151 (first generation right (right to take part in public affairs)); *Id.* art. 26, 1144 U.N.T.S. at 152 (second generation right (right to education)); *Id.* art. 26, 1144 U.N.T.S. at 152 (third generation right (right to health care)).

60. See, e.g., African Charter, *supra* note 44, art. 13(1), 21 I.L.M. at 61 (first generation right (right to participate in government)); *Id.* art. 8, 21 I.L.M. at 60 (second generation right (freedom of religion)).

61. See, e.g., European Convention, *supra* note 6, art. 11, 213 U.N.T.S. at 232 (first generation right (freedom of assembly)); *Id.* Protocol 1, art. 2 (second generation right (right to education)).

62. See, e.g., ICPD, *supra* note 6, princ. 9 (first generation right (right to marry)); *Id.* princ. 10 (second generation right (right to education)); *Id.* princ. 3 (third generation right (right to development)).

Summit Declaration and Programme of Action,⁶³ and the Beijing Platform for Action for the Fourth World Conference on Women.⁶⁴ These instruments provide for the protection of rights to privacy,⁶⁵ health,⁶⁶ equality and non-discrimination,⁶⁷ education,⁶⁸ religion,⁶⁹ travel,⁷⁰ family life,⁷¹ deci-

63. See, e.g., *CDPOA*, *supra* note 6, commitment 4(c) (first generation right (right to participate in politics)); *Id.* commitment 5(c) (second generation right (right to education)); *Id.* commitment 5(d) (third generation right (right to health care)).

64. See, e.g., *Beijing Platform*, *supra* note 1, ch. I (first generation right (right to participate in policy-making processes)); *Id.* strat. obj. B(1) (second generation right (right to equal access to education)); *Id.* strat. obj. C(1) (third generation right (right to health care)).

65. See, e.g., *Universal Declaration*, *supra* note 6, art. 12 ("No one shall be subjected to arbitrary interference with h[er] privacy . . ."); *ICCPR*, *supra* note 6, art. 17(1), 999 U.N.T.S. at 177 ("No one shall be subjected to arbitrary or unlawful interference with h[er] privacy . . ."). The Beijing Declaration and Programme of Action reinforces the right of privacy by noting that women often do not fully enjoy it, particularly with respect to matters of health. See, e.g., *Beijing Platform*, *supra* note 1, ¶ 104 ("Women are frequently not treated with respect, nor are they guaranteed privacy and confidentiality . . ."); *Id.* ¶¶ 95, 108 (recognizing lack of privacy in health matters for young girls and adolescents).

66. See, e.g., *Women's Convention*, *supra* note 47, art. 11(1)(f), 1249 U.N.T.S. at 18 ("State Parties shall take all appropriate measures to eliminate discrimination against women . . . to ensure . . . [t]he right to protection of health and to safety in working conditions . . ."); *Id.* art. 12(1), 1249 U.N.T.S. at 19 ("State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services . . ."); *African Charter*, *supra* note 44, art. 16(1), 21 I.L.M. at 61 ("Every individual shall have the right to enjoy the best attainable state of physical and mental health."). ¶ 91 of the Beijing Platform states that:

Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Women's health involves their emotional, social and physical well-being and is determined by the social, political and economic context of their lives, as well as by biology. However, health and well-being elude the majority of women. [The major] barrier for women to the achievement of the highest attainable standard of health is inequality, both between men and women and [among women]. In national and international forums, women have emphasized that to attain optimal health throughout the life cycle, equality, including the sharing of family responsibilities, development and peace are necessary conditions.

Beijing Platform, *supra* note 1, ¶ 91; *Id.* ch. IV., sec. C (on women's health).

67. See, e.g., *Universal Declaration*, *supra* note 6, art. 1 ("All human beings are born free and equal in dignity and rights."); *Id.* art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . ."); *Economic Covenant*, *supra* note 40, art. 2(2), 993 U.N.T.S. at 5 ("The

States Parties to the present Covenant undertake to guarantee that the rights enunciated . . . will be exercised without discrimination of any kind"); Race Convention, *supra* note 46, art. 2(1), 660 U.N.T.S. at 216-19 ("States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"). The Beijing Platform clearly incorporates the attainment of equality for women as its primary purpose. *See, e.g., Beijing Platform, supra* note 1, ¶ 13 ("Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace").

68. *See, e.g., European Convention, supra* note 6, Protocol No. 1, art. 2 ("No person shall be denied the right to education."); Economic Covenant, *supra* note 40, art. 13(1), 993 U.N.T.S. at 8 ("The States Parties to the present Covenant recognize the right of everyone to education."); ¶ 71 of the Beijing Platform states that:

Education is a human right and an essential tool for achieving the goals of equality, development and peace. Non-discriminatory education benefits both girls and boys, and thus ultimately contributes to more equal relationships between women and men. Equality of access to and attainment of educational qualifications is necessary if more women are to become agents of change. Literacy of women is an important key to improving health, nutrition and education in the family and to empowering women to participate in decision-making in society.

Beijing Platform, supra note 1, ¶ 71; *Id.* ch. IV, sec. B (on women's education).

69. *See, e.g., Universal Declaration, supra* note 6, art. 18 ("Everyone has the right to freedom of thought, conscience and religion"); European Convention, *supra* note 6, art. 9(1), 213 U.N.T.S. at 230 ("Everyone has the right to freedom of . . . religion; this right includes freedom to change h[er] religion"). ¶ 25 of the Beijing Platform states that:

Religion, spirituality and belief play a central role in the lives of millions of women and men, in the way they live and in the aspirations they have for the future. The right to freedom of thought, conscience and religion is inalienable and must be universally enjoyed. This right includes the freedom to have or to adopt the religion or belief of their choice either individually or in community with others, in public or in private, and to manifest their religion or belief in worship, observance, practice and teaching. In order to realize equality, development and peace, there is a need to fully respect these rights and freedoms. Religion, thought, conscience and belief may, and can, contribute to fulfilling women's and men's moral, ethical and spiritual needs and to realizing their full potential in society. However, it is acknowledged that any form of extremism may have a negative impact on women and can lead to violence and discrimination.

Beijing Platform, supra note 1, ¶ 25; *Id.* ¶ 12.

70. *See, e.g., ICCPR, supra* note 6, art. 12(1), 999 U.N.T.S. at 176 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose h[er] residence."); Universal Declaration, *supra* note 6, art. 13 ("Everyone has the right to freedom of movement and residence within the borders of each State. . . . [And] the right to leave any country, including h[er] own, and to return to h[er] country.").

71. *See, e.g., ICPD, supra* note 6, princ. 9 ("The family is the basic unit of society and as such should be strengthened. It is entitled to receive comprehensive

sion-making regarding the number of children and their spacing,⁷² information,⁷³ life, liberty, security of the person, integrity of the person,⁷⁴ freedom from torture,⁷⁵ freedom from

protection and support."); *CDPOA*, *supra* note 6, commitment 4(k) ("At the national [level we will] . . . [s]trengthen institutions that enhance social integration, recognizing the central role of the family and providing it with an environment that assures its protection and support."). ¶ 30 of the Beijing Platform states that:

Women play a critical role in the family. The family is the basic unit of society and as such should be strengthened. It is entitled to receive comprehensive protection and support. In different cultural, political and social systems, various forms of the family exist. The rights, capabilities and responsibilities of family members must be respected. Women make a great contribution to the welfare of the family and to the development of society, which is still not recognized or considered in its full importance. The social significance of maternity, motherhood and the role of parents in the family and in the upbringing of children should be acknowledged. The upbringing of children requires shared responsibility of parents, women and men and society as a whole. Maternity, motherhood, parenting and the role of women in procreation must not be a basis for discrimination nor restrict the full participation of women in society. Recognition should also be given to the important role often played by women in many countries in caring for other members of their family.

Beijing Platform, *supra* note 1, ¶ 30.

72. See *Beijing Platform*, *supra* note 1, ¶ 98 ("The ability of women to control their own fertility forms an important basis for the enjoyment of other rights."); see also *ICPD*, *supra* note 6, ¶ 7.3 ("[A]ll couples and individuals [have the right] to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so . . ."); Women's Convention, *supra* note 47, art. 16(1)(e), 1249 U.N.T.S. at 20 (Women have "[t]he same rights to decide freely and responsibly on the number and spacing of their children . . ."); REPORT OF THE WORLD CONFERENCE OF THE INTERNATIONAL WOMEN'S YEAR, MEXICO CITY 1975, art. 12, U.N. Doc. E/CONF.66/34, U.N. Sales No. S.76.IV.1 (1976) ("Every couple and every individual has the right to decide freely and responsibly whether or not to have children as well as to determine the number and spacing, and to have information, education and the means to do so."); NAIROBI FORWARD-LOOKING STRATEGIES FOR THE ADVANCEMENT OF WOMEN, ¶ 156, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. S.85.IV.10 (1986) ("[a]ll couples and individuals have the basic human right to decide freely and informally the number and spacing of their children"). See generally THE HUMAN RIGHTS FRAMEWORK OF THE BEIJING PLATFORM OF ACTION (Rhonda Copelon et al. eds. 1995).

73. *Beijing Platform*, *supra* note 1, ¶ 35 ("Ensure women's equal access to economic resources including land, credit, science and technology, vocational training, information . . ."); *Id.* ¶ 57 ("Particularly in developing countries, the productive capacity of women should be increased through access to . . . information . . .").

74. See African Charter, *supra* note 44, art. 4, 21 I.L.M. at 60 (right to life and integrity of the person); American Convention, *supra* note 43, arts. 4, 5, 1144 U.N.T.S. at 145-46 (right to life, right to "physical, mental and moral integrity"); *ICPD*, *supra* note 6, princ. 1; *Vienna Declaration and Programme of Action*, *supra* note 5, *passim*. ¶ 118 of the Beijing Platform states that:

slavery,⁷⁶ political participation,⁷⁷ free assembly and association,⁷⁸ work,⁷⁹ enjoyment of the benefits of scientific progress,⁸⁰ development,⁸¹ environment,⁸² peace,⁸³ democra-

Acts or threats of violence, whether occurring within the home or in the community, or perpetrated or condoned by the State, instill fear and insecurity in women's lives and are obstacles to the achievement of equality and for development and peace. The fear of violence, including harassment, is a permanent constraint on the mobility of women and limits their access to resources and basic activities.

Beijing Platform, *supra* note 1, ¶ 118; *Id.* ch. IV, sec. D *passim* (on violence and women).

75. See, e.g., American Convention, *supra* note 43, art. 5(2), 1144 U.N.T.S. at 146 ("No one shall be subjected to torture . . ."); African Charter, *supra* note 44, art. 5, 21 I.L.M. at 60 ("All forms of exploitation and degradation of [hu]man[s] particularly . . . torture . . . shall be prohibited."); ICCPR, *supra* note 6, art. 7, 999 U.N.T.S. at 175 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *Beijing Platform*, *supra* note 1, ¶ 13 ("Grave violations of the human rights of women occur, particularly in times of armed conflict, and include murder, torture, systematic rape, forced pregnancy and forced abortion, in particular under policies of 'ethnic cleansing'").

76. See, e.g., African Charter, *supra* note 44, art. 5, 21 I.L.M. at 60 ("All forms of exploitation and degradation of [hu]man[s] particularly slavery . . . shall be prohibited."); *Beijing Platform*, *supra* note 1, ¶ 131(a) (Actions to be taken by governments include consideration of ratifying and enforcing international conventions on trafficking and slavery.).

77. See, e.g., Universal Declaration, *supra* note 6, art. 21(1) ("Everyone has the right to take part in the government of h[er] country, directly or through chosen representatives."); ICCPR, *supra* note 6, art. 25(a), 999 U.N.T.S. at 179 ("Every citizen shall have the right . . . [t]o take part in the conduct of public affairs . . ."); *Beijing Platform*, *supra* note 1, ¶ 135 ("If women are to play an equal part in securing and maintaining peace, they must be empowered politically and economically and represented adequately at all levels of decision-making."). ¶ 183 states that:

Women's equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women's interests to be taken into account. Without the active participation of women and the incorporation of women's perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved.

Id. ¶ 183.

78. See, e.g., Universal Declaration, *supra* note 6, art. 20(1) ("Everyone has the right to freedom of peaceful assembly and association."); ICCPR, *supra* note 6, art. 21, 999 U.N.T.S. at 178 ("The right of peaceful assembly shall be recognized."); *Beijing Platform*, *supra* note 1, ¶ 192(c) (Governments should take actions to "[p]rotect and promote the equal rights of women and men to engage in political activities and to freedom of association . . .").

79. See, e.g., Universal Declaration, *supra* note 6, art. 23(1) ("Everyone has the right to work . . ."); Women's Convention, *supra* note 47, art. 11(1)(a), 1249 U.N.T.S. at 18 ("The right to work is an inalienable right of all human beings . . ."); *Beijing Platform*, *supra* note 1, ch. IV, sec. A *passim* (on women and poverty).

80. See, e.g., African Charter, *supra* note 44, art. 22(1), 21 I.L.M. at 62 ("All

cy,⁸⁴ self-determination,⁸⁵ and solidarity,⁸⁶ to name various

peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of [hu]mankind."); *CDPOA*, *supra* note 6, commitment 4(c) ("[A]t the national level, we will . . . [p]romote access for all to education, information, technology and know-how as essential means for enhancing communication and participation in civil, political, economic, social and cultural life . . ."); *Economic Covenant*, *supra* note 40, art. 15(1)(b), 993 U.N.T.S. at 9 ("The States Parties to the present Covenant recognize the right of everyone . . . to enjoy the benefits of scientific progress and its applications . . ."); *Beijing Platform*, *supra* note 1, ¶ 57 ("Particularly in developing countries, the productive capacity of women should be increased through access to . . . technology . . .").

81. See, e.g., *ICPD*, *supra* note 6, princ. 3 ("The right to development is a universal and inalienable right . . ."); *CDPOA*, *supra* note 6, commitment (1)(m) ("[A]t the national level, we will . . . [r]eaffirm and promote all human rights, which are universal, indivisible, interdependent and interrelated, including the right to development . . ."); *Economic Covenant*, *supra* note 40, art. 1(1), 993 U.N.T.S. at 5 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *Women's Convention*, *supra* note 47, pmbl., 1249 U.N.T.S. at 14-16; *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, arts. 1, 2, 6-8, at 186, U.N. Doc. A/41/53 (1986); *Vienna Declaration and Programme of Action*, *supra* note 5, ¶ 10; *Beijing Platform*, *supra* note 1, ¶ 220 ("Every person should be entitled to participate in, contribute to and enjoy cultural, economic, political and social development. In many cases women and girls suffer discrimination in the allocation of economic and social resources. This directly violates their economic, social and cultural rights.").

82. See, e.g., *Rio Declaration*, *supra* note 31, princ. 1 ("Human beings are at the center of concerns for sustainable development."); *African Charter*, *supra* note 44, art. 24, 21 I.L.M. at 63 ("All peoples shall have the right to a general satisfactory environment favorable to their development."); *Beijing Platform*, *supra* note 1, ch. IV, sec. K *passim* (on women and the environment).

83. See *African Charter*, *supra* note 44, art. 23(1), 21 I.L.M. at 62 ("All peoples shall have the right to national and international peace and security."); *Beijing Platform*, *supra* note 1, ¶ 13 ("Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace."); *Id.* ch. IV, sec. E *passim* (on women and armed conflict).

84. See *Franck*, *supra* note 43; see also *Grossman*, *supra* note 8, at 1305; *Beijing Platform*, *supra* note 1, ¶ 15 ("Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy."); *Id.* ¶ 183 ("Achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of society and is needed in order to strengthen democracy and promote its proper functioning.").

85. See *African Charter*, *supra* note 44, art. 20(1), 21 I.L.M. at 62 ("All peoples . . . shall have the unquestionable and inalienable right to self-determination."); *Women's Convention*, *supra* note 47, pmbl., 1249 U.N.T.S. at 14-16; *ICPR*, *supra* note 6, pmbl., art. 1, 999 U.N.T.S. at 172-73; *Economic Covenant*, *supra*

of the rights pertinent to the protection of women's international status and condition as human beings.

By addressing these substantive rules first, this article takes an easy route. Without exception, the international instruments that define human rights expressly *mandate* sex equality and prohibit discrimination on the basis of sex.⁸⁷ With such clear formal pronouncements requiring gender equity, it is intriguing, but given the historical context not all that surprising, that gender inequality persists. As the following section will show, despite the rules that the lofty aspirational goals of equality have fallen far short of expectations and obligations creating a large schism exists between women's "paper" rights and the realities of their everyday lives.

note 40, art. 1, 993 U.N.T.S. at 5; *Beijing Platform*, *supra* note 1, ¶ 147(a) (Actions to be taken by governments include reaffirming "the right of self-determination of all peoples, in particular of peoples under colonial or other forms of alien domination or foreign occupation, and the importance of the effective realization of this right . . .").

