INTERNATIONAL LAW FROM THE BOTTOM UP: FRAGMENTATION AND TRANSFORMATION

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1. FROM THE BEGINNING

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

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1 See Lori F. Damrosch et al., International Law xv (5th ed. 2009) (“[I]nternational law has been understood as the law made by states to govern relations among them.”); Louis Henkin, International Law: Politics, Values and Functions 21 (1989) (offprint from the 216 Collected Courses, 1989-IV) (“International law is the normative expression of the international polity which has States as its basic constituent entities.”); Mark Weston Janis & John E. Noyes, International Law 1-2 (4th ed. 2011) (“An important part of international law has consequently had to do with the establishment of a set of mutually agreed-upon rules respecting the nature of these states and their fundamental rights and obligations inter se.”). But see Benno Teschke, The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations (2003) (arguing that this is a simplistic account of a more complicated reality).

2 David J. Bederman, International Law Frameworks 3 (3d ed. 2010) (noting that positivism viewed States as “subject to no moral authority above them”).
natural law principles should also be binding on states. Despite differing views on the legitimate sources of international law, it was generally accepted that it governed states alone.\(^3\)

1.1. Transformation

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

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


\(^6\) See, e.g., MARY ANNE GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (documenting the work of the commission led by Eleanor Roosevelt tasked with putting together this
political rights, familiar to Americans from our own Constitution, as well as less familiar economic, social, and cultural rights, including the right to health and the right to an adequate standard of living. The recognition of individual human beings as subjects of international law was the first major sea change in international law from the bottom up.

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

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

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


9 RAJAGOPAL, supra note 6, at 9-10.
states. They have been known by many different terms, including the “Third World,”10 the “Group of 77,”11 the “Global South,”12 and the “Least Developed Countries” (LDCs),13 which is the term used here.

The LDCs and human rights both challenge international law from the bottom up.14 Both defy the political status quo. Both seek
to dilute the authority of the older sovereign states. Both question the distribution of global resources. Both generate a rich rhetoric of empowerment, equality, and independence.

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

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

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


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

1.2. Fragmentation

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

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

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

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

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

This Article examines the relationship between fragmentation and the simultaneous bottom-up transformation of international law. While this relationship is complex, it can be characterized, in general, as positive insofar as conflicts between wealthy, powerful top-down entities, such as industrialized states\textsuperscript{22} and the international organizations (IOs) which they control,\textsuperscript{23} and 'bottom-up' human rights constituencies are concerned. That is, in such contexts, these two developments reflect and reinforce each other. Where top-down entities are in tension with human rights, fragmentation is likely to work to the advantage of the latter. Indeed, human rights advocates contribute to fragmentation, and

\textsuperscript{20} Fragmentation of International Law, supra note 19, at 11.

\textsuperscript{21} Id. at 12.

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

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

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

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

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

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

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


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

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

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

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

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

28 Lowrey, supra note 27.

29 Chen & Ravallion, supra note 27, at 3. Many question the usefulness of GNP or per capita expenditure as meaningful indicators. See, e.g., MARTHA C. NUSSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5-6
The benefits of additional laws, fora, non-governmental organizations (NGOs) and other mechanisms for furthering women’s human rights usually fail to offset the costs of living in an LDC.

But the fragmentation of international law is an ongoing process, and women’s human rights in LDCs are far from a lost cause. Indeed, as journalists Nicholas D. Kristof and Sheryl WuDunn proclaim, “[I]t is the . . . cause of our time.”

Legal scholar Dianne Otto is less blunt, but no less provocative: “[F]eminist engagement with human rights law . . . has barely begun and it is hard to predict what new opportunities and insights will emerge.”

2. HOW FRAGMENTATION AFFECTS WOMEN’S HUMAN RIGHTS

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

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


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


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

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

35 The roughly 163 million missing women is a population made up by aborted female fetuses or victims of female infanticide. See U.N. Population Fund,
Second, women’s human rights have generated a substantial jurisprudence, including multiple fora in which their claims may be raised. This context, accordingly, provides plentiful examples of the fragmentation of international law. Third, and finally, women comprise roughly half the global population, giving my argument substantive heft. While I do not claim that my thesis holds true in all contexts, if it is persuasive here, it should not be dismissed as trivial.

2.1. Women’s Rights

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

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


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

38 There are 57 million more men than women. WORLD’S WOMEN 2010, supra note 25, at vii. See World Population, INSTITUT NATIONAL D’ÉTUDES DÉMOGRAPHIQUES, http://www.ined.fr/en/everything_about_population/faq/theme_1/bdd/q_text/are_there_more_men_or_more_women_in_the_world/_question/53/ (last visited Mar. 26, 2013) (stating that the number of men and women in the world is roughly equal, though men hold a slight lead with 102 men for 100 women, as of 2010). See also World Population Prospects, the 2010 Revision: Frequently Asked Questions, U.N. DEP’T OF ECON. & SOC. AFFAIRS (Oct. 31, 2011), http://esa.un.org/unpd/wpp/Other-Information/faq.htm#q4 (explaining in question four that Oct. 31, 2011 “is a symbolic date” because it is when the world population will reach roughly 7 billion). But see U.N. Population Fund, supra note 35 (noting “a dramatic increase” in the proportion of males to females in Asia and concluding that “if the continent’s overall sex ratio was the same as elsewhere in the world, in 2005 Asia’s population would have included almost 165 million more women and girls”).
Rights. Nondiscrimination has been a cornerstone of international human rights since 1948 and the Universal Declaration, the Civil Covenant, and the Economic Covenant all bar discrimination on the basis of sex. Women are even singled out for special treatment in Article 10 of the Economic Covenant, which assures mothers special protections while pregnant and after giving birth.

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

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39 See Universal Declaration of Human Rights, supra note 4.
40 See, e.g., ICESCR, supra note 5, art. 2.2 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . sex . . . .”); id. art. 3 (“The State Parties . . . ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”); id. art. 7(a)(i) (“[R]ecogniz[ing] the right of everyone to the enjoyment of just and favourable conditions of work . . . [including] fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”); CCPR Human Rights Comm., General Comment 28: Equality of Rights Between Men and Woman (Article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (“The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, State should ensure to men and women equally the enjoyment of all rights provided for in th[is] Covenant.”); Otto, supra note 31, at 349 (describing the ICCPR rights as “reimag[ed] as a woman”). But see Comm. on Econ., Soc., & Cultural Rights, General Comment N. 16, Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights 3, ¶ 8, U.N. Doc E/C.12/2005/3 (May 13, 2005) (“Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face. . . . States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities . . . .”); Montréal Principles on Women’s Economic, Social and Cultural Rights, 26 HUM. RTS. Q. 760 (2004) (noting deep disagreement about the nature of gender equality).
41 ICESCR, supra note 5, art. 10.2 (“Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.”).
42 Important early examples of the burgeoning scholarship on women’s human rights include: HUMAN RIGHTS OF WOMEN (Rebecca J. Cook ed., 1994); NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN (1983); RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda Dallmeyer ed., 1993); 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly D. Askin & Dorean M. Koenig eds., 1999); WOMEN’S RIGHTS, HUMAN RIGHTS (Julie
fact remain second-class citizens, subordinated throughout the world,\textsuperscript{43} despite their equal treatment in these foundational human rights instruments.

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

\section{2.2. Fragmentation of the Law}

Women’s rights became a focus of international law in the 1990s.\textsuperscript{46} Faced with the dearth of law addressing women’s

\cite{Steiner-Alston, Fraser, Peters-Wolper, Nagle, Cossman, Murphy, Qazi, Murphy, Zaidi, Murphy}

\textsuperscript{43} See supra notes 32-36.