86. See U.N. CHARTER arts. 55(b), 56 (taking joint action to solve problems); Universal Declaration, *supra* note 6, art. 22 (entitlement to national and international cooperation); Women's Convention, *supra* note 47, pmb., 1249 U.N.T.S. at 14-16 (affirming duty of cooperation); Economic Covenant, *supra* note 40, art. 11, 993 U.N.T.S. at 7 (importance of international cooperation); American Convention, *supra* note 43, art. 26, 1144 U.N.T.S. at 152 (adopt measures for international cooperation); *DEVAW*, *supra* note 5, art. 5(a) (foster international and regional cooperation); *Vienna Declaration and Programme of Action*, *supra* note 5, ¶¶ 1, 8, 11, 18, 21 (international cooperation to attain various goals); *ICPD*, *supra* note 6, princ. 15, ¶¶ 8.9, 14.16 (international cooperation and universal solidarity to attain goals); *CDPOA*, *supra* note 6, commitments 1-3, 5-6, 9-10, ¶¶ 26(a), 82, 94 (international cooperation to attain goals); *Beijing Platform*, *supra* note 1, ¶ 16 ("Hence, it is indispensable to search for new alternatives . . . based on a holistic approach to all aspects of development: growth, equality between men and women, . . . sustainability, solidarity, participation, peace and respect for human rights."); *Id.* ¶ 196(a) (Women's and non-governmental organizations should "[b]uild and strengthen solidarity among women through information, education and sensitization activities . . .").

87. U.N. CHARTER pmb., art. 55; Universal Declaration, *supra* note 6, art. 2; ICCPR, *supra* note 6, art. 3, 999 U.N.T.S. at 174; Economic Covenant, *supra* note 40, arts. 2-3, 993 U.N.T.S. at 5; Women's Convention, *supra* note 47, *passim*; American Convention, *supra* note 43, art. 1, 1144 U.N.T.S. at 145; European Convention, *supra* note 6, art. 14, 213 U.N.T.S. at 232; African Charter, *supra* note 44, art. 2, 21 I.L.M. at 60; Race Convention, *supra* note 46, pmb., 660 U.N.T.S. at 212-13.

IV. WOMEN'S REALITIES

Ironically, the first place where women's voices must be raised and their presence made visible is in the very same formal rules' constructs discussed above. The international instruments that define human rights—the U.N. Charter,⁸⁸ the Universal Declaration,⁸⁹ the ICCPR,⁹⁰ the Economic Covenant,⁹¹ regional instruments,⁹² and substantive human rights instruments such as the Women's Convention⁹³ and the Race Convention,⁹⁴ facially provide protections on the basis of sex. However, the implementation of these human rights documents must be reformulated to protect in practice. Women's articulated rights must be translated to compel real, not virtual, equality.

Unlike theory, the reality for women has been that, until the Women's Convention,⁹⁵ and Vienna, Cairo, Copenhagen and Beijing,⁹⁶ in both the formal context and in the parallel track, women's voices and perspectives were absent from the international human rights discourse and structure. Women were not present when the rules were being crafted and thus the rules were not made *by* women *for* women or *with* women in mind.⁹⁷ Consequently, women's problems, issues, and con-

88. U.N. CHARTER.

89. Universal Declaration, *supra* note 6.

90. ICCPR, *supra* note 6.

91. Economic Covenant, *supra* note 40.

92. *See* American Convention, *supra* note 43; African Charter, *supra* note 44; European Convention, *supra* note 6.

93. Women's Convention, *supra* note 47.

94. Race Convention, *supra* note 46.

95. Women's Convention, *supra* note 47.

96. *Vienna Declaration and Programme of Action*, *supra* note 5; *ICPD*, *supra* note 6; *CDPOA*, *supra* note 6; *Beijing Platform*, *supra* note 1.

97. *See* Charlesworth et al., *supra* note 11, at 621-34.

In March 1991, women headed their country's government in 4 of the 159 member states of the United Nations. In mid-1989, at cabinet level only 3.5% of the ministries in 155 countries were held by women, and 99 nations had no women ministers. States are slow to make women permanent representatives to the United Nations: in March 1990, 4 out of 149 were women.

Id. at 622 n.56 (citations omitted). Further, there has only been one woman at the bench at the International Court of Justice, and "no woman has ever been a member of the International Law Commission." *Id.* at 623-24. Additionally, "[i]n 1991 . . . there were 2 women (out of 18) on the Economic, Social and Cultural Rights Committee, 1 (out of 18) on the Committee on the Elimination of Racial Discrimination, 2 (out of 18) on the Human Rights Committee, and 2 (out of 10)

cerns were not central to the rights framework. The invisibility of women as rule-makers led to the inevitable, surreal struggle to assert simply that women are human beings too, and thus entitled to the rights and freedoms contained in international human rights norms.⁹⁸

It is important to emphasize the significance of the Women's Convention which, by focusing on gender issues, places women's interests and concerns at center stage.⁹⁹ This treaty articulates the goal of establishing equality for all women in all aspects of public and private life, including health, education, and political participation.¹⁰⁰ The Women's Con-

on the Committee against Torture. *Id.* at 624 n.67; see also UNHCR 1995, *supra* note 2, at 42 (noting that worldwide there are only 10 women who are political leaders in their countries and that women only hold 10% of slots in parliaments and 6% of the cabinet posts of ministerial work); Diane Bell, *Considering Gender: Are Human Rights for Women, Too? An Australian Case*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 339, 350 (Abdullahi Ahmed An-Na'im ed., 1992) [hereinafter CROSS-CULTURAL] (noting that recent moves to enfranchise Australian Aboriginal women were protected on basis of tradition, thereby depriving them of knowledge of certain rights under the Women's Convention).

98. See Cecilia Medina-Quiroga, *Remarks*, 44 AM. U. L. REV. 693, 1093 (1995).

99. See Natalie H. Kaufman & Stefanie A. Lindquist, *Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women*, in FEMINIST PERSPECTIVES, *supra* note 5, at 114 (proposing criteria to analyze gender-neutral laws); Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 158-69 (1994) (discussing state responsibility under Women's Convention).

100. See Women's Convention, *supra* note 47, art. 7, 1249 U.N.T.S. at 17 ("States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country . . ."); *Id.* art. 14(2)(b), 1249 U.N.T.S. at 19 (Women have the right "[t]o have access to adequate health care facilities . . ."); *Id.* art. 10, 1249 U.N.T.S. at 17 ("States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education . . ."); see also ICPD, *supra* note 6, princ. 8 ("Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health."); *Id.* princ. 4 ("The full and equal participation of women in civil [and] political . . . life . . . are priority objectives of the international community."); *Id.* princ. 10 ("Everyone has the right to education . . ."); CDPOA, *supra* note 6, commitment 4(c) ("[A]t the national level we will . . . [p]romote access for all to education . . ."); *Id.* commitment 5 ("We commit ourselves to . . . achieving equality . . . between women and men, and to recognizing and enhancing the participation and leadership roles of women in political . . . [and] civil . . . life . . ."); *Id.* commitment 5(d) ("We shall . . . [t]ake appropriate measures to ensure, on the basis of equality of men and women, universal access to health-care services."); Beijing Platform, *supra* note 1, strat. obj. B.1 ("Ensure equal access to education"); *Id.* strat. obj. C.1 ("Increase women's access . . . to . . . health care."); *Id.* strat. obj. G.1 ("Take measures to ensure women's equal access to and full participation in power structures and decision-

vention, by taking a holistic approach to women's rights and lives, is a testament to the indivisibility of rights and the humanity of women.

In reviewing the realities of women's lives worldwide in the context of international women's human rights, two distressing facts surface. First, the rules are, at best, imperfect and, at worst, venal in effecting women's exclusion—silencing women's voices and rendering them invisible. Second, as far as universally enjoying human rights—women simply do not. This is as true in the West as it is in the East, and in the North as it is in the South. The condition of women, as evidenced by the on-going tragedies in Bosnia,¹⁰¹ Haiti,¹⁰² and Rwanda¹⁰³—where women have been pillaged and raped as instruments or prizes of war¹⁰⁴—illustrates that women are a

making.”).

101. See Letter from the International Women's Human Rights Law Clinic at City University of New York School of Law, to the Secretary-General, Organization of American States, The Member States and the General Assembly 1 (June 1994) (on file with author) [hereinafter IWHRLC] (“On March 23, the UN/OAS Observer Mission reported . . . that 12 women and girls had been raped in Port-au-Prince and concluded that it appeared that rape was being used as an instrument of terror against the female population of Haiti who were suspected or designated as opponents of the illegal regime.”). IWHRLC demanded effective investigation, publicization and prosecution of crimes. *Id.* at 2. See also, Knop, *supra* note 2, at 294 n.4 (citing Donna E. Arzt, Genocidal Rape in Bosnia-Herzegovina and Croatia and the Role of International Law, Paper presented at Rape as Genocide in Bosnia-Herzegovina and Croatia: A Symposium on War Crimes, Rights, and International Law, Syracuse University College of Law (Apr. 1993) (unpublished manuscript)); Copelon, *supra* note 30, at 197 (commenting on mass rape of women in former Yugoslavia); Jasmine Kuzmanović, *Legacies of Invisibility: Past Silence, Present Violence Against Women in the Former Yugoslavia*, in FEMINIST PERSPECTIVES, *supra* note 5, at 57 (for accounts of rape in Bosnia).

102. See IWHRLC, *supra* note 101.

103. See DEPARTMENT OF STATE, 104TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994, at 206 (1995) (Comm. Print 1995) [hereinafter COUNTRY REPORTS 1994] (noting rapes on massive scale by combattant forces).

104. See Copelon, *supra* note 30, at 197, 204 (discussing rape of women as “booty” of war). Rape was not treated as a crime for which the Japanese Commander would be separately charged at the Judgment of the Military Tribunal in Tokyo. *Id.* at 197. There existed the systematic rapes in both World Wars, including the “rape of German women by the conquering Russian army and the enslavement on the battlefields of 200,000-400,000 ‘comfort women’ by the Japanese army.” *Id.* See *Vienna Declaration and Programme of Action*, *supra* note 5, which coincided with the revelation of the mass rapes in Bosnia-Herzegovina, including a general condemnation of gender violence as well as making specific mention of “systemic rape, sexual slavery and forced pregnancy” in armed conflict.” Copelon, *supra* note 30, at 198 (citing *Report of the Drafting Committee, Addendum, Final*

long way from being universally respected or heard, let alone safe.

Significantly, this is not a woman's reality solely in times of war. One need not go to Bosnia or even to war for evidence of women's *inequality*. One need only look at the realities of everyday life. The United Nations, no bastion of gender equality, confirms the persistent and prevailing gender disparities in its description of women as the "largest excluded group in the world."¹⁰⁵ This sad truth of women's subordinate status is borne out regardless of which statistics are considered: employment, economics, personal autonomy, education, political participation, health or personal security (i.e., freedom from violence)¹⁰⁶—all matters that are critical to women's enjoy-

Outcome of the World Conference on Human Rights, U.N. Doc. A/CONF.157/PC/Add. 1 (June 24, 1993)); *see also* Julie Peters & Andrea Wolper, *Introduction*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 1 (noting that rape by soldiers is among gendered crimes suffered by women).

The rape of women in war is not limited to global wars. For example, as part of an investigatory mission in Peru, members of Amnesty International questioned a military commander whether his soldiers ever raped women:

"Yes, of course." That was followed up with the statement that when you have men who are headquartered away from their homes for a long time . . . they need to have their needs met somehow. There was not even the sense that this person should take care and deny [this]. When they raised the question of torture, of course *that* was denied. But there wasn't even the sense that [rape] was something that should be looked at askance. (Roach 11/17/93).

Friedman, *supra* note 11, at 26; *see also* Kadic v. Karadzic, No. 93 Civ. 1163, 1993 WL 385757 (S.D.N.Y. Sept. 24, 1993); Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994).

105. *See* UNITED NATIONS HUMAN DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1993, at 25 (1993) [hereinafter UNHDR 1993]. The Report labeled women as a "non-participating majority" because despite the fact that women constitute a majority of the world's population, they "receive only a small share of developmental opportunities." *Id.*; *see also* Berta E. Hernández-Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 30 (1994) (outlining different results in Cuba than those reported in UNHDR 1993); Siobhan Dowd, *Women and the Word: The Silencing of the Feminine*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 317 (describing how women's illiteracy silences their voices).

106. *See* UNHDR 1993, *supra* note 105, at 25 (highlighting routine exclusion of women from "educational [opportunities] or from better jobs, from political systems or from adequate health care"); UNITED NATIONS HUMAN DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1994, at 96 (1994) [hereinafter UNHDR 1994] (conceding that "men generally fare better than women on almost every socio-economic indicator"); *see also* UNHDR 1993, *supra* note 105, at 29 (expressing the existence of a "widespread pattern of inequality between men and women . . . in their access to education, health and nutrition, and even more in

ment of their international human rights and freedoms. Notwithstanding the existing "paper rights," the universal fact is that women are routinely subjected to torture,¹⁰⁷ starvation,¹⁰⁸ terrorism,¹⁰⁹ humiliation,¹¹⁰ mutilation,¹¹¹ rape,¹¹² multiple birth and other maternity-related health

their participation in the economic and political spheres"); Hernández, *supra* note 105, at 30-31 (detailing analogous situation women confront in Cuba notwithstanding paper commitments to equality). Moreover, Charlotte Bunch has observed that:

The importance of control over women can be seen in the intensity of resistance to laws and social changes that put control of women's bodies in women's hands: reproductive rights; freedom of sexuality whether, heterosexual or lesbian; laws that criminalize rape in marriage and so on. Abusing women physically maintains this territorial domination and is sometimes accompanied by other forms of human rights abuse such as slavery (forced prostitution), sexual terrorism (rape), or imprisonment (confinement to the home).

Bunch, *supra* note 9, at 15.

107. See COUNTRY REPORTS 1994, *supra* note 103, at 557 ("There are credible reports that some women detainees in Tibet have been tortured . . ."); Bunch, *supra* note 8, at 16 ("Rape has been recognized by the rapporteur of the United Nations on torture as a form of torture when it is performed by police or by other agents of the government . . .").

108. See UNHDR 1994, *supra* note 106, at 27 ("[I]n South Asia, 30% of babies born are underweight . . . a sad indication of inadequate access to food, particularly for women, who are often the last to eat in the household."); WOMEN'S HEALTH, *supra* note 20, at 8, 22-23 (discussing that malnutrition often results in women and girls because males are often fed first when food is scarce); Bunch, *supra* note 9, at 16 (malnutrition of girls as form of genocide); Indira Jaising, *Violence Against Women: The Indian Perspective*, in FEMINIST PERSPECTIVES, *supra* note 5, at 51 ("Girl[s] . . . are fed less and for shorter periods and are not given foods like butter or milk, which are reserved for boys.").

109. See Bunch, *supra* note 9, at 16 ("Women face terrorism in the form of sexual assault on the streets and in jobs where sexual harassment is a condition for receiving a paycheck.").

110. HUMAN RIGHTS WATCH WORLD REPORT 1994, at 361 (1993) [hereinafter HRWWR 1994] (describing forced virginity control exams on Turkish women); *Id.* at 359 (noting Peruvian practice of questioning rape victims at judicial proceedings about their "honor" and sexual past).

111. See COUNTRY REPORTS 1994, *supra* note 103, at 252 (describing prevalence of female genital mutilation in Sudan); see also Nahid F. Toubia, *The Social and Political Implications of Female Circumcision: The Case of The Sudan*, in WOMEN AND THE FAMILY IN THE MIDDLE EAST: NEW VOICES OF CHANGE 148 (Elizabeth Warnock Fernea ed., 1985); Nahid Toubia, *Female Genital Mutilation*, in FEMINIST PERSPECTIVES, *supra* note 5, at 224 [hereinafter Toubia, *Female Genital Mutilation*].

112. See COUNTRY REPORTS 1994, *supra* note 103, at 360 (describing systematic rapes of women in former Yugoslavia); *Id.* at 359 (noting that "[s]oldiers and police routinely raped women . . ."); UNHDR 1995, *supra* note 2, at 105 (noting "intolerable . . . use of mass violence against women as weapons of war" and that "[m]ass rape and torture" of women have been documented in recent conflict situations); see also Bunch, *supra* note 9, at 16 (noting that rape is human rights viola-

risks,¹¹³ economic duress,¹¹⁴ and sexual exploitation,¹¹⁵ simply because of their sex. Recurrently, these inflictions on women because of their sex are justified or explained by culture and tradition: genital mutilation,¹¹⁶ female infanticide,¹¹⁷ bride burning,¹¹⁸ foot-binding,¹¹⁹ slavery,¹²⁰ face-

tion even when committed by private actors); Jaising, *supra* note 108, at 52, 53 (sexual abuse of women and girls in Indian families is common and rape of women in police custody is rampant).

113. See *infra* note 165.

114. See UNHCR 1995, *supra* note 2, at 4 ("[w]omen receive a disproportionately small share of credit"); *Id.* at 87 ("Much of women's work remains unrecognized and undervalued. . . . Women's work is greatly undervalued in economic terms."); see also *supra* note 19 and accompanying text.

115. See HRWWR 1994, *supra* note 110, at 364 (describing trafficking of Bangladesh women in Pakistan and their subsequent arrests); *Id.* at 361 (noting that Turkish "police and other state actors were forcing women and girls to undergo gynecological exams to determine whether they were virgins"); Peters & Wolper, *supra* note 104, at 1 (listing sale of girls as one of many gendered-based human rights violations suffered by women). For story of young girl enslaved in Thai sex industry, see Hnin Hnin Pyne, *AIDS and Gender Violence: The Enslavement of Burmese Women in the Thai Sex Industry*, in FEMINIST PERSPECTIVES, *supra* note 5, at 215, 215-23 (Most Burmese girls/women working in Thai brothels were tricked and sold into slavery with brothel owners paying agents the equivalent of \$120-\$200 (U.S.) per girl/woman. These girls/women are only released after paying that amount back to the owner, in whose hands the calculations are done. Their movements are restricted and they are prohibited from refusing sexual services to any number of clients (in some cases, 20 per day). Since few customers use condoms, the girls/women are at high risk for contracting HIV/AIDS and few have knowledge of how the disease is actually spread.); see also Jaising, *supra* note 108, at 53 (discussing practice in some parts of India where teenage girls are dedicated to Hindu gods and goddesses and then are sexually exploited); Zhu Hong, *The Testimony of Women Writers: The Situation of Women in China Today*, in FEMINIST PERSPECTIVES, *supra* note 5, at 96, 97 (widespread practice of abduction and sale of women as sex slaves).

116. See *supra* note 111.

117. See COUNTRY REPORTS 1994, *supra* note 103, at 561 ("[B]ecause of the traditional [Chinese] preference for male children . . . some families have used ultrasound to identify and abort female fetuses."); *Id.* at 562 ("Female infanticide may also be a factor in some areas of China."); see also Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)other Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1991); Bunch, *supra* note 9, at 16 (female infanticide as form of genocide); Jaising, *supra* note 108, at 51 (noting that many women choose to abort fetuses detected to be female).

118. See DEPARTMENT OF STATE, 103D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 1230 (Comm. Print 1994) [hereinafter COUNTRY REPORTS 1993] ("In the typical dowry dispute [in India], a groom's family will harass a woman they believe has not provided sufficient dowry. This harassment sometimes end in the woman's death, which family members often try to portray as a suicide or kitchen accident. . . . Government figures show a total of 5,377 dowry deaths in 1993 Nonetheless, convictions in dowry death cases

hiding,¹²¹ wife-beating,¹²² honor-killing,¹²³ forced pregnancy,¹²⁴ forced abortion,¹²⁵ and multiple, early and closely

are rare.”); cf. UNHCR 1994, *supra* note 106, at 31 (women’s groups in India put the number of dowry deaths at 9,000); see also Jaising, *supra* note 108, at 53, 55 (Author notes that when dowry is not met, if psychological and physical abuse does not drive the women to suicide, they are often victims of bride burning. She further reveals in some parts of India the custom of *sati* still exists where a widow will be burned or buried alive along with the body of her deceased husband.).

119. See Anna Y. Park, *The Marriage Fraud Act Revised: The Continuing Subordination of Asian and Pacific Islander Women*, 1 ASIAN AM. PAC. ISLAND L.J. 29, 47 (1993) (noting that in past, Chinese women were forced to bind their feet until they became gangrenous); Hong, *supra* note 115, at 96 (noting that gender images such as foot-binding have been used as symbol of China’s “backwardness”).

120. The Human Rights Watch World Report 1994 noted that:

An estimated 20,000 to 30,000 Burmese women and girls were believed to be held in Thai brothels Expecting to work in restaurants and factories, most of them became trapped in brothels instead, under deplorable conditions that amounted to a modern form of slavery. The Burmese were being held in debt bondage and compelled to have sex with as many as ten to fifteen customers a day in order to pay off their recruitment, transportation and living expenses.

HRWW 1994, *supra* note 110, at 360; see also Akram Mirhosseini, *After the Revolution: Violations of Women’s Human Rights in Iran*, in FEMINIST PERSPECTIVES, *supra* note 5, at 72, 73 (noting a form of sexual slavery in Iran, in that a married woman “must be at all times willing to meet her husband’s sexual needs, and if she refuses, she loses her right to shelter, food, and clothing”).

121. COUNTRY REPORTS 1993, *supra* note 118, at 1281 (“In public, Muslim women are required to wear the *abaya*, headscarf and face veil Saudi authorities have repeatedly said that non-Muslim women need not wear the *abaya* and headscarf. However, the Mutawwa’in [volunteer religious police] have increasingly tried to force all foreign women to wear the *abaya* and cover their hair.”); see also Mirhosseini, *supra* note 120, at 74-75.

To be sure, very recently a Turkish mother and daughter were killed by male relatives for not observing the Islamic dress code, and an Islamic gunman in Gumushane assassinated the leader of a legal association who would not let female lawyers wear head scarves in court. *Islamic Dress Code Deaths*, N.Y. TIMES, Aug. 3, 1995, at A8.

122. See COUNTRY REPORTS 1994, *supra* note 103, at 567 (according to survey of 2,100 Chinese families, “one-fifth of all wives had been abused by their spouses.”).

123. See Mirhosseini, *supra* note 120, at 73 (“A husband, father, or brother has the right to kill his wife, daughter, or sister—and go unpunished—if he finds her committing an ‘immoral’ or ‘unchaste’ act (such as having sex with a man not her husband.)”); see also Mertus, *supra* note 5, at 140 (In Brazil, wife killings, called “honor killings” often went unpunished, and in one year almost eight hundred husbands killed their wives.); James Brooke, *Honor Killings of Wives is Outlawed in Brazil*, N.Y. TIMES, Mar. 29, 1991, at B16.

124. The Human Rights Watch World Report 1994 noted that:

Women victims of rape reported being threatened with forcible impregnation. A number of women recounted that, as they were being assaulted, rapists taunted them with ethnic slurs or stated their intentions to impregnate the victims. J., a thirty-nine-year-old Croatian woman who was

spaced, child-bearing and birthing,¹²⁶ to name but a few. These practices, that some accept without protest because they are based on sex, would be inconceivable to justify if they were instead predicated upon another protected classification, such as race (although until recently culture and tradition were used to justify racial discrimination, including apartheid and slavery).¹²⁷ Yet, all these practices, individually and collectively, interfere with women's general well-being and perpetuate women's second-class status and conditions.

In fact, the United States Department of State (another institution whose crowning glory is certainly not gender equality), recognizes "the problem of rampant discrimination against

raped by a reserve captain of the self-proclaimed "Serbian Republic" in the Omarska detention camp, told us, "They said I was an Ustasa and that I needed to give birth to a Serb—that I would then be different."

HRWWR 1994, *supra* note 110, at 360; see also Bunch, *supra* note 9, at 16 ("compulsory pregnancy both kills women and forces them into involuntary labor").

125. Reproductive freedom includes the right to have or to refrain from having an abortion. The latter, albeit not the usual perspective, is an important consideration because large, populous countries, notably India and China, in an attempt to curb tremendous populations, not only encourage but also often apply coercive pressure on women to have abortions — even when women would rather carry the child. For a discussion of China's coercive population control policies, see E. Tobin Shiers, *Coercive Population Control Policies: An Illustration of The Need For a Conscientious Objector Provision for Asylum Seekers*, 30 VA. J. INT'L L. 1007, 1010-16 (1990); COUNTRY REPORTS 1994, *supra* note 103, at 561 ("Chinese officials acknowledge privately that there are instances of forced abortions and sterilizations."); Hernández, *supra* note 21, *passim*; Jaising, *supra* note 108, at 51 (noting that in India, many women are forced to abort if fetus is detected as female); Hong, *supra* note 115, at 97 (discussing recent Chinese government plan for forced sterilization and abortion).

126. See WOMEN'S HEALTH, *supra* note 20, at 30-32 (noting that woman's right to found family includes right to "plan, time and space the births of children so as to maximize their health and her own."). For the origins of these rights, see DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS, POPULATION AND HUMAN RIGHTS: PROCEEDINGS OF THE EXPERT GROUP MEETING ON POPULATION AND HUMAN RIGHTS (United Nations 1990); Hernández, *supra* note 21, at 310 n.9 (noting documents which recognize right to determine freely and responsibly number and spacing of children); Rebecca J. Cook, *Abortion Laws and Policies: Challenges and Opportunities*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 61, 67 (Supp. 3) (noting that pregnancies that come too early or too late in reproductive lives, too close to another pregnancy, or too frequently raise rates of maternal mortality).

127. See, e.g., Charles R. Lawrence III, *Forward: Race, Multiculturalism and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (noting system of apartheid was based on race). Interestingly, the United States once utilized a similar cultural justification to sanction the institution and maintenance of slavery. See Mikell, *supra* note 8.

women,"¹²⁸ and the resulting myriad human rights violations women suffer simply because of their sex.¹²⁹ Women worldwide are rendered invisible and silenced by being killed,¹³⁰ physically abused into submission,¹³¹ and even starved.¹³²

128. See COUNTRY REPORTS 1993, *supra* note 118, at xvi.

129. Basically, the Department of State agrees with and confirms the U.N.'s evaluation concerning the status of women worldwide. The State Department reports that there exists:

the problem of rampant discrimination against women. Physical abuse is the most obvious example. In many African countries, the practice of female genital mutilation continued. In Pakistan, many women in police custody are subjected to sexual or physical violence. On several continents, women and girls are sold into prostitution. In many Gulf countries, domestic servants from Southeast Asia are forced to work excessively long hours and are sometimes physically and sexually abused. In Bangladesh and India, dowry deaths continue. Marital rape in many countries is not recognized as a crime, and women raped or beaten at home often have no recourse. That female life is not valued as much as male life is apparent in countries such as China where it is reported that more female fetuses than male are aborted.

COUNTRY REPORTS 1993, *supra* note 118, at xvi; see also Cook, *supra* note 99, at 129 n.19 (citing Andrew Byrnes, *Women, Feminism and International Human Rights Law: Methodological Myopia, Fundamental Flaws or Meaningful Marginalization?*, 12 AUSTL. Y.B. INT'L L. 205, 214 (1992)).

130. For example, the Shining Path insurgency in Peru "often murdered [women], either to punish, intimidate, or coerce particular female victims or as part of their efforts to achieve broader political ends." HRWWR 1994, *supra* note 110, at 359. The greater value placed on males is sometimes evidenced before birth. In some countries pre-natal testing is used to ascertain the sex of the fetus which may then be aborted if it proves to be female. UNHDR 1995, *supra* note 2, at 7. Such sex-based feticide is arguably a violation of human rights. See, e.g., ICPD, *supra* note 6, ¶ 4.23 ("Governments are urged to take the necessary measures to prevent infanticide, prenatal sex selection, trafficking in girl children and use of girls in prostitution and pornography."). Similarly, the phenomenon of "missing women"—a shortfall of the expected male to female ratio in population—estimated at over 100 million women is attributed to the lack of value in female life ranging from feticide to less adequate nutrition being provided to girls than boys. UNHDR 1995, *supra* note 2, at 7, 35.

131. See *supra* note 117; see also UNHDR 1994, *supra* note 106, at 31 ("In no society are women secure or treated equally to men And from childhood through adulthood, they are abused because of their gender. . . . It was recently estimated that one-third of wives in developing countries are physically battered. One woman in 2,000 in the world is reported to have been raped."); UNHDR 1995, *supra* note 2, at 7 (studies in various countries show: sexual abuse of females during childhood or adolescence; a million children in Asia, mostly girls, are forced into prostitution; approximately 100 million girls experience FGM; high percentages of married women experience domestic violence; high percentages of women are raped in their lifetimes; a high percentage of women are murdered by present or former partners; marital violence is a leading cause of female suicide).

132. See *supra* note 108; UNHDR 1995, *supra* note 2, at 35 ("[P]erception is widespread that infant boys are fed more adequately than infant girls [And]

In addition to such direct physical abuses, women's human rights and freedoms are further imperiled by the systematic denial of their political,¹³³ economic,¹³⁴ social,¹³⁵ civil,¹³⁶ and other legal rights which purportedly ensure women's full participation in the cultural and political life of the state.¹³⁷ Even as we approach the 21st century in today's world, some women are still silenced by exclusion from such basic activities as voting,¹³⁸ traveling,¹³⁹ and testifying in court.¹⁴⁰ In

[adult women suffer more than men from malnutrition . . .").

133. The right to political participation is guaranteed by, *inter alia*, Universal Declaration, *supra* note 6, art. 21; ICCPR, *supra* note 6, art. 25, 999 U.N.T.S. at 179; Women's Convention, *supra* note 47, arts. 7-8, 1249 U.N.T.S. at 17; European Convention, *supra* note 6, arts. 10-11, 14, 213 U.N.T.S. at 230-31; American Convention, *supra* note 43, arts. 16, 23, 1144 U.N.T.S. at 149, 151; African Charter, *supra* note 44, art. 13, 21 I.L.M. at 61.

134. See, e.g., Economic Covenant, *supra* note 40, *passim*. Specifically, art. 11(2)(a)-(b) requires equitable distribution of resources. *Id.* art. 11(2)(a)-(b), 993 U.N.T.S. at 7. In addition, the Women's Convention, *supra* note 47, arts. 13(b), 14, 1249 U.N.T.S. at 19, seeks specifically to ensure equal access to economic resources to women. The recently-concluded conference documents also focus on the need for women's economic empowerment. See, e.g., ICPD, *supra* note 6, princ. 3, ¶ 3.16 (right to development), princ. 10, ¶¶ 4.2, 4.4, 4.12, 4.18, 4.29, 11.1, 11.16 (education), ¶ 3.18 (employment), ¶ 3.22, 4.1 (economic resources); CDPOA, *supra* note 6, commitment 1, ¶ 15 (right to development), commitment 5 (education), commitments 3(c), (f), 5(j), ¶¶ 45, 51(d), 73(d), 82 (employment), ¶ 26, commitments 1, 2, 3, 6, 9, ¶¶ 26(e), (g), 56(c) (economic resources). Much of the discourse in Beijing surrounded women's much-needed access to economic resources including the issue of women's non-remunerated employment. *Beijing Platform*, *supra* note 1, ¶¶ 158, 167, 209, 212, 62, 167 (access to resources), 60, 163, 180 (access to employment in terms of eliminating gender differences in salary and available jobs); see also Nadia H. Youssef, *Women's Access to Productive Resources: The Need for Legal Instruments to Protect Women's Development Rights*, in FEMINIST PERSPECTIVES, *supra* note 5, at 279, 279-84 (noting that land reform laws and resettlement programs in particular discriminate against women who also experience discrimination in access to livestock and credit). Nadia Youssef explained that:

Excluding women from the bases of rural productivity has been achieved by: (1) denying women rights to land ownership; (2) stipulating 'exceptions' for women in cases where full ownership of land is granted irrespective of sex; and, and most important, (3) 'masculinizing' the head of household concept on the premise that all families contain an adult male economically responsible for maintaining women and children.

Id. at 281.

135. See, for example, Economic Covenant, *supra* note 40, 993 U.N.T.S. 3 *passim*, Women's Convention, *supra* note 47, 1249 U.N.T.S. 13 *passim*, for economic, social and cultural rights of persons.

136. See, for example, ICCPR, *supra* note 6, 999 U.N.T.S. 171 *passim*, Women's Convention, *supra* note 47, 1249 U.N.T.S. 13 *passim*, for recognized civil rights of persons.

137. See, e.g., ICCPR, *supra* note 6; Economic Covenant, *supra* note 40; Women's Convention, *supra* note 47, 1249 U.N.T.S. 13 *passim*.

138. See COUNTRY REPORTS 1993, *supra* note 118, at xvi (noting that women

addition, women are shut out from economic discourse by being forbidden to inherit and own property,¹⁴¹ and routinely are denied access to education,¹⁴² remunerated employment,¹⁴³

throughout world are denied right to vote); *Id.* at 1231 (Kuwaiti women are denied right to vote).

139. UNHDR 1995, *supra* note 2, at 43 ("In some Arab countries, a husband's consent is necessary for a wife to obtain a passport, but not vice versa."). In Iran, married women may not travel abroad without written permission from their husbands or fathers. *See id.* ("Women cannot leave the country without their husband's permission in Iran."); Mirhosseini, *supra* note 120, at 72. This is also the case in Saudi Arabia, and in Nigeria, where a married woman cannot obtain a passport without her husband's permission. *See generally* Marsha A. Freeman, *The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women's Convention*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 149, 151.

140. *See* COUNTRY REPORTS 1993, *supra* note 118, at 1220-21 (under *Shar'ia* law in Jordan, a woman's court testimony equals half that of a man).

141. Under Islamic inheritance laws in Kuwait, a Muslim woman may receive only half of what male heirs receive, and "[u]nder customary law in Africa . . . where [there] is communal or clan [real] property, a woman has no right to exercise ownership rights over it." Mertus, *supra* note 5, at 142. Also, in many countries law and/or tradition dictates that the husband has exclusive control over marital property. Freeman, *supra* note 139, at 149, 151, 158-59. For example, "[m]arried women are under the permanent guardianship of their husbands and have no right to manage property in Botswana, Chile, Lesotho, Namibia and Swaziland." UNHDR 1995, *supra* note 2, at 43.