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

\textsuperscript{46} HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 159 (2d ed. 2000). Steiner and Alston contend that, prior to the 1990s, “[o]f the several blind spots in the early development of the human rights movement, none is as striking as that movement’s failure to give to violations of women’s (human) rights the attention . . . that they require.” \textit{id.} at 158. This is not
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experience, women’s advocates sought empirical data to substantiate that experience. They also demanded the disaggregation of existing data on the basis of sex. They pressed for new laws on multiple fronts, including human rights and humanitarian law, expanded interpretations of existing law, and new fora in which to present these new claims.

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

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

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


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

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

51 For a rigorous comparative analysis of German and European Community political quotas, see ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS 221–25, 254–55 (1999).
out, it affords “space amongst rules and institutions in which to discover ‘opportunities for political engagement.’”\textsuperscript{52}

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

\textsuperscript{52} Anne Orford, \textit{A Jurisprudence of the Limit, in International Law and Its Others} I, \textit{supra} note 6, at 16–17 (citing DAVID KENNEDY, \textit{The Dark Sides of Virtue: Reassessing International Humanitarianism} 131 (2004)).

\textsuperscript{53} Indeed, international lawmaking is often so contentious that no law is made at all; in many areas there are more gaps than law. The growing body of international law on reproductive rights, for example, does not directly address the issue of abortion. The Convention on the Elimination of All Forms of Discrimination Against Women, \textit{infra} note 54, does not ensure the right to abortion, reflecting the lack of consensus among states. \textit{See, e.g.}, Conseil constitutionnel [CC] [Constitutional Court] decision No. 18030, Jan. 15, 1975, JCP II (Fr.) (upholding France’s abortion law as consistent with art. 2 of the Declaration of the Rights of Man and of the Citizen). \textit{See generally} Law No. 239 of 24 March 1970 on the Interruption of Pregnancy, as amended by Law No. 364 of 19 July 1978 and Law No. 572 of 12 July 1985 (Fin.), available at http://cyber.law.harvard.edu/population/abortion/Finland.abo.htm (permitting, in Finland, abortions under certain conditions); Florian Miedel, \textit{Is West Germany’s 1975 Abortion Decision a Solution to the American Abortion Debate?: A Critique of Mary Ann Glendon and Donald Kommers}, 20 N.Y.U. REV. L. & SOC. CHANGE 471 (1993) (discussing a 1975 West German court decision which struck down a law that failed to criminalize abortions in first trimester). Finland’s restrictive laws reflect its “more conservative culture,” despite its “common legal heritage and close ties with Sweden.” David Bradley, \textit{Convergence in Family Law: Mirrors, Transplants and Political Economy}, 6 MAASTRICHT J. EUR. & COMP. L. 127, 134 (1999).


\textsuperscript{55} While states may choose to participate in order to exercise a moderating influence on the drafters, as Beth Simmons has shown, participation may have unintended consequences. \textit{See BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS} 237 (2009) (explaining that "Japan’s efforts during negotiations were minimal, and largely directed toward softening
Feminists have also drawn on the unique characteristics of customary international law (CIL)\(^{56}\) to further women’s rights.\(^{57}\) CIL provides a process through which “soft law,” that is, ‘law’ that is precatory or aspirational, rather than legally binding, can ‘harden’ over time, and become legally binding. States may persistently dissent from CIL, and thereby exempt themselves from its coverage.\(^{58}\) However, their failure to do so may leave them bound to norms, such as the norm against domestic violence, that they might have preferred to ignore.\(^{59}\)

2.2.1. Multiple Laws

In addition to the prohibitions on discrimination cited above,\(^{60}\) several human rights instruments explicitly focus on women. In

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

\(^{58}\) See Restatement (Third) of Foreign Relations Law of the United States § 102 cmt. d (1987) (noting that states that dissent while law is still in the process of development are not bound by that law).