142. Since the Islamic Revolution in Iran:

women have been excluded from 79 out of 159 courses of study in the university: 55 courses out of 84 in technology and mathematics, 7 out of 40 in natural sciences, and 17 out of the remaining 33. Only 50 percent of women who passed the entrance examination in medicine have been allowed to attend. Women have been banned from all four fields of agriculture. In the faculties of letters and humanities, only 10 of 35 courses are available to women, and women are not allowed to study archaeology, the restoration of historic monuments, handicrafts, graphics, visual communications or cinematography. They are banned from the Central Art Institute. In industrial design, there is the maximum quota of 20 percent women. In most fields, women are denied scholarships and not allowed to leave Iran for postgraduate study.

Mirhosseini, *supra* note 120, at 74. Significantly, "[a]mong the world's 900 million illiterate people, women outnumber men two to one." UNHDR 1995, *supra* note 2, at 34.

143. Moreover, Rebecca Cook has noted that:

Women suffer additional discrimination, however, because roles identified with female gender are not valued in social and economic terms. Those who perform domestic and child care work in their own homes are frequently regarded as "unemployed" and ineligible for non-monetary benefits related to paid employment Service roles associated with females . . . have almost invariably been low paid.

WOMEN'S HEALTH, *supra* note 20, at 6; *see also*, UNHDR 1995, *supra* note 2, at 43 ("Husbands can restrict a wife's employment outside the home in Bolivia, Gua-

and health care.¹⁴⁴ Girls and women have their nutritional needs and food denied because of their sex.¹⁴⁵ Moreover, in a cruel twist, women even are denied custody of the children they have borne, simply because of their sex.¹⁴⁶ All of these practices and policies, physical and mental roadblocks to women's ability to achieve equality and enjoy their human rights, are often justified by culture. These limitations, exclusions, and denials maintain the status quo and ensure that women remain ill-equipped to assert, let alone vindicate, their rights. Considering that the rules formally mandate gender equality, these facts of life demonstrate that there is a serious void between the rules of human rights and the realities of women's lives, with both conspiring to marginalize and subordinate women.

It is indeed ironic that the discrepancy between the paper rights and the everyday realities can be explained, in part, by a review of the very rules that purport to protect women. Notwithstanding the sex equity/equality rhetoric of the instruments, a scrutiny of some provisions indicates that in the rules themselves sex, meaning female, is a leading indicator of inequality. In fact, many articles in human rights documents ex-

temala and Syria.")

144. See Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, in FEMINIST PERSPECTIVES, *supra* note 5, at 256 (noting historical lack of protection of women's reproductive health rights); WOMEN'S HEALTH, *supra* note 20; UNITED NATIONS, WOMEN: CHALLENGES TO THE YEAR 2000, at 23 (1991) [hereinafter CHALLENGES] (women's health needs "are almost everywhere inadequately addressed").

145. See *supra* note 108. In Bangladesh, girls have a 70% higher mortality rate than boys. Girls are more likely to receive less access to health care than boys in many countries, and in the developing world girls are more than four times as likely as boys to be malnourished. See CHALLENGES, *supra* note 144, at 23. A shocking example of discriminatory health practices is revealed in a picture of a Pakistani woman holding her two small twins. The boy, who was breast fed, is plump and healthy-looking. The girl, who was bottle fed, is less than half her brother's size and obviously near death from malnourishment. The woman's mother-in-law told her that she did not have enough breast milk for both children, so only the boy was breast fed. The twin sister died the day after the photo was taken. *Id.*; see also UNHCR 1995, *supra* note 2, at 35.

146. For example, Qatari women rarely obtain custody of children after a divorce, and non-Muslim women never do. See COUNTRY REPORTS 1994, *supra* note 103, at 1163. In Iran, women only obtain custody of children if both the father and grandfather of the children are dead. See Mirhosseini, *supra* note 120, at 73; see also Mertus, *supra* note 5, at 135, 141 (noting that under *Shar'ia*, women lose custody of their children when boys are seven (or reach puberty) and girls are nine (or of marriageable age)).

pressly *exclude* sex as a basis of protecting first, second, and third generation rights, many of which affect women's well-being. This existing rights framework creates at least the effect of excluding women, and at worst the *intent* to exclude women from equal participation in, and enjoyment of, internationally accepted rights and freedoms. These exclusions, purposeful or not, render women invisible and silent in the human rights world, making sex less important than other protected classifications.

For example, notwithstanding the ICCPR's express protection of gender equality,¹⁴⁷ Article 20 provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."¹⁴⁸ On its face, Article 20 does not proscribe advocacy of hatred based on sex. Does such omission signify that advocacy of gender-based "hatred that constitutes incitement to discrimination, hostility or violence" is acceptable, or even appropriate? Certainly, canons of construction support and even urge such a conclusion.¹⁴⁹ Moreover, the logical inference of Article 20 is that discrimination, hostility or violence based on sex is not as venal or heinous as ethnicity-based, race-based or religion-based hatred. This message is powerful and frightening, given the prevalence of violence against wom-

147. See ICCPR, *supra* note 6, art. 2(1), 999 U.N.T.S. at 173 ("Each State Party . . . undertakes to respect and to ensure . . . the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex . . .").

148. *Id.* art. 20(2), 999 U.N.T.S. at 178.

149. See *infra* note 160 and accompanying text, for discussion of rules of construction.

en,¹⁵⁰ especially when combined with some of the cultural pretexts.¹⁵¹

Similarly, the Economic Covenant falls short of providing full protection based on sex. In Article 13, parties to the Covenant recognize and agree that education:

shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. . . .
[And] shall enable all persons to participate effectively in a

150. UNHCR 1995, *supra* note 2, at 44 ("Violence against women is a universal issue, crossing boundaries of culture, geography, race, ethnicity, class and religion."); see Lori L. Heise, *Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights*, in FEMINIST PERSPECTIVES, *supra* note 5, at 238, 238 (noting that "[g]ender violence is a major yet often underrecognized obstacle to reproductive choice"). Violence against women takes many forms. See HRW-WOMEN 1995, *supra* note 26. It ranges from rape as a weapon of war, *id.* at 1-97 (setting out the use of "rape as a weapon of war and a tool of political repression" in Bosnia, Somalia, Haiti, Kashmir, and Peru), to sexual assaults against refugee women, *id.* at 100-137 (reporting such abuses in Bangladesh and Kenya), to abuses against women in custody, *id.* at 140-191 (detailing such abuses by police in Pakistan, sexual abuse of prisoners in the United States, sexual assaults by border patrol agents, and abuses of women detained in Egypt), to trafficking of women and girls into forced prostitution and coerced marriages, *id.* at 196-270 (setting forth information on Burmese women and girls trafficked to Thailand, Nepali women and girls trafficked to India, Bangladesh women and girls trafficked to Pakistan), to abuses (economic violence) against women workers, *id.* at 274-338 (giving examples of Asian domestic workers in Kuwait, discrimination against women workers in Russia, and employment discrimination in post-communist Poland), to domestic violence, *id.* at 341-407 (range of domestic violence from wife murder to battery in Brazil, and domestic violence examples in Russia and South Africa), and to violence against reproductive, sexual and other human rights, *id.* at 410-456 (examples *inter alia*, of forced virginity exams in Turkey of women in custody, political and prostitution detainees).

151. See Mikell, *supra* note 8. Professor Mikell highlights the interplay between cultural notions of inferiority and social-structural relationships that have denied women equal participation in the articulation, development, implementation and enforcement of rights. Such gender inequities are compounded by the process of structural adjustment and women's limited access to judicial fora to vindicate paper rights. Thus cultural, social, economic and legal impediments frustrate goals of equality and further the poverty in which women live. For example, Professor Mikell noted that after economic crises and the implementation of structural adjustment programs, the increasing male migration, climbing divorce rates, abandonment of wives and children, and reduced maternity services placed women in a precarious position. See also BALOS & FELLOWS, *supra* note 5, at 146-57 (describing exclusion of women from provisions in instruments and contending that discrepancy between rules and reality reveals inclination, if not intent, to exclude women from certain protections given on other grounds—essentially rendering women invisible in human rights world—and thereby making sex, meaning female, worthless).

free society, promote understanding, tolerance and friendship among all nations *racial, ethnic, or religious groups*, and further the activities of the United Nations for the maintenance of peace.¹⁵²

In a paragraph that explicitly enumerates the classes protected, gender again stands out because of its absence. This omission in Article 13 signifies that exclusion from participation in a free society on the basis of sex is not only acceptable but the rule of law. This exclusion of sex is significant because of the paramount importance of education to women's self-determination, overall well-being, and particularly to the attainment of human rights.¹⁵³

Not surprisingly, the regional instruments are similarly flawed. For example, the American Convention effects an exclusion almost identical to that found in Article 20 of the ICCPR.¹⁵⁴ The African Charter excludes sex in its prohibition of mass expulsions,¹⁵⁵ making gender-based expulsions, at

152. Economic Covenant, *supra* note 40, art. 13, 993 U.N.T.S. at 8 (emphasis added).

153. See CDPOA, *supra* note 6, commitment 6(e). By this provision, the Member States promised to "[e]nsure full and equal access to education for girls and women, recognizing that investing in women's education is the key element in achieving social equality, higher productivity and social returns in terms of health, lower infant mortality and the reduced need for high fertility." *Id.* Empowering women "requires . . . actions that will improve women's access to . . . education In addition, improving one status of women also enhances their decision-making capacity at all levels . . . especially in the area of sexuality and reproduction." ICPD, *supra* note 6, ch. IV, ¶ 4.1.

154. See American Convention, *supra* note 43, art. 13(5), 1144 U.N.T.S. at 149. The article, in the context of freedom of expression, provides that:

any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of *race, color, religion, language, or national origin* shall be considered as an offense punishable by law.

Id. (emphasis added). Compare Article 20 of the ICCPR *supra* note 146 and accompanying text. The American Convention commits a further exclusion in provision prohibiting deportation or returning of an alien to a country "if in that country [her] right to life or personal freedom is in danger of being violated because of [her] *race, nationality, religion, social status, or political opinions*." *Id.* art. 22(8), 1144 U.N.T.S. at 151 (emphasis added). This provision, on its face, permits such deportation for violations based on sex.

155. The African Charter in dealing with freedom of movement, provides that "[t]he mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at *national, racial, ethnic, or religious groups*." African Charter, *supra* note 44, art. 12(5), 21 I.L.M. at 62 (emphasis added). Again, gender is

best, not as bad as other expulsions such as those based on nationality, race, ethnicity or religion, and, at worst, acceptable in the name of law. This is particularly distressing because women and their children comprise 70-80% of the world's refugees.¹⁵⁶ Significantly, refugee women as displaced persons whose status disadvantages them,¹⁵⁷ are denied their human rights and freedoms in the very sphere where they need the most protection.¹⁵⁸

excluded when other classifications are explicitly listed.

156. The Beijing Platform noted that:

Women and children constitute some 80 per cent of the . . . [23] million refugees and [of the 26 million internally] displaced persons in the world. They are threatened by deprivation of property, goods and services and deprivation of their [basic] right to return to their homes of origin as well as by violence and insecurity. Particular attention should be paid to sexual violence against uprooted women and girls employed as a method of persecution in systematic campaigns of terror and intimidation and forcing members of a particular ethnic, cultural or religious group to flee their homes.

Beijing Platform, *supra* note 1, ¶ 137.

The United Nations recognizes that refugee women are in particular peril. In July 1991, the Office of the United Nations High Commissioner for Refugees issued Guidelines on the Protection of Refugee Women, paragraph 73 of which specifically addresses "Country conditions affecting women":

Adjudicators [must] be familiar with the status and experiences of women in the country from which a refugee claimant has fled. Among the issues of which interviewers should be aware are:

- * the political rights of women, including the right to vote, to hold office and to belong to a political party;
- * the social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, a job or remunerated activities, the status of a widow or divorcee, and freedom of dress;
- * the incidence of reported violence against women, the forms it takes (such as sexual assaults, *honour* killings, bride burnings), protection available to women and the sanctions or penalties on those who perpetrate the violence."

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN ¶ 73 (1991); *see also* Pamela Goldberg, *Where in the World is There Safety for Me?: Women Fleeing Gender-Based Persecution*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 345, 345 ("Of the estimated 18 million refugees worldwide, 80 percent are women and children.") (citations omitted).

157. The ICPD recognizes that "there is a need to strengthen the support for international protection of and assistance to refugees, especially refugee women and refugee children, who are particularly vulnerable. Displaced persons . . . are also vulnerable and need international assistance." *ICPD*, *supra* note 6, ch. X(D).

158. The impact of war and other forms of political and economic hardship is felt most severely by women. Goldberg, *supra* note 156. During wartime when men are away fighting, women are left to carry the family burdens alone and women

Finally, the Race Convention commits a similar though more egregious faux pas: it *excludes* sex in making reference to a provision of the Universal Declaration that *includes* sex.¹⁵⁹ This exclusion demonstrates that sex, meaning female, is so inconsequential that it can be deleted even from where it exists.

These provisions that exclude sex as a basis of protection of certain rights are particularly troubling in light of canons of construction. Both common law and the Vienna Convention on the Law of Treaties mandate that when a general provision and a specific provision conflict, the specific or detailed provision shall prevail.¹⁶⁰ Using such rules of construction, the drafters effectively excised sex-based protections from certain substantive provisions in the instruments themselves, even if the lofty preambular language included sex as a protected

are often expected to eat less or not at all during times of drought and food shortages. *Id.* Women are often victims of rape and other forms of sexual assault, as well as torture during war or oppressive regimes. *Id.* However, the hardships do not end once the women have decided to flee; rather, they are especially vulnerable at this time because "traveling without men, women are subject to rape, assault, robbery, harassment, and other cruel treatment. They may be separated from their children. Money may be taken from them, and food denied them by those 'assisting' them in their passage." *Id.* at 346.

159. The preamble to the Race Convention incorporates the principles of dignity and equality of the U.N. Charter, the purpose of which is "to promote and encourage universal respect for an observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion" and purportedly incorporating similar concepts from the Universal Declaration, it provides for the entitlement of rights and freedoms "without distinction of any kind, in particular as to race, color, or national origin" Race Convention, *supra* note 46, pmbl., 660 U.N.T.S. at 212-15. The omission of "sex" from the Convention's articulation of the purpose of the Declaration is particularly egregious as the Declaration itself *does* provide that one of the grounds upon which distinctions shall not be drawn is sex.

Further, similar to Article 20 of the ICCPR, see discussion *supra* note 147-51 and accompanying text, and Article 13 of the American Convention, see discussion *supra* note 154 and accompanying text, the Race Convention eliminates protection from sex-based offenses when it censures dissemination of ideas "based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence . . . against any race or group of persons of another colour or ethnic origin" *Id.* art. 4(a), 660 U.N.T.S. at 220-21.

160. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* (1990). A general rule of interpretation provides "that parties who list specific items, without any more general or inclusive term, *intend to exclude* unlisted items" a norm that is expressed in the "*maxim expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another)." *Id.* at 515 (emphasis added); see also Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31, 32, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980).

classification. While in theory this can be attributed to, at best, sloppy drafting, in the real world of rights advocacy it means a loss of rights and perpetuation of subordination based on sex.

The realities of women's lives, as handicapped by an insensitive legal framework, entrench the invisibility, silence, and exclusion of women from the international fora at the rule-making, rule-interpreting, and rule/rights-enforcing levels. This exclusion imperils women's holistic well-being and denies full personhood on the basis of sex. For instance:

- While the rules protect against discrimination based on sex,¹⁶¹ the reality is virtual starvation of the girl child¹⁶² and female infanticide.¹⁶³
- While the rules protect the right to life,¹⁶⁴ the reality is maternal mortality because of too-early, multiple, and closely spaced pregnancies and a lack of health services during pregnancy and childbirth.¹⁶⁵
- While the rules prohibit genocide,¹⁶⁶ the reality is the rape of women and girls for ethnic cleansing and/or as prizes of war.¹⁶⁷

161. See, e.g., *supra* notes 34-35, 41, 45-47.

162. See *supra* notes 108, 145.

163. See *supra* note 145.

164. See Universal Declaration, *supra* note 6, art. 3 ("Everyone has the right to life . . ."); ICCPR, *supra* note 6, art. 6(1), 999 U.N.T.S. at 174 ("Every human being has the inherent right to life."); American Convention, *supra* note 43, art. 4(1), 1144 U.N.T.S. at 145 ("Every person has the right to have [her] life respected."); European Convention, *supra* note 6, art. 2(1), 213 U.N.T.S. at 224 ("Everyone's right to life shall be protected by law."); Cook, *supra* note 144 (for expansion of notion of right to life from women's rights perspective).

165. See *supra* notes 12, 117, 124-26; Hernández-Truyol, *supra* note 8, at 1393 (noting that maternal mortality claims 500,000 lives per year); Cook, *supra* note 144, at 256 (noting that "[m]any women die or are chronically disabled from pregnancy-related causes because of neglect of women's reproductive health.") (citations omitted); Hernández, *supra* note 21, at 337-39; *supra* notes 128-42 and accompanying text (for statistics showing that denial of reproductive freedom imperils fundamental right to health).

166. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 278 (entered into force Jan. 12, 1951).

167. See *supra* note 104.

- While the rules prohibit torture,¹⁶⁸ the reality sees brides burned¹⁶⁹ and others raped.¹⁷⁰
- While the rules guarantee women's bodily integrity¹⁷¹ and equality,¹⁷² the reality sees women as wombs¹⁷³ and as war booty.¹⁷⁴

The juxtaposition of rules and realities is ample evidence of the limitation, implausibility, and inefficacy of the traditional, unidimensional approach to achieving international protection of women's human rights and freedoms.¹⁷⁵ Women's exclusion from the rights construct at all levels has meant *loss* and denial of rights and the perpetuation of subordination of women derived from and influenced by gender-based stereotypes, customs, and tradition. Women's rights advocates must work towards the adoption of a multidimensional,¹⁷⁶ multiple-

168. See, e.g., Universal Declaration, *supra* note 6, art. 5; ICCPR, *supra* note 6, art. 7, 999 U.N.T.S. at 174; African Charter, *supra* note 44, art. 5, 21 I.L.M. at 60; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985) (entered into force June 26, 1987).

169. See Mertus, *supra* note 5 (discussing dowry murders of Hindu wives in India); *supra* note 118.

170. See *supra* note 112.

171. See, e.g., ICPD, *supra* note 6, ¶ 7.34 ("Equal relationships between men and women in matters of sexual relations and reproduction, including full respect for the physical integrity of the human body . . .").

172. See, e.g., Women's Convention, *supra* note 47, art. 2(c), 1249 U.N.T.S. at 16 ("States Parties . . . undertake . . . [t]o establish legal protection of the rights of women on an equal basis with men . . ."); see also *supra* notes 34, 36, 39-45.

173. See Hernández-Truyol, *supra* note 8, at 1391 (commenting that ICPD represented focus of women in context of reproductive and sexual health rights and freedoms, a shift from traditional focus on women as "wombs").

174. See Copelon, *supra* note 30.

175. See Cook, *supra* note 20 (discussing limitation of single-right based approach and proposing alternative approaches); see also María Isabel Plata & María Cristina Calderón, *Legal Services: Putting Rights Into Action-Profamilia-Colombia*, 44 AM. U. L. REV. 1105 (1995) (discussing Colombia's Profamilia, successful program promoting women's well-being); Sandra Coliver, *The Right To Information Necessary For Reproductive Health and Choice Under International Law*, 44 AM. U. L. REV. 1279 (1995) (proposing novel approach to promote reproductive autonomy and education); Monica Sharma, *The Utility and Limits of Rights-Based Approaches: What Role Can Rights Play in the World of International Agencies?*, 44 AM. U. L. REV. 1097 (1995) (discussing role international agencies can play by recognizing existing paradigm and focusing on women's realities).

176. It is sensible to argue that such a multidimensional approach is envisioned by the international human rights documents themselves as in the "classes protected" clauses the classifications are not (as they should not be) made mutual-

perspective human rights approach that recognizes rights affecting women as indivisible from, and integral to, the existing rights construct. The reconfigured model also must accommodate women's diverse experiences, including those informed by race, ethnicity, nationality, culture, language, color, religion, socio-economic class, and sexuality.

For example, one of the problems the world must face, in light of the Bosnian, Haitian, and Rwandan tragedies, is that a gender-based genocide construct does not exist.¹⁷⁷ This limited view of the rules renders women who have been repeatedly and brutally raped, and those who have been forcibly impregnated, invisible in the legal world. Rape in se is a horror, but it is not recognized as such.¹⁷⁸ Rather, in order to condemn this

ly exclusive. See, e.g., Universal Declaration, *supra* note 6, art. 2; Women's Convention, *supra* note 47, pmbl.; ICCPR *supra* note 6, arts. 1, 2(1), 26, 999 U.N.T.S. at 173, 179; Economic Covenant, *supra* note 40, art. 2(2), 993 U.N.T.S. at 5; African Charter, *supra* note 44, art. 2, 21 I.L.M. at 60; American Convention, *supra* note 43, art. 1, 1144 U.N.T.S. at 145; European Convention, *supra* note 6, art. 14, 213 U.N.T.S. at 232; ICPD, *supra* note 6, princ. 1; CDPOA, *supra* note 6, commitments 4, 6, ¶ 45.

To be sure many scholars urge this approach. See Hernández-Truyol, *supra* note 9 (discussing multidimensionality approach); Bunch, *supra* note 9, at 12 ("Gender must always be analyzed in relation to other factors such as nationality, race, and class in order to discern the multiple forms of human rights that women suffer."). For a discussion on intersectionality, see Crenshaw, *supra* note 9; see also Cook, *supra* note 20 (suggesting that broader rights construct would be more effective in making reproductive and sexual health rights and freedoms reality).

177. See Copelon, *supra* note 30, at 207 ("Emphasis on the gender dimension of rape in war is critical not only to surfacing women as full subjects of sexual violence in war but also to recognizing the atrocity of rape in so-called times of peace.").

178. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) (entered into force Feb. 2, 1956 for the United States). This Convention labels international crimes as "grave breaches," and only "grave breaches" are "subject to universal jurisdiction under the Geneva Conventions, triggering the obligation of every nation to bring the perpetrators to justice and justifying the trial of said crimes before an international tribunal." See Copelon, *supra* note 30, at 201. The Convention and Protocols have long proscribed rape and other sexual violations, including forced prostitution, as war crimes. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1978, arts. 75(2)(b), 76(1), 1125 U.N.T.S. 3, 37-38; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 4(2)(e), 1125 U.N.T.S. 609, 612. Rapes, however, have not been among those crimes enumerated as "grave breaches." Rather, rape is characterized as a crime against the honor and dignity of women, which is problematic in that it implies dishonor upon the victim and

largely female-victim crime it must be placed in the largely male construct of torture¹⁷⁹—the proverbial round peg in a square hole. The prohibition against rape formally must be articulated as a separate offense against the law of nations so that there can be no question that it is a heinous and inhuman crime whatever the context, be it global war or the neighborhood bar.

Steps must be taken to remedy the existing gaps between rules and realities.¹⁸⁰ Part VI proposes a model that considers women's concerns at all stages: rule-making, rule-interpreting, and rule/rights-enforcing. However, first it is important to examine the role of culture in the existing rights construct.

V. THE ROLE OF CULTURE

Cultural views of gender have created, facilitated, and perpetuated the schism between paper rights and the realities of women's lives. Throughout time, a myth of equality has permitted subordination of women at all levels of their existence under the guise of a benevolent and inclusive rule of law.¹⁸¹ Indeed, even in those rare instances when practices

eclipses the emphasis on the crime as one of raw violence. See YOUNGINDRA KHUSALINI, DIGNITY AND HONOUR OF WOMEN AS A BASIC AND FUNDAMENTAL HUMAN RIGHT 39-76, 201 (1982).

However, recent developments in international law have recognized rape as among the worst human rights violations. The Statute of the International Criminal Tribunal for the Former Yugoslavia, approved by the U.N. Security Council, lists rape as a crime against humanity (art. 5(g)) and the prosecutor of the Tribunal has charged rape as a "grave breach" (a form of torture and a violation of the customs and laws of war) under the Geneva Convention. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 880*, U.N. SCOR, 48th Sess., ¶ 49, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1173 (1993).

179. In its 1995 Report on the Situation of Human Rights in Haiti, the Inter-American Commission on Human Rights recognized the rape of women by the illegal regime in Haiti and all other parties, whether public or private, as a form of torture under article 5(2) of the American Convention. *Report of the Situation of Human Rights in Haiti*, at 43, OEA/ser. L/V/II.88, doc. 10 rev. (1995).

180. As a leading scholar simply stated, "[t]he precondition to effective protection of rights is the authentication of abuses committed against women and the recognition that they are legal wrongs." Cook, *supra* note 99, at 128.

181. As stated by John Stuart Mill:

[T]he principle which regulates the existing social relations between the two sexes - the legal subordination of one sex to the other - is wrong in itself, and now one of the chief hindrances of human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.

Id. at 131 n.28 (citing JOHN STUART MILL, ON LIBERTY 119 (1869)).

that effect the subordination of women are conceded to be human rights violations, victims often have no relief.

The fundamental problem is that international law, like other social institutions, has evolved as normative. This "norm" is the well-entrenched perspective by which all is analyzed and measured: a white, Western/Northern European, Judeo-Christian, heterosexual, propertied, educated, male ideology.¹⁸² This concept of "normal" represents the group that historically has controlled, and still controls, the power structure which then "protects" or in some cases colonizes its subordinates by conferring rights that exist only as this ruling class chooses to define them.¹⁸³

Governments endorse such a myopic perspective and, in fact, accept and promote it as the rule of law. Certainly, only in this framework can an *ability* such as childbearing be labeled a *disability* simply because the normatives cannot do it. Is it a wonder then that the focus on women's rights, particularly their bodily integrity and health rights in areas of sexuality and reproduction, is a relative novelty?

One chilling example of the facilitating role of normativity in the manipulation of women is government interference with individuals' reproductive freedom to effect a state population policy. This meddling wholly disregards that health, reproductive, and sexual rights and freedoms belong not to governments but to individuals.¹⁸⁴ It is individuals who should be

182. See Hernández-Truyol, *supra* note 9. Feminist theory and critical race theory, including a strand designated as critical race feminism, have critiqued the normative model as flawed. See also Hilary Charlesworth, *Human Rights as Men's Rights*, in FEMINIST PERSPECTIVES, *supra* note 5, at 103, 103 (arguing that "current international human rights structure itself and the substance of many norms of human rights" actually hurt women because "law-making institutions of the international legal order . . . [are] dominated by men . . ."). For a discussion of feminist theory and critical race theory, see *infra* note 201. For an annotated critical race bibliography, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). For a feminist theory bibliography, see Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991).

183. See Fathalla, *supra* note 21 (discussing impact of reproductive subordination on women's health); see also Sofia Gruskin, *Negotiating The Relationship of HIV/AIDS To Reproductive Health and Reproductive Rights*, 44 AM. U. L. REV. 1191 (1995) (discussing AIDS policies and their inherent sexism, racism and homophobia).

184. See *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (Human Rights Committee, under Optional Protocol to the ICCPR stated that "it is undis-

able to exercise such rights in light of their particular circumstances which, of course, may include socio-economic, religious, and cultural considerations, but are free from state encroachment upon, interference with, or regulation of such rights and freedoms.¹⁸⁵ Nevertheless, world history is replete with examples of governments' exploitation of women's fertility to increase or decrease the population in order to meet perceived state needs.¹⁸⁶

For example, although the then-Soviet Union decriminalized abortion in the 1920s, the government reversed its policy in the mid-1930s to compensate for the loss of population anticipated in expectation of a World War. Yet, in 1955, in post-Stalinist Russia, abortion again was decriminalized. Similarly, the devastating effects of World War II on the population prompted many Eastern European states to outlaw abortion in the hopes of increasing population to re-establish the labor force and rebuild armies.¹⁸⁷

puted that adult consensual sexual activity in private is covered by the concept of 'privacy,' and that the mere existence of law that criminalizes such conduct, even if not enforced, "continuously and directly interferes with . . . privacy."); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 21 (1988) (European Court of Human Rights concluded that criminal laws proscribing consensual homosexual acts between adults violated right of privacy under Article 8 of European Convention); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (ser. A) at 25 (1981) (court simply noted that sexual life is part of private life and specifically held that under Article 8 of European Convention, applicant had a "right to respect for his private life"); *Case 2141 (Baby Boy Case)*, Inter-Am. C.H.R. 25, OEA/ser. L./V/II.54, doc. 9 rev. 1 (1981) (holding that unborn do not have protectible right to life); *Roe v. Wade*, 410 U.S. 113 (1973) (upholding woman's fundamental right to reproductive freedom grounded upon constitutional right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing that right to privacy exists in penumbra of Bill of Rights). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state law criminalizing homosexual sodomy between consenting adults in privacy of home).

185. This is not to suggest that the state cannot regulate health, hygiene and safety by setting standards for performance of medical procedures such as, for example, natural childbirth or cesarean section deliveries. The state arguably has such authority based on its obligation to protect the health and welfare of persons within its jurisdiction. *See, e.g., Economic Covenant, supra* note 40, arts. 8-12, 993 U.N.T.S. at 6-8; *Women's Convention, supra* note 47, art. 12, 1249 U.N.T.S. at 19. This, however, does not encompass state encroachment upon an individual's exercise of her internationally protected rights to, among others, privacy and bodily integrity. *See supra* notes 65, 74, 184.

186. *See Fathalla, supra* note 21, at 1182-83; *see also Hernández, supra* note 21.

187. *See Melissa A. Matteo, Note, Governmental Abortion Policies and the Right to Privacy: The Rights of the Individual and the Rights of the Unborn*, 11 BROOK. J. INT'L L. 103 (1985).

Even Adolf Hitler, shortly after rising to power, criminalized abortion and instituted an anti-abortion policy in order to increase the population of the state, a policy that resulted in many more abortionists being criminally charged.¹⁸⁸ Indeed, during World War II, German tribunals could impose the death penalty for illegal abortions.¹⁸⁹ However, in Hitler's Germany, the charged abortionists could use as a defense that the woman was Jewish—termination of a Jewish fetus did not violate the proscription against abortion.¹⁹⁰ More recently, the government of Germany has sought to encourage births by offering payments of approximately \$650 for each child.¹⁹¹

Governments also have used abortion laws to reduce population. For example, India and China, two countries with serious over-population problems, have instituted coercive abortion policies as an integral part of the state's program to control population growth.¹⁹² Because these societies maintain a preference for boy children, reproductive technologies have been used for sex selection purposes, although recently, both India¹⁹³ and China¹⁹⁴ have passed laws to prohibit this practice. State coercive reproduction policies, as well as the private

188. See Henry P. David et al., *Abortion and Eugenics in Nazi Germany*, 14 POPULATION & DEV. REV. 81, 89-101 (1988).

189. *Id.* at 81, 97.

190. *Id.* at 94.

191. See Stephen Kinzer, *\$650 a Baby: Germany to Pay to Stem Decline*, N.Y. TIMES, Nov. 25, 1994, at A3.

192. See Hernández, *supra* note 21, at 346 n.1. In 1990, the Census Leading Group in China under the State Council, the State Family Planning Commission and the Ministry of Public Security issued a circular on census and family planning providing that "it is wrong to give birth to any child beyond the state target . . . from now on, we still need to enforce the policy of family planning." 17 ANN. REV. POPULATION L. 6 (1993) (quoting Census Leading Group, Beijing Domestic Service, Mar. 21, 1990, at 24-25). In India, many women who learn the sex of the fetus during the first trimester opt or are forced to abort if the fetus is female. One study showed that 7,997 of 8,000 fetuses aborted were female while another study showed that 40,000 female fetuses were aborted in 1984 in Bombay. Jaising, *supra* note 108, at 51.

193. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, Act No. 57 of Sept. 20, 1994.

194. *Maternal and Infant Health Care Law* (BBC summary of world broadcasts, Nov. 3, 1994); see also *Birth Law in China*, Hous. Post, Nov. 15, 1994, at A10 (noting that China will ban sex-screening of fetuses). Significantly, in a different form of state-imposed population control that nevertheless also encroaches on individual rights, it was also reported that China would forbid couples carrying serious genetic diseases from having children. *Id.*

use of technology for sex-selection objectives, not only perpetuate the subordination of women and the stereotype of "women as wombs," but also severely affect women's well-being by, among other things, infringing upon their exercise and enjoyment of guaranteed international human rights. Thus, government regulation of fertility must be scrutinized and exposed as a calculated attempt to control women's bodies in violation of their individual human rights and freedoms.

In this context, serious consideration must be given to the notion of cultural relativism.¹⁹⁵ As will be discussed, culture is, or can be, used both to perpetuate women's subordination in the name of tradition, or to subordinate non-dominant cultures in the name of law. Culture can be but a smoke screen to prevent dealing with and recognizing historic oppression of women and their subjection to the prevailing normative culture.¹⁹⁶

Especially in an extreme case such as female genital mutilation (FGM), a practice recently condemned by the Committee

195. See Ann Elizabeth Mayer, *Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience*, in FEMINIST PERSPECTIVES, *supra* note 5, at 176. In providing a definition of cultural relativism, the author states:

Cultural relativists argue that members of one society may not legitimately condemn the practices of societies with different traditions, denying that there can be valid external critiques of culturally-based practices and claiming that no legitimate cross-cultural standards for evaluating the treatment of rights issues exist. . . . [C]ultural relativists object to universalist approaches on the grounds that they use criteria that are ostensibly international but that actually reflect the values of Western culture.

Id.