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

\(^{60}\) See supra notes 39–41.
1967, the Commission on the Status of Women (CSW)\textsuperscript{61} drafted the Declaration on the Elimination of All Forms of Discrimination Against Women,\textsuperscript{62} and in 1974, the legally binding Women’s Convention was drafted.\textsuperscript{63} It was adopted by the General Assembly in 1979\textsuperscript{64} and came into force in 1981.\textsuperscript{65} CEDAW addresses women’s actual subordination as well as the gendered assumptions of human rights law.\textsuperscript{66} First, CEDAW requires States Parties to address discrimination in fact as well as in law, including in discriminatory “social and cultural patterns of conduct.”\textsuperscript{67} Second, CEDAW authorizes “temporary special measures aimed at accelerating \textit{de facto} equality”; that is, the state may take temporary affirmative measures to level the playing field to compensate for historical discrimination.\textsuperscript{68} Third, CEDAW explicitly addresses reproduction and reproductive work, requiring state support for both and further requiring states to educate men regarding their responsibility for reproductive work.\textsuperscript{69}

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

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\textsuperscript{61} See supra note 46.


\textsuperscript{63} See CEDAW, supra note 54.

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

\textsuperscript{65} See CEDAW, supra note 54.

\textsuperscript{66} See supra Part 2.1.

\textsuperscript{67} See CEDAW, supra note 54, art. 5.

\textsuperscript{68} See id., art. 4 (authorizing temporary affirmative measures by States).

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


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


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

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


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

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

\begin{footnotesize}
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\item \textsuperscript{83} Id. at 5. The Guidance Note for Fund Staff mentions gender, but “gender” is omitted from the other five Guidance Notes. Id.
\item \textsuperscript{85} See Nicholas Pialek, \textit{Is This Really the End of the Road for Gender Mainstreaming? Getting to Grips with Gender and Institutional Change, in CAN NGO’S MAKE A DIFFERENCE? THE CHALLENGE OF DEVELOPMENT ALTERNATIVES} 279, 281 (Antony J. Bebbington et al. eds., 2008) (“[T]ransition from gender-rich policy to gender-poor practice is frequently cited as an example of policy evaporation . . . .”). See also Hilary Charlesworth, \textit{Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations}, 18 HARV. HUM. RTS. J. 1, 13 (2005) (“[The ‘mainstreaming’] policy has served to justify the reduction of resources for specialized women’s units within U.N. agencies.”).
\item \textsuperscript{87} See supra Part 2.1.
\item \textsuperscript{88} See Merry, supra note 59, at 56 (describing the effects of recognition of domestic violence as a human rights violation).
\item \textsuperscript{89} See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 165–198 (1998) (explaining the swift and recent development of transnational networks on}
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three World Conferences on Women organized in connection with the UN Decade for Woman between 1975 and 1985 provided fora. Some women’s groups lobbied for recognition of rape as a war crime. Others urged the international community to mobilize against female genital surgeries (FGS). Still others focused on domestic violence. Their work culminated in the 1993 Declaration on the Elimination of Violence Against Women, which recognizes that violence against women both violates and “impairs or nullifies [women’s] enjoyment of [human] rights and freedoms.”

This was not binding law, but it was a crucial step toward binding law. The appointment of the Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, added to the momentum. Coomaraswamy launched a series of fact-finding missions and her office prepared over two dozen reports on violence against women. Though CEDAW does not explicitly mention violence against women; Hilary Charlesworth, Feminist Methods in International Law, 93 Am. J. Int’l L. 379, 387 (1999) (noting efforts of women’s organizations in influencing international tribunals to recognize “fuller responses to sexual violence”).


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

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


95 Id. ¶ 5.

96 See, e.g., Fifth South Asia Regional Ministerial Conference, Celebrating Beijing Plus Ten, Islamabad, Pak., May 3–5, 2005, The Varied Contours of Violence
prohibit violence against women, in General Recommendation No. 19, the Committee explained that gender-based violence is a form of discrimination and therefore included in CEDAW’s bar against gender discrimination in general. Now, a state’s acquiescence or failure to take effective measures to combat domestic violence, FGS, or wartime rape, is recognized as a violation of women’s human rights.