196. It is ironic that the term "universal rights" is being urged by some as a means to *limit* rights by using the term as a modifier to signify only to those that all cultures, religions and traditions accept. See, e.g., *Beijing Platform*, *supra* note 1, ¶¶ 2, 4, 8-9, 11-12, 14, 33, 113, 125(e), 132, 134, 149(b), 213, 223, 226 (use of "universal" as a modifying/limiting term). This certainly is a flawed view approach, particularly in the context of the development of human rights norms coming at the heels of the genocidal tragedies of World War II. Indeed, universal rights are precisely those from which no state may derogate, as they are fundamental to personhood. Certainly, the *individual* must be free to consider, without state interference, her religious, cultural, and traditional norms and values in making decisions and exercising control over her person. This was the view taken by the Women's Linkage Caucus in its preparation for the Fourth World Conference on Women in Beijing, China. See Women's Environment and Development Organization, Women's Linkage Caucus Advocacy Chart 11 (July 1, 1995) (on file with author) ("We strongly affirm language asserting that women's human rights are universal and, at the same time, call for deleting the term 'universal,' when used as a modifier to limit the universality of human rights.").

on the Elimination of Discrimination Against Women (CEDAW) recommendations¹⁹⁷ and the Cairo Programme of

197. The Committee on the Elimination of Discrimination against Women (CEDAW), during its ninth session in 1990, issued General Recommendation No. 14 concerning the practice of FGM. That recommendation provides that CEDAW:

Concerned about the continuation of the practice of female circumcision and other traditional practices harmful to the health of women,

Noting with satisfaction that Governments, where such practices exist, national women's organizations, non-governmental organizations, and bodies of the United Nations system, such as the World Health Organization and the United Nations Children's Fund, as well as the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities, remain seized of the issue having particularly recognized that such traditional practices as female circumcision have serious health and other consequences for women and children,

Noting with interest the study of the Special Rapporteur on Traditional Practices Affecting the Health of Women and Children, as well as the study of the Special Working Group on Traditional Practices,

Recognizing that women are taking important action themselves to identify and combat practices that are prejudicial to the health and well-being of women and children,

Convinced that the important action that is being taken by women and by all interested groups need to be supported and encouraged by Governments,

Noting with grave concern that there are continuing cultural, traditional and economic pressures which help to perpetuate harmful practices such as female circumcision,

Recommends to State parties:

(a) That State parties take appropriate and effective measures with a view to eradicating the practice of female circumcision. Such measures could include:

(i) The collection and dissemination by universities, medical or nursing associations, national women's organizations or other bodies of basic data about such traditional practices;

(ii) The support of women's organizations at the national and local levels working for the elimination of female circumcision and other practices harmful to women;

(iii) The encouragement of politicians, professionals, religious and community leaders at all levels, including the media and the arts, to cooperate in influencing attitudes toward the eradication of female circumcision;

(iv) The introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;

(b) That State parties include in their national health policies appropriate strategies aimed at eradicating female circumcision in public health care. Such strategies could include the special responsibility of health personnel, including traditional birth attendants, to explain the harmful effects of female circumcision;

(c) That State parties invite assistance, information and advice from the appropriate organizations of the United Nations system to support and

Action,¹⁹⁸ a holistic women's well-being approach mandates abolition of such a practice.¹⁹⁹ Otherwise, as far as controlling deleterious "health" effects of FGM, all that arguably would be required for its legitimacy is an antiseptic setting, notwithstanding its many long-term disadvantages to women, including interfering with their health, safety, bodily integrity, and sexuality.²⁰⁰

assist efforts being deployed to eliminate harmful traditional practices;
(d) That State parties include in their reports to the Committee under articles 10 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women information about measures taken to eliminate female circumcision.

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: General Recommendation No. 14 (Ninth Session, 1990), at 79, 80, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

198. *ICPD*, *supra* note 6, ¶ 4.22 ("Governments are urged to prohibit female genital mutilation . . .").

199. *Id.*; see also Hernández-Truyol, *supra* note 8:

Female Genital Mutilation

10. Cultural practices such as female genital mutilation (FGM) have deleterious, long-lasting effects on women's reproductive and sexual health which are or can be life-threatening. Governments, intergovernmental and international organizations and NGO's must work together to eradicate the practice of FGM and protect girls and women from such a practice with such harmful effects on health. Resources must be invested to educate all persons about the detrimental effects of FGM, to focus on the issue as part of the holistic reproductive and sexual health construct, and to provide treatment and rehabilitative services to girls and women who have experienced FGM.

Id. at 1411-12; Toubia, *supra* note 111, at 224 ("Female genital mutilation . . . is an extreme example of efforts common to societies around the world to suppress women's sexuality, ensure their subjugation, and control their reproductive functions.").

200. This is not a theoretical platitude. See Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture and the Law*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 417 (1993). Anna Fruder has noted that:

[h]ealth, the objective discourse of medical science, has provided relief for a symptom of a problem of culture and politics, not medicine. This is commendable and will hopefully prove effective, but the problem of culture, and sensitive treatment or marginalization of issues affecting women, remains unaddressed. *In Somalia's urban areas educated families have their girls mutilated in hygienic modern hospitals.*

Id. at 437 (emphasis added).

Female Genital Mutilation often results in death and:

[t]he lesser implications are infertility, Keloid formation (scars which shrink the vagina) blockage of menstruation, painful intercourse (as infibulated women must be cut open to permit insertion of the penis), obstructed childbirth, hemorrhaging, tetanus and septicemia from unsterile instruments (kitchen knives, razor blades, pieces of glass), infection (an infibulated child's excrement remains trapped in the bandages which bind

The question of cultural relativism squarely presents a challenge to the notion of the universality of human rights.²⁰¹ Some cultural relativists would have the human rights structure itself be limited, rather than enriched, by culture. They

her legs together during the period of immobility which is required for the skin between her legs to bind), bleeding of adjacent organs, and shock and pain from the mutilation which is often carried out without anesthesia.

Id. at 435-36.

Further, "psychological consequences can include frigidity and insatiability, anxiety, melancholy and depression." *Id.* at 436. Variants of FGM, locations where it is practiced, and health implications and justifications offered for it are discussed at *id.* at 434-37; see also Kirsty Magarcy & Elizabeth Evatt, *Genital Mutilation: A Health and Human Rights Issue*, Australian Development Studies Network Briefing Paper No. 18 at 3 (1990); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 180, 189 (1992).

201. An in-depth treatment of the theories of relativism and universality are beyond the purview of this article. Briefly, relativists hold that one society/group cannot condemn traditions or practices of another because outsiders' critiques of insiders' conduct is invalid, as there is no appropriate basis upon which to judge others' conduct. Universalists, on the other hand, hold that all persons are entitled to the same inalienable, fundamental human rights. Significantly, relativism and universality are really inter-disciplinary, multi-layered concepts that incorporate sociology, psychology, anthropology, philosophy and law. For an in-depth discussion of these topics, see MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER xvii (1980) ("The conception of human rights which we recommend . . . can be made to transcend all differences in the subjectivities and practices of peoples, not merely across national-state lines, but as between the different arenas of the larger community."); RENTELN, *supra* note 37 (for relativist perspective); Tesón, *supra* note 7 (for general critique of relativism and analysis of human rights documents which author argues does not support the relativist position); Donoho, *supra* note 53 (for general discussion of relativism and universality). Donoho disagrees with Tesón, regarding human rights documents' lack of support for relativism, positing that:

relativism, while largely incompatible with the founding principals of the current international system, is nevertheless partially reflected in the nature of states' international human rights obligations and in the international system's limited international monitoring and interpretive capacity. . . . [And that] important practical reasons exist for tolerating some relativity regarding the interpretation of human rights requirements.

Id. at 347; see also Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, in CROSS-CULTURAL, *supra* note 97, at 23, 24-25 ("Cultural relativism has been charged with neutralizing moral judgment and thereby impairing action against injustice. . . . In my view, the merits of a reasonable degree of cultural relativism are obvious, especially when compared to claims of universalism that are in fact based on the claimant's rigid and exclusive ethnocentricity."); Anna Funder, *supra* note 200. But see Detlev F. Vagts & Douglas L. Donoho, *Book Review*, 85 AM. J. INT'L L. 416 (1991) (reviewing and critiquing ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS UNIVERSALISM VERSUS RELATIVISM).

would posit that treatment of an individual that comports to local traditions is non-reviewable under universal human rights norms because the tradition itself is the defining factor of what is right and what is a right in a given locality.

This position is contrary to the lessons learned from slavery, the Holocaust, and contemporary tragedies such as Bosnia. Certainly, if governments could exterminate entire groups of people in the name of culture, human rights would be but a faded dream. A plethora of recent events have focused attention on practices ranging greatly in their nature and effects such as FGM,²⁰² caning as a form of punishment,²⁰³ the imposition of the death penalty (especially on minors),²⁰⁴ the wearing of a veil,²⁰⁵ the cutting off of a hand for steal-

202. The increased number of immigrants from countries where FGM is practiced, such as the Sudan and Somalia, has brought FGM to the attention of the United States. In October 1993, a bill was introduced in Congress by Patricia Schroeder to ban the practice in the United States. The Female Genital Mutilation Act of 1993, H.R. 3247, 103d Cong., 1st Sess. (1993) (offered as amendment to ch. 7 of tit. 18 U.S.C.). The United Kingdom, Sweden and Switzerland have explicitly banned FGM by statute, and Australia, Canada and France are applying existing laws to prohibit it. See Mary Ann James, *Federal Prohibition of Female Genital Mutilation: The Female Genital Mutilation Act of 1993*, 9 BERKELEY WOMEN'S L. J. 206, 208 n.3 (1994); See also Jill Smolowe, *A Rite of Passage-or Mutilation*, TIME, Sept. 26, 1994, at 65.

203. See COUNTRY REPORTS 1994, *supra* note 103, at 680. The government of Singapore applied the Vandalism Act to Michael Fay, an American teenager convicted of spray-painting private automobiles for which the punishment was imprisonment and caning. Many critics questioned such a severe punishment for "youthful, non-violent, first-time offenders." *Id.* Interestingly, women are exempt from this form of punishment.

204. The Human Rights Committee, in its review of the United States' first report on the implementation of the ICCPR (the first time ever United States' human rights practices have been subject to review by an international body), sharply criticized the United States for imposing the death penalty as a form of punishment, and particularly to its maintaining the legality of executing minors. One expert noted that the "[d]eprivation of life was not a limitation but an absolute act [And therefore] [l]imitations should not go beyond what was absolutely necessary to protect a given societal value [She further asked whether] the United States plan[ned] to renew its position on the death penalty for minors in light of those parameters." *Human Rights Committee Begins Considering Initial Report of United States*, Hum. Rts. Comm., 53d Sess., 1401st mtg., U.N. Doc. H R / C T / 4 0 0 (1 9 9 5), a v a i l a b l e i n > g o - p h e r : / / g o p h e r . u n d p . o r g : 7 0 / 0 0 / u n c u r r / p r e s s _ r e l e a s e s / H R / C T / 9 5 _ 0 3 / 4 0 5 (comments by Cecilia Medina-Quiroga).

205. In 1979, the Ayatollah Khomeini of Iran announced that the veil and Islamic attire were mandatory for women. Mirhosseini, *supra* note 120, at 74. Special camps were set up for women caught not in proper Islamic dress, and in order to avoid abuse, the women would usually have to bribe the guards. *Id.* at

ing,²⁰⁶ to name a few that some argue are wholly unacceptable as violative of human rights norms, but that others justify in the name of culture, religion, and tradition.²⁰⁷ The relativists' rejection of value judgments²⁰⁸—ironically, a value

75. Further:

[c]lause number 102 of the Islamic Penal Code now provides that the penalty for women who do not adhere to the dress code is between 34 and 74 lashes with a whip But, just as commonly, women who do not adhere to the dress code are punished with acts of extreme cruelty: their feet may be put in a gunny sack full of mice and cockroaches, their faces splashed with acid or cut with razor blades.

Id. at 75.

In March of 1994, Algerian terrorist groups posted notices threatening to kill any woman whose head was not covered by a scarf. Terrorists did in fact kill a 17-year-old girl for not wearing proper attire. COUNTRY REPORTS 1994, *supra* note 103, at 1052-53. Women in Saudi Arabia are required to wear the *abaya*, a black garment covering the entire body including the head and face. *Id.* at 117. See also Asma Mohamed Abdel Halim, *Challenges to the Application of International Women's Human Rights in the Sudan*, in HUMAN RIGHTS OF WOMEN, *supra* note 5, at 406, 407-410.

206. One of the categories of Islamic criminal offenses is *sariqa*, or theft, which is punished by amputation of the thief's right hand. An-Nan'im, *supra* note 201, at 33.

207. The use of religion to justify practices that many hold to be a human rights violation, such as FGM, is not a new concept. See Arthur Schlesinger, Jr., *The Opening of The American Mind*, N.Y. TIMES, July 23, 1989, § (Book Review), at 1. Arthur Schlesinger explains that:

As a historian, I confess to a certain amusement when I hear the Judeo-Christian tradition praised as the source of our concern for human rights. In fact, the great religious ages were notable for their indifference to human rights in the contemporary sense. They were notorious not only for acquiescence in poverty, inequality, exploitation and oppression but for enthusiastic justifications of slavery, persecution, abandonment of small children, torture, genocide. Religion enshrined and vindicated hierarchy, authority and inequality.

Id. at 26.

208. See RENTELN, *supra* note 37, at 13 (viewing cultural relativism as descriptive, not value theory, and thus concluding that, as such "it does not entail tolerance or any other value . . . [r]ather, it is a theory about moral judgments [and] . . . enculturation rather than tolerance proves to be the essential contribution of the theory . . . [so that] moral criticism is possible for the relativist"). Yet, the author embraces what she labels ethical relativism which, in her words, holds that "there can be no value judgments that are true, that is, objectively justifiable independent of specific cultures." *Id.* at 71. Nonetheless, Renteln contends that "human rights cannot be derived philosophically, but can only be established by empirical demonstration." *Id.* at 12. However, Vagts & Donoho critique Renteln's approach by stating that:

On the one hand, Renteln posits that moral values and judgments only have objective validity or meaning in their specific cultural contexts. On the other hand, since toleration and objectivity are not logically necessary to this metaethical relativist viewpoint, external moral values may never-

judgment in itself—is simply flawed. This article opposes such a hands-off approach which, interestingly, tends to be most vehemently employed when the rights of women are at stake, such as the right to property ownership, integrity of the body, self-determination, or enfranchisement. This skewed strand of relativism appears to be simply pretextual—an excuse to keep women under the proverbial thumb of patriarchy in the name of culture, religion or tradition. Like racism, sexism in the name of culture is no less sexism than sexism for sport.²⁰⁹ Why is it, we should ask ourselves, that when women are deprived of rights simply because of their sex, the justifications of culture, religion or tradition are so readily acceptable and defensible?

This article, of course, does not constitute, nor should it be read or interpreted to constitute, a blanket rejection of culture, religion or tradition. Rather, it advocates cultural *pluralism* as an objective in any human rights discourse. Ethnocentric, culturally-biased notions of right and wrong should be evaluated in the context of appreciation for and recognition of other world views. Personal decisions should be exercised by the individual herself,²¹⁰ not by institutional fiat, and the individ-

theless be used to criticize any culture's social practices. If, however, such external judgments are not only possible, but valid in the sense that one need not tolerate moral practices contrary to one's own, the relativist insight is reduced to a seemingly empty acknowledgement that all moral judgments, including international human rights critiques, ultimately reflect a degree of ethnocentricity and enculturation.

Vagts & Donoho, *supra* note 201, at 416-18.

209. For example, certain laws provide that:

wi[ves] must obey [their] husband[s], that they are not allowed to work outside the home without their husband's permission, that men may take up to four wives, that Muslim women may not marry outside the faith, and that women are entitled to only one-half the inheritance share that men inherit in the same capacity . . . that women are compelled to wear concealing garments in public, . . . that they are deprived of the right to vote, that they are barred from the legal profession and the judiciary, that their testimony in court is excluded or valued at one-half the weight of a man's, that they are not allowed to travel without the permission of a male relative or unless accompanied by a male relative, or that they are not allowed to drive cars.

Mayer, *supra* note 195, at 177. These laws are no less an affront to women's equality because they are in the name of culture and under the "rule of law" than apartheid or slavery have been to racial equality which also had the imprimatur of the "rule of law" and tradition. *Id.*

210. Finding that the right belongs to the individual, particularly when referring to women, does not ensure a paper right's translation into equality in fact.

ual should be free to believe in, follow, or observe cultural, religious or traditional practices or not.²¹¹ This, too, has its limits, as no one would argue that torture or genocide should, or could, ever be justified in the name of culture. Further, an individual's right might well be illusory *vis à vis* societal and familial pressures and expectations.²¹² Certainly social ostracism, rejection or even punishment for failure to submit to a practice might well negate, if not vitiate, the individual's free will and exercise of her rights, including the right to self-determination.²¹³

The individual needs to be informed of her right to reject certain practices, a wholly illusory right if, for example, the practices are carried out on children who do not have a legal or actual opportunity to consent. *See, e.g.,* Toubia, *supra* note 111, at 233 ("There is, however, one very important difference between FGM and the ways in which women alter their bodies in other cultures: FGM is mainly performed on children, with or without their consent.").