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

Women’s advocates argued that rape was a crime


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

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


101 *Id.* at 220–221 (“[A]s rape was in the *Hague Convention* of 1907 and the *Geneva Conventions*, it was implicitly so, categorized as an offence against ‘family honour and rights’ or as ‘outrages against personal dignity’ or ‘humiliating and degrading treatment’. The *Fourth Geneva Convention* called for ‘protect[ion]
against the woman herself even if her husband was its intended target. This understanding of rape was subsequently clarified in the Statute of the International Criminal Tribunal for Rwanda, the Rwandan Tribunal in the Akayesu case, and in the Statute of the International Criminal Court.

2.2.2. Multiple Fora

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

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

102 Id.

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

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

105 See Rome Statute, supra note 74, art. 7(1) (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . [r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. . . .”). See also WOMEN’S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 2010 (Nov. 2010), available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf (assessing the implementation by the ICC of the Rome Statute, Rules of Procedure and Evidence and Elements of Crimes and, in particular, the gender mandates they embody); The International Criminal Court: Fact Sheet 7—Ensuring Justice for Women, AMNESTY INT’L (Apr. 12, 2005), http://www.amnesty.org/en/library/asset/10R40/006/2005/en/73581868-d50c-11dd-8a23-d58a44c0d652/ior400062005en.html (proclaiming the Rome Statute as “a model of international best practice for national legal systems to follow”).
international tribunals noted above, these include regional courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, and the hearings of the human rights treaty committees, as well as national courts.

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

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

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


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

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

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

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

¹¹² See Charlesworth, Not Waving, supra note 85 (explaining how ‘mainstreaming’ detracts from women’s agencies at the U.N.).
¹¹³ World’s Women 2010, supra note 25, at 75-77.
¹¹⁴ Id. at 75.
¹¹⁶ World’s Women 2010, supra note 25, at xii.
¹¹⁷ Id. at viii.
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decline in material mortality rates,118 and the decline of FGS.119 In higher income countries, women’s human rights are increasingly relied upon in a range of contexts. In Germany, for example, women have drawn on multiple laws and fora, including European Community Directives, and anti-discrimination legislation in the United Kingdom and the former German Democratic Republic, to promote non-discriminatory labor legislation, recognition of child-rearing, and abortion legislation.120

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

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

118 Denise Grady, Maternal Deaths in Sharp Decline Across the Globe, N.Y. TIMES, April 14, 2010, at A1 (citing study in The Lancet showing a “significant drop worldwide in the number of women dying each year from pregnancy and childbirth, to about 342,900 in 2008 from 526,300 in 1980.”).
119 WORLD’S WOMEN 2010, supra note 25, at x.
121 U.N. WOMEN, supra note 32.
122 Id.
123 Id.
124 WORLD’S WOMEN 2010, supra note 25, at 168.
125 Id.
126 Id.
3. HOW FRAGMENTATION AFFECTS LDCS

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

3.1. Political Frames

The fragmentation of international law reflects and reinforces the political fragmentation of the LDCs themselves, from a relatively monolithic ‘Third World,’ to the less unified but still intact ‘Group of 77’ (‘G-77’), to the factionalized ‘LDCs,’ defined by bureaucrats, competing with each other for a sliver of a rapidly shrinking pie. The Third World emerged from the former European colonies. As David Bederman explains, World War II “accelerated the process of decolonization. The British and French colonial empires collapsed by the early 1960’s and by the 1980’s there remained no part of the world under unwilling colonial domination by Europeans.”