211. For a supporting view, see Rhoda E. Howard, *Dignity, Community, and Human Rights*, in CROSS-CULTURAL, *supra* note 97, where Rhoda Howard states that:

Human rights adhere to the human being by virtue of being human, and for no other reason. Every human being ought to have human rights, regardless of status or achievement. . . . Human rights are claims by the individual against society and the state that, furthermore, 'trump' other considerations This means that the human being who holds rights holds them not only against the state, but also against 'society,' that is, against his or her community or even family.

Id. at 82-83.

212. *See* Toubia *supra* note 111, at 233 (noting impact of pressure to conform to tradition and submit to FGM regardless of fear of pain and stories of suffering as "the desire to please parents, grandparents, and relatives by doing something that is highly valued and approved of . . . there is the desire to be 'normal'-that is, to be like other members of society, particularly the peer group"); *see also* *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993) (noting that in some communities female circumcision is a prerequisite for women to be accepted as members of their ethnic group). For an example of another type of "peer/group pressure" in our own backyard, *see* *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (discussing whether non-sectarian prayer at graduation ceremony of public school was impermissible establishment of religion under First Amendment by forcing student to stand and remain silent during prayer).

213. *See, for example,* Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L. J. 155 (1985), where Miller explains that consent to be circumcised is not a realistic notion because:

In addition to cultural pressures economic and social concerns may compel women to "consent" to these operations [because] [i]n much of Africa, marriage is a primary path to social and economic survival and advancement [and] [b]ecause uncircumcised women are not considered suitable for marriage in some areas, many African women are forced to undergo

International human rights theory supports the concept of the universality of rights.²¹⁴ Indeed, while human rights documents consistently address culture as a basis upon which protections must be afforded,²¹⁵ not one cites to culture as the grounds upon which protected rights may be abridged.²¹⁶ Rather, many of these documents support the conclusion that some aspects of culture, particularly those justified solely by status, particularly sex, must cede to universal human rights. For example, the African Charter on the Rights and Welfare of the African Child expressly balances rights and culture and requires member states of the Organization of African Unity to "abolish customs and practices harmful to the welfare, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child, and (b) those customs and practices discriminatory to the child on the grounds of sex or other status."²¹⁷ Similarly, the Women's Convention squarely confronts the possibility of the misuse of culture as a pretext to discriminate and urges states parties "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women."²¹⁸ Further, the Women's Convention requires that

circumcision to avoid becoming social and economic outcasts.

Id. at 157-58. The author offers that "[t]he use of the word 'consent' in this context is problematic [because] [w]hile many women do agree to undergo this operation, overt or subtle pressures may cause them to feel that they have no effective choice." *Id.* at 157 n.18.

214. For instruments supporting the universal nature of human rights, see U.N. CHARTER art. 55(c); Universal Declaration, *supra* note 6, pmbl.; ICCPR, *supra* note 6, pmbl., 999 U.N.T.S. at 172-73; *DEVAW*, *supra* note 5, pmbl.; Economic Covenant, *supra* note 40, pmbl., 993 U.N.T.S. at 4-5; Race Convention, *supra* note 46, pmbl., 660 U.N.T.S. at 212; Vienna Declaration and Programme of Action, *supra* note 5, ¶¶ 1, 5, 18; *ICPD*, *supra* note 6, ¶¶ 26(j), 28-29, Commitment 5(i); *see also*, *Tesón*, *supra* note 7. *But see* Donoho, *supra* note 53.

215. *See, e.g.*, Economic Covenant, *supra* note 40, art. 1(1), 993 U.N.T.S. at 5 ("All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their . . . cultural development.").

216. However, the documents do refer to the protection of culture. *See, e.g., id.* art. 1(1) ("By virtue of . . . [the right to self-determination all people may] . . . freely determine their . . . cultural development.").

217. Charter on the Rights of the Welfare of the African Child, July 11, 1990, art. 21, OAU Doc. CAB/LEG/24.9/49 (emphasis added).

218. Women's Convention, *supra* note 47, art. 2(f), 1249 U.N.T.S. at 16 (emphasis added). Significantly, distinctions on the basis of sex appears to occur even in the ratification of documents. The Women's Convention has the somewhat dubious

states parties "take all appropriate measures: (a) [t]o modify the *social and cultural patterns of conduct* of men and women, with a view to achieving the elimination of prejudices *and customary and all other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"²¹⁹

This rejection of cultural relativity is not intended to give a sweeping endorsement to the concept of universality as it has been applied under the present "normative" construct.²²⁰ As one activist keenly observed, "one of the biggest problems with universality as it has existed in the past is that [in] the pro-

distinction of having more reservations than any other human rights instrument, many of these based on culture. For example, reservations were interposed by Bangladesh, Egypt, Libya, and Tunisia conditioning compliance on conformity with the *Shari'a*. An interesting question arises as to whether these reservations can be valid under international law which maintains that although reservations can be taken, those that are contrary to the "object and purpose" of the treaty are not valid. See Vienna Convention on the Law of Treaties, *supra* note 160, art. 19(c), 1155 U.N.T.S. at 337. Indeed, such reservations raise the question as to whether a claim that sexual inequality is based on culture/religion/tradition can be valid in light of a treaty whose basic purpose is to mandate sexual equality. For a discussion of the debate over the legality of these reservations, the outcome being not to review them, see Mayer, *supra* note 195, at 177-80.

Many non-Muslim states took reservations to the Convention as well. See generally, Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 687 (1990); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991). The Women's Convention is not the only instrument in which such anomalies occur. See ICPD, *supra* note 6; CDPOA, *supra* note 6.

219. Women's Convention, *supra* note 47, art. 5(a), 1249 U.N.T.S. at 17 (emphasis added). Moreover, Article 16 mandates that all:

1. States Parties . . . take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular . . . ensure, on a basis of equality of men and women: [rights that clearly are culture-related such as]

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse . . . ;

* * *

(e) The same right to decide freely and responsibly on the number and spacing of their children . . . ;

* * *

(g) The same personal rights as husband and wife including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.

Id. art. 16(1)(a)-(b), (e), (g), (h), 1249 U.N.T.S. at 20.

220. See *supra* notes 182-83 and accompanying text.

cess that led to universal articulation, a lot of people did not participate."²²¹ Hence, this article proposes an analytical model that respects this critique. The issue in this perspective of universality is not about colonizing by way of a Western imposition of moral or ethical views. Rather, it exposes the present construct as flawed for failure to consider perspectives of insiders and outsiders. This problem is resolved in the proposed model, in part, by ensuring that culture—meaning the customs, practices and rituals of a particular group as well as the ideas, beliefs, and values underlying them which define the roles and status of the people in a given community and shape their way of life—is included as part of the analysis in the context of an amalgam of indivisible rights.

Indeed, this author rejects and eschews the normative analytical construct that dichotomizes cultural relativism and universality of rights without so much as a consideration of possible alternative methodologies.²²² In the model proposed here, observations, findings, and judgments have to be fluid,

221. Statement of Mallika Dutt of the Center for Women's Global Leadership, as cited by Dorothy Q. Thomas, *Conclusion*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 356, 357.

222. For another author who rejects narrow view of culture as only existing juxtaposed with some other right, see Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 167, where Rao explains that:

When a government exempts itself from the perceived cultural hegemony of human rights doctrine, its supporters as well as its detractors participate in perpetuating a false oppositional dichotomy in which geopolitical borders are erased and a multitude of cultures are collapsed into two falsely unified packages, one bearing the stamp of human rights and the other lacking it. . . . I want to move away from these misleading constructions of culture to ask: What are the *politics* of any argument based on culture in human rights discourse today? . . . I question our easy acceptance of cultural differences as they are presented to us, and critically assess four major components of any claim made from culture. First, what is the status of the speaker? Second, in whose name is the argument from culture advanced? Third, what is the degree of participation in culture formation of the social groups primarily affected by the cultural practices in question? Fourth, what is culture, anyway?

Id. at 168; see also, Howard, *supra* note 211, where Howard explains that:

Awareness of the erroneous descriptive and analytic nature of simplistic dichotomies such as traditional versus modern and African versus Western enables one to look more critically at the cultural relativity debate. Scholars who use such dichotomies without perceiving their nuances and internal inconsistencies frequently defend African culture as if it is undifferentiable, unchangeable and nonpolitical in its impact.

Id. at 171-72.

not carved in stone.²²³ Only such an approach can accommodate modern societies, diverse peoples, and the rule of law. As science, religion, technology, communications, medicine, anthropology and, yes, even the law, grow and evolve, our way of looking at tradition, social conditions, medical progress, technological changes, and the nature and status of rights also should grow and evolve.

223. Charlotte Bunch, promoting a fluid notion of human rights, stated that: The concept of human rights, like all vibrant visions, is not static or the property of any one group; rather, its meaning expands as people reconceive of their needs and hopes in relation to it. In this spirit, feminists redefine human rights abuses to include the degradation and violation of women. The specific experiences of women must be added to traditional approaches to human rights in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives.

Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 486-87 (1990); Rao, *supra* note 222, at 173 ("[C]ulture is a series of constantly contested and negotiated social practices whose meanings are influenced by the power and status of their interpreters and participants [and it] is only one constituent art of the complex web of power relationships that circumscribes our existence."); Abdullahi Ahmed An-Na'im, *Introduction*, in CROSS-CULTURAL, *supra* note 97, at 3, 4 ("Furthermore, since cultures are constantly changing and evolving internally, as well as through interaction with other cultures, it may be possible to influence the direction of that change and evolution from outside through 'cross-cultural dialogue'."); see also Toubia, *supra* note 111, for the cultural development of FGM, showing both that culture is fluid and that the flow does not always follow the right (and rights) course:

Although FGM is a practice of culture (not religion), it is often strongly associated with Islam. . . . But FGM is not a requirement of any religion: it is practiced by some Catholic groups (some Catholic missionaries condoned it as a means of preserving women's purity) and many Coptic Christians, as well as by Ethiopian Falasha Jews now living in Israel; it is not practiced in many predominantly Islamic countries such as Saudi Arabia, Iraq, the Gulf States, Kuwait, Algeria and Pakistan. There is no major Islamic citation that makes female genital mutilation a religious requirement. Neither the Quran nor the "hadith" (collections of the sayings of the Prophet Mohammed) includes a direct call for FGM.

FGM was spread by dominant tribes and civilizations, often as a result of tribal, ethnic, and cultural allegiances. For example, it was not known in western Sudan among the Furs and the residents of the Nuba mountains until the 1950s. After independence in 1956, local government, education, and health services were introduced in the region by professionals from the educated middle classes of the north where FGM was practiced. In the next twenty years, the cultural influences of the northern elites prevailed. A survey conducted in 1979 reported that in Fur and Nuba families, mothers were not circumcised but most daughters were.

Id. at 230.

The inviolability and indivisibility of human rights must be the foundation for all analyses. It would be as absurd to suggest that there is no difference between and among cultures as it would be to suggest that genocide and torture are not universal wrongs. Thus, human rights cannot and should not be excised from or exorcised of culture. In this context, however, acts and practices that harm an individual's physical or mental well-being unequivocally and irreversibly, even in the name of culture, are simply wrong. Indeed, denial of equality to women on cultural, religious and traditional grounds appears to create a "Catch 22" situation: if an obligation to eliminate barriers to women's equality can be limited by the status quo—such as culture, religion and/or tradition—and the status quo has at its core entrenched and institutionalized *inequality* on the basis of sex, then equality can never be achieved, being shielded by the law that purports to mandate it.

This certainly is not to say or to suggest that there are no cultural considerations or accommodations to be made when dealing with human rights.²²⁴ Quite the contrary, factors such as race, nationality, ethnicity, etc., are integral to the human rights construct. However, there is a distinction to be made between considering or accommodating cultural customs and using culture as a pretext to deny the integrity and dignity of individuals on the basis of sex. These rights—to culture, religion, tradition—are rights of the individual that governments should neither impose upon nor abridge in the name of the law. In other words, international human rights scholars, activists and representatives should neither use culture as a

224. See American Convention, *supra* note 43, art. 12, 1144 U.N.T.S. at 148 (freedom of religion); *Id.* art. 20, 1144 U.N.T.S. at 150 (right to nationality); European Convention, *supra* note 6, art. 14, 213 U.N.T.S. at 232 (prohibiting discrimination based on "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"); See also Hernández-Truyol, *supra* note 8:

Reconstruction of Rights

* * *

4. Articulated rights must be reviewed and reconstructed in light of health, medical, social, economic, educational, religious, and cultural realities so that the reconstructed rights framework develops, expands and transforms the content and meaning of rights in a manner that is sensitive to, effects, promotes and protects reproductive and sexual health rights and freedoms.

Id. at 1410 (Recommendations).

shield to protect practices that violate women's human rights, nor use human rights norms as a sword, a weapon of subjugation, colonialism and moral imperialism, to oppress other communities and ways of life.

VI. REFORM

This article proposes, and in this part develops, a theoretical and analytical construct that effects much needed reform in the international human rights arena to render women visible and raise women's voices, *all* women's voices, so that human rights can be women's rights too. In order to bridge the gap between the rules and the realities, the proposal urges the adoption of a theoretical construct²²⁵ that uses communication theory,²²⁶ legitimacy theory,²²⁷ and critical feminist/race theory²²⁸ as applied to international human rights law in a

225. The model uses the concepts of communication and legitimacy theories of lawmaking, see *infra* notes 226-27, and critical feminist and race theories, see *supra* note 228, and is being developed by the author in a work-in-progress.

226. The communication theory of law-making was developed by Professors Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, The Harold D. Lasswell Memorial Lecture (Apr. 24, 1981); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE J. WORLD PUB. ORD. 249 (1980); Myres S. McDougal et. al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); see also LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE (1989).

This model rejects the mainstream view of international lawmaking which sets up a positive body of rules that govern relations between or among states as well as between states and individuals. Rather, communication theory views international norm prescription as "a complex process of authoritative and controlling decisions in which rules (and doctrines and principles) are continuously being fashioned and refashioned by a wide variety of global actors to suit the needs of the living" See Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 REV. D. MCGILL 542, 548 (1983).

227. See Franck, *supra* note 43.

228. Feminist theory is grounded on a critique of traditional lawmaking as endemically inadequate because of its historic exclusion of women from the law-making process. See, e.g., Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987). Feminist theorists urge the incorporation of women's voices and the asking the "woman question." See Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). The historic legal perspective is deemed to be "male [which] is systemic and hegemonic. . . . Feminism criticizes this male totality without an account of our capacity to do so or imagine or realize a more whole truth." Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636-37 (1983); see also Martha Minow, *The*

multidisciplinary, multidimensional context. The model requires that the following three inquiries be made at each stage of the rule-making process. First, the gender question: are there any gender implications of the proposed lawmaking; second, the women's question:²²⁹ a non-essentialist, multidimensional evaluation of the impact of the lawmaking on women; third, the culture question: an analysis of the cultural implications of the lawmaking.

Supreme Court 1986 Term-Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987). Martha Minow opines that:

[w]hat initially may seem to be an objective stance may appear partial from another point of view. Furthermore, what initially appears to be a fixed and objective difference may seem from another viewpoint like the subordination or exclusion of some people by others. Regardless of which perspective ultimately seems persuasive, the possibility of multiple viewpoints challenges the assumption of objectivity and shows how claims to knowledge bear the imprint of those making the claims

. . . [I]nstitutional arrangements define whose reality is to be the norm and make what is known as different seem natural.

Id. at 14. The feminist critique has been applied in the international context to show how international law, like domestic law, is andro-centric and has marginalized and ignored women, failed to meet their needs and accord them equal status. *See also* Charlesworth, *supra* note 11.

Similar to the feminist critique, the critical race theorists challenge the normative nature of law based on the distressingly "slow pace of racial reform in the United States. . . . [The race critics concluded that] new approaches were needed to understand and come to grips with the more subtle, but just as deeply entrenched varieties of racism that characterize our times." Richard Delgado, *Introduction*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* xiii (Richard Delgado ed., 1995). A recent strand of critical race theory, called critical race feminism, writes about intersectionality. For an example, see Brigitte Mabandla, *Women in South Africa and the Constitution-Making Process*, in *FEMINIST PERSPECTIVES*, *supra* note 5, at 67 (discussing oppression of South African women stemming from intersection of race, class, and gender); Crenshaw, *supra* note 9; Hernández-Truyol, *supra* note 9; Harris, *supra* note 9; Margaret E. Montoya, *Máscaras, Trenzas y Greñas: Un/Masking The Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994); Adrien Katherine Wing & Sylke Merchán, *Rape, Ethnicity and Culture: Spirit Injury From Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

229. *See* Bartlett, *supra* note 228. The model proposed in this paper asks the "women's question" as influenced by critical race theory, thus it is not simply a pluralizing of Bartlett's "woman question" which infers a female counterpart to the established male normative. *See infra* note 232 for origin of term "normativo[a]." Bartlett's woman question, as it evolved both domestically and internationally, was, much like traditional rights theory, essentialist in that it excludes all but those asking the question. On the other hand, the women's question, as a multidimensionality inquiry, would include all women in a non-essentialist analysis.

The common thread of each inquiry, of course, is to make women visible and raise their voices so that their needs are met and their rights are respected. The basic tenet of the communication theory incorporated into this methodology is the recognition that communications are at the root of law-making.²³⁰ Although the ultimate lawmaking function may be relegated to specialized institutions, these institutions as well as the process of creating, interpreting, and enforcing the laws, must include and integrate the views of those about whom the law is concerned and for whom the law creates expectations as to future behavior.²³¹ In this view, it is essential to focus on raising women's voices and including women's perspectives with a critical feminist/race conceptualization at all stages of the formal and informal international prescriptive processes: rule-making, rule-interpreting and rule/rights-enforcing.²³² To achieve this end, it stands to reason that representation of women, by women, is highly desirable, if not a legal and moral imperative.

Similarly, the proposed model incorporates concepts from Professor Franck's legitimacy theory which is based on the premise that the legitimacy of a government is dependent upon having the consent of the governed and respect for the opinion of the people.²³³ In this regard, the government, to be legitimate, must ascertain the opinions and desires of the people, including women, by asking the articulated questions at each stage of the lawmaking process. Once prescribed, a government must follow the rule of law, an integral part of which is providing for and securing individual rights.

Moreover, the critical feminist/race dimension (like the communications and legitimacy theories) would also require women's participation. Only with women's presence and perspectives in the process of government and governing, will women's concerns and issues become an integral part of, and incorporated into, the global agenda. It is significant that the failure to ask the pertinent questions concerning gender, women, and culture is largely due to the exclusion of women from the global communication process which makes, interprets, and

230. See *supra* note 226.

231. See *supra* note 226.

232. See *supra* note 226.

233. See Franck, *Emerging Right*, *supra* note 43.

enforces international legal norms. Without women in the roles of commissioners, rapporteurs, committee members, commission members, U.N. and international agency representatives, activists, citizens, and scholars, women's thoughts and feelings, rights, needs, realities, and perspectives will not be expressed or addressed. Without women's input, the normatives²³⁴ will retain a monopoly on, and power over, false-truth images.

Inquiry 1: The Gender Question — Are there any gender implications of the rules or practices that otherwise appear neutral or objective? In human rights considerations, this question will ascertain whether (and which) women's rights are involved. Women must be among the inquirers as well as the inquired.

Inquiry 2: The Women's Question — What will the implications of the rule or practice, as interpreted and enforced, be on the real lives of women, and how will women be disadvantaged?²³⁵ It is imperative to conduct this inquiry in a non-essentialist manner with a multidimensional, holistic perspective. In order to avoid, and institutionally eschew essentialism, the methodology requires the inquiry to address the conflation of gender and other aspects of a woman's personhood, such as race, ethnicity, class, ability, and sexual orientation, both to evidence and to account for the indivisibility of rights. The methodology also must ensure that any identified causal links between gender and a particular outcome are accurate and relevant to the issue being considered.²³⁶

To be sure, such articulation of the women's question is over-simplified. In its proper application, it must take into account the multiplicity of coexisting factors and issues—the multidimensionality of women's lives. Thus, the inquiries need to be taken factor by factor, issue by issue, not simply creating dichotomies, but permitting consideration of combinations, permutations, and implications of rules and practices for women, who by their status constitute anywhere from one to manifold "deviations" from the norm.²³⁷ Thus, the proposed

234. See Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071, 1071-75 (1991) (Professor Richard Delgado coins the term "normative/[a].").

235. See Cook, *supra* note 20, at 975, 986-87 (discussing the "woman question" in context of reproductive rights).

236. See Freedman & Maine, *supra* note 25, at 1089-92 (noting that maternal mortality effect of FGM is often cited as being factually unproven).

237. Of course, this term is not used in its formal statistical sense, rather it is

women's questions, effectively a series of communications in which women participate in the process of governance both as inquirers and as the inquired, will better facilitate a proper landscape for making a reality of women's paper rights.²³⁸

Recent events are evidence that women have slowly but surely started this process. In Vienna, the "Women's Issues" NGOs were recognized as the most effective of all groups, both official and unofficial, attending the conference. They made women's voices heard and women's realities visible, effecting the establishment of women's rights as an official part of the human rights agenda.²³⁹ The same is true for the

used to measure the degree of an individual's difference from the so-called "norm". See *supra* note 182 and accompanying text; see also Hernández-Trujol, *supra* note 9.

238. For example, at the domestic and international levels, women lack representation in official governmental structures as well as in private sphere organizations involved in the international arena. One of the critical differences today is the growing number of NGO's whose concerns are women's rights. These NGO's must be heard. They must speak loudly and clearly about women's issues and insist that the women's questions be asked. However, the process of inquiry cannot stop at NGO membership, but must address those who will be affected, their purported constituency - the real life women in the trenches and on the front line.

In looking at the constituency, the central question then becomes "when human rights deprivations occur, can victims or others bring complaints to appropriate transnational decision makers for remedy?" In my view, this is a critical place to ask the women's question. To be sure, various covenants provide for the right of individual petition. However, as we all know, this is far removed and remote from many women. We need to extend the concept of invocation to include local groups and grassroots organizations that not only process the complaints, but also are equipped to take action at the appropriate levels, with the support and assistance of the transnational decision makers, to provide real (and not just theoretical) remedies. The historic concept of complaint must thus be expanded so that all women's voices can be heard. This is particularly true in seeking redress for so-called culturally justified practices.

The outcome sought by international human rights law is the enjoyment of articulated rights. Thus, it is important to challenge unlawful deprivations; it is imperative that basic community policies be applied to control practices and that a continuing consensus is mobilized in support of prescriptions toward the greater future protection and fulfillment of women's human rights. Human rights must be transplanted from an institutional transnational context to a global network of local, regional, national, and international organizations that focus on women and their concerns. In so doing, as with the invocation, the application must consistently ask the women's question.

239. See *Vienna Declaration and Programme of Action*, *supra* note 5. For examples of the recognition of women's rights, see *id.* sec. II, ¶ 38 (noting that violations of women's human rights during wartime violate basic principles of international human rights law and calling for an end to violence against women in public and private spheres); *Id.* sec. II, ¶ 39 (urging universal ratification of Women's Convention).

ICPD—women again organized, galvanized, and were heard.²⁴⁰ Such efforts to present and evaluate women's issues from a multidimensionality and interdisciplinary perspective require an analysis of cultural relativity.

Inquiry 3: The Culture Question — What are the cultural considerations driving the practices and rules? To evaluate any perceived or claimed cultural conflict between a practice and a universal human right, the model proposes applying a balancing test which includes aspects of the communication, legitimacy and critical feminist/race theories. First, one must obtain information about the cultural practice from both an "insider's" and an "outsider's" perspective, the insider being the proponent or practitioner of the cultural practice; the outsider being the normativist/a asserting the conflict. In addition, in light of the challenged practice, the human rights norm must also be examined from both an insider and an outsider perspective, the insider here being the proponent of the human rights principle and critic of the culture.

In this context, particular attention to cultural practices is necessary so that they may be carefully protected from the improper imposition of outsiders' ideologies. However, culture must not be used as a smoke screen to prevent recognizing and dealing with the historic oppression of women and their universal, cross-cultural subordination. In examining a cultural practice that appears to disadvantage only women, or have a disproportionately burdensome impact on women, the cost of violating the human rights norm must be weighed against the benefit of the cultural practice. One should commence by asking at least these questions: What is the origin and value of the cultural practice?; What is its level of significance to the culture and within the community?; What is its level of intrusion on a protected individual right?; and How significant is the human rights norm to the international community? The inquiry must be further contextualized by addressing the following: the nature of the practice being challenged, who is challenging the practice (i.e., an insider²⁴¹ versus an outsider

240. The *Vienna Declaration and Programme of Action* notes that one of its main objectives is "gender equity and equality." See *ICPD*, *supra* note 6, pmb1., ¶ 1.12.

241. For example, is it a woman who does not want to follow her culture's or country's dress code, such as wearing a veil? Is it a woman who does not want to

er²⁴²), the challengers' motives for opposing the practice, and the claimed harmful outcomes of the practice.²⁴³

In this regard, we must recognize that a broad range of practices exists. At one end of the spectrum are rituals such as ear-piercing female infants, a practice that arguably has no detrimental lifelong effect on women's human rights and freedoms, including health. At the other end of the spectrum are practices such as FGM, female infanticide, and reproductive controls, such as forced pregnancies or forced abortions—both equally troubling,²⁴⁴ all of which have dramatic and harmful life-long effects on women's reproductive and sexual health rights and freedoms both *in se* and as indivisible parts of a plethora of rights critical to women's existence, well-being and full personhood, including life, health, privacy, family life, economic self-determination, political participation, education, and equality.

Significantly, it is imperative that for any analysis of cultural practices to be valid, it must be conducted from the perspective of both "insiders" and "outsiders." For example, industrial state feminists need to think seriously about how certain practices could be explained to others. Consider, for example, the glass ceiling phenomenon,²⁴⁵ the feminization of poverty,²⁴⁶ the denial to *mothers* of welfare benefits if they have more children than a state thinks they should, while *fathers* (many of whom do not support the mothers or the children) are not part of the "welfare reform" equation.²⁴⁷ Of course, there are extremes, such as FGM,²⁴⁸ where the age at the time of the procedure is, or could or should be, a critical issue.²⁴⁹

submit to a traditional practice, such as FGM?

242. For example, does the dispute concern a blanket Western challenge to a non-Western dress code, such as wearing a veil, or a non-Western practice, such as caning for punishment?

243. For example, is a woman's life and/or well-being threatened because she refuses to submit to a traditional practice or follow a dress code, or because she wants to drive or travel alone?

244. See Fathalla, *supra* note 21; see also Hernández, *supra* note 21.

245. See *supra* note 27 for discussion of glass ceiling phenomenon.

246. See BECKER, *supra* note 19.

247. See, e.g., N.J. ADMIN. CODE, tit. 10, § 82-1.11 (1995) (New Jersey's child exclusion law).

248. See *supra* note 111.

249. The age of girls when "circumcised" varies widely. In some cultures, it is done at infancy, while in others the girl is 16 years old, of marriageable age. The

This raises the interesting question of whether analysis of the practice could or should depend on whether the genital surgery was delayed until an appropriate age of consent. Would "consent" make the practice an *elected* procedure and thus not a violation of the rights to bodily integrity? In such cases, the answer would have to include considerations of individual free will and self-determination.²⁵⁰ Is the problem solved by, as some recently have suggested, performing the procedure in an antiseptic hospital setting?²⁵¹ What about other elected cosmetic surgeries that carry serious physical and mental health risks, such as breast augmentation?²⁵² Even if none of these practices is acceptable, the methodological question remains: how does the human rights community inform a group that certain practices violate human rights norms. For example, what is the appropriate way to inform certain communities, for example American Indians that domestic violence is unacceptable conduct and not private business as usual.²⁵³

It is clear that there are no easy answers to the cultural inquiry. However, there are questions that can be raised and examined to start the process of communication that will eventually, and hopefully, lead to a multidimensional and culturally sensitive perspective. This proposed process represents a major leap forward in ensuring the protection of women's human rights.

most common age, however, is between four and six-years-old. Toubia, *supra* note 111, at 226. FGM is practiced in "at least twenty-six African countries, among a few groups in Asia, and (increasingly) among immigrant populations in North and South America, Australia, and Europe." *Id.* at 224.

250. See *supra* note 85 (discussing right to self-determination).

251. Barbara Crossette, *Cairo Visitors Hear Plea to End Genital Maiming*, N.Y. TIMES, Sept. 11, 1994, at A10.

252. See Gunning, *supra* note 200; see also Peters & Wolper, *supra* note 104, at 6 (While [FGM] is generally considered primarily an African problem, "cultural norms of sexual desirability in other regions . . . encourage women to mutilate their bodies through poisonous breast implants and other kinds of dangerous plastic surgery."). Nahid Toubia expands on this notion explaining that women whose cultures practice FGM sometimes take exception to criticism levelled at them when Western women undergo "feminization rites" of their own, such as cosmetic surgery and high heels. Toubia, *supra* note 111, at 232-33.

253. See Gloria Valencia-Weber & Christine Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. (forthcoming 1996) (discussing domestic violence among various Native American Indian nations).

VII. CONCLUSION

The proposed methodology, with its expansive and extensive role for women, will better facilitate an inclusive global setting for addressing women's issues, resolving women's problems, and effecting women's greater participation in a process that is central to their dignity and status as women and as human beings. In this context, the role and propriety of government regulation must be scrutinized as part of the overall inquiry. Take for example reproductive freedom controls. Ostensibly, such controls are intended to protect a nascent form of life,²⁵⁴ or some other allegedly appropriate government interest.²⁵⁵ A look at the history of reproductive freedom reg-

254. For example, the House Judiciary Committee recently sent a bill to the House floor which would criminalize what is referred to as "partial-birth" abortions by anti-abortion groups, and "intact D and E" (for dilation and evacuation) by pro-choice groups. Under this procedure "the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." *Diary: Yesterday in Washington*, N.Y. TIMES, July 19, 1995, at A16 (description provided by congressional opponents of abortion); see Tamar Lewin, *Method to End 20-Week Pregnancies Stirs a Corner of the Abortion Debate*, N.Y. TIMES, July 5, 1995, at A10 (anti-abortionists describe the process as suctioning out the fetus's brain to make the head fit more easily through the birth canal). Opponents of the bill voiced concern that it would erode the rights established by *Roe v. Wade*, 410 U.S. 113 (1973). *Diary: Yesterday in Washington, supra*, at A16. In this still hotly-debated case, the Court held that "for the stage subsequent to viability the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 114; see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (rejecting trimester framework of *Roe* and holding that women may abort fetus before "viability"); National Defense Authorization Act for Fiscal Year 1996, 141 CONG. REC. H5990-06, H6000 (1995) (commenting on legislation to ban abortions on military bases).

255. Notwithstanding the fundamental nature of the individual right to choose whether or not to bear a child, see, for example, *Roe v. Wade*, 410 U.S. 113 (1973) (right to reproductive freedom grounded in constitutional right to privacy), the fiscal access necessary to the exercise of that right appears to have been disconnected. See *Harris v. McRae*, 448 U.S. 297 (1980) (holding that an amendment denying public funding for certain medically necessary abortions "places no government obstacle in the path of a woman who chooses to terminate her pregnancy"). The Court reasoned that although indigency would be an obstacle for some who had a medical necessity for an abortion, "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Id.* at 316. The Court concluded that the amendment did not abridge the constitutionally protected freedom of choice recognized in *Roe v. Wade*. *Id.* at 317; see also *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). The Court, in *Webster*, noted that "[h]aving held that the

ulations, however, spins a different tale of manipulation of women's bodies for improper purposes.²⁵⁶

One of the critical differences in the human rights world today is the growing number of NGOs whose focus and concerns are women's rights. These NGOs have spoken loudly and clearly on women's issues, insisting that women be included in the process and successfully planting women firmly in the international rights landscape. This process was successfully started in Vienna and has continued in the ICPD, at the Social Summit, and in Beijing, despite large obstacles.²⁵⁷ However, women's initiatives must not stop at NGO membership, but must reach *all* women—in their everyday lives, of having babies, working for no pay, making less money than men even when they are paid, and suffering personal abuse to their bodies and dignity simply because of their sex.

In looking at this constituency, a central concern is whether "when human rights deprivations occur, can victims or others bring complaints to appropriate transnational decision makers for remedy?"²⁵⁸ To be sure, various international covenants and declarations provide for the right of individual petition. However, this process is far removed and remote from many women's realities. The implementation of women's human rights must extend beyond paper to involve local groups and grassroots organizations in not only the process of taking *complaints* but in taking appropriate *action* as well (with the support and assistance of transnational legal institutions) in order to provide real, rather than theoretical, remedies. This is particularly true in seeking redress for so-called culturally justified practices, about which local groups are the most informed and aware. The formalistic concepts of complaints must be expanded to include more informal structures to ensure that

state's refusal to fund abortions does not violate *Roe v. Wade*, it strains logic to reach a contrary result for the use of public facilities and employees." *Id.* at 509-10. Thus, a statute's ban on the use of public employees and facilities for the performance of nontherapeutic abortions was constitutional. *Id.* at 510-11. It becomes an interesting question then, whether a fundamental right without access to a remedy is a right at all or instead a claim "full of sound and fury, signifying nothing." WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5.

256. See *supra* notes 184-94 and accompanying text (for discussion of fertility controls).

257. See *China: Tibet Groups Banned from Conference*, L.A. TIMES, July 22, 1995, at A7.

258. See Zulficar, *supra* note 11, at 1020.

women are visible and their voices heard. These changes are at the heart of the proposed reform.

The outcome sought from this process is the enjoyment by women of their human rights. This requires the development, expansion, and transformation of the content and meaning of articulated human rights norms so that they include, and apply to, the reality of women's lives. It is important to challenge unlawful deprivations; it is imperative to mobilize a continuing consensus; it is vital that the rules are interpreted and enforced for the protection and fulfillment of women's human rights. The methodology urged in this article seeks to facilitate the creation and the realization of a holistic, non-essentialist, multidimensional construct in which women are not, and indeed cannot be, marginalized or subordinated. It focuses on the inclusion of *all* women in a system that defines and defends women's rights as human rights, and thus protects and promotes the well-being, integrity, and international human rights and freedoms of women worldwide.