The Third World—a collection of non-aligned states—was wooed by the capitalist, democratic West—including the United States and Europe—and the socialist East—including the Soviet Union and its satellites. A generation of legal scholars from the newly independent states developed sophisticated approaches toward international law. As Antony Anghie and B.S. Chimni summarize their work,
Third World Approaches to International Law (TWAIL) “indicted colonial international law for legitimizing the subjugation and oppression of Third World peoples.”\textsuperscript{133} Some TWAIL scholars argued that the developed states owed the Third World compensation for colonialism and the benefits that the developed states still reaped from it.\textsuperscript{134} In 1964, the former colonies, then newly independent states, formed the G-77.\textsuperscript{135} Most of these states had high hopes for the UN and sought to advance their claims for a fairer international economic system through international lawmaking.\textsuperscript{136} In 1967, Arvid Pardo of Malta suggested in the General Assembly that the deep seabed should be considered the “common heritage of mankind.”\textsuperscript{137} In 1970, this was formalized into the Declaration of Principles Governing the Seabed and the Ocean Floor.\textsuperscript{138} A few years later, in 1974, the G-77 drafted the UN Declaration on the Establishment of a New International Economic Order (NIEO).\textsuperscript{139} This initiative recognized that these states constituted seventy percent of the world’s population, but accounted for only thirty percent of the world’s income.\textsuperscript{140} In furtherance of the “[f]ull permanent sovereignty of every state over its natural resources and all economic activities,” the NIEO affirmed the rights of the new sovereign states to “nationalization or transfer of ownership to its
nationals.” The G-77 viewed the NIEO as “one of the most important bases of economic relations between all peoples and all nations.”

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

3.2. Multiple Regimes

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

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141 Id. art. 4(e).
142 Id. art. 7.
146 See, e.g., 33rd Annual Meeting of Ministers for Foreign Affairs of the Group of 77, Sept. 25, 2009, Ministerial Declaration, http://www.g77.org/doc/Declaration2009.htm (last visited Mar. 17, 2013) (stating, inter alia, different priorities of: LDCs (¶ 21-22); middle-income developing countries (¶ 23); low-income developing countries (¶ 24); countries emerging from conflict (¶ 25); and countries experiencing serious draught or desertification (¶ 35)).
147 See infra note 155.
trade regimes have in many cases made things worse for the LDCs, as described below.

3.2.1. ‘Development’

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

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

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148 See supra note 77.
150 RAJAGOPAL, supra note 6, at 95-96.
152 JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 216 (2007).
153 See Elizabeth A. Mandeville, United Nations Development Programme, in 5 OXFORD ENCYCLOPEDIA OF HUMAN RIGHTS 150, supra note 46, at 150-51 (“[Following World-War II, there were] two new grand efforts in international cooperation and relations—the human rights movement, which sought to assure that these political and civil rights were globally afforded and protected, and the development movement, which sought to create standards of living and institutions of support in the development world to foster economies (and thus societies) in which these freedoms could be guaranteed.”). See generally BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 483-84 (4th ed. 2003) (recounting the formation of the IMF and World Bank at the conference in Bretton Woods, New Hampshire in 1944); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 11-12 (2003) (describing the economic goals of the global institutions formed at the Bretton Woods conference).
154 CARTER ET AL., supra note 153, at 486.
through trade was the key to reducing ‘poverty and inequality.’

This was not only the premise of the BWIs, but of many private investors and their lawyers. As David Stewart explains,

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

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

As Majid Rahnema points out:

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


157 Escobar, supra note 155, at 21.

158 Id. at 21 (quoting Majid Rahnema, Global Poverty: A Pauperizing Myth (1991)). See generally 50 Years Is Enough: The Case Against the World Bank and the International Monetary Fund (Kevin Danaher ed., 1994) (containing a collection of essays criticizing the IMF and the World Bank’s “notion of progress”); William Easterly, The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good 13-14 (2006) (explaining, for example, that, when agencies hand out free nets, they “are often diverted to the black market . . . or wind up being used as fishing nets or wedding veils”).
As Kerry Rittich explains, the Washington Consensus assumes “that the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes ‘level the playing field’ and ensure fairness among otherwise unequal parties.” This has been criticized as the self-serving ideology of the developed states. Bob Sutcliffe observes that the development story is captured in the metaphor of a journey—nation states start from roughly the same place, but at different times. Thus, the LDCs are today where Europe was in the fourteenth century. For Sutcliffe, “[t]he form of travel is characterized by the transfer of labour from low-productivity agriculture to higher-productivity industry and modern services.” But everyone ends up at the same place, with high consumption matching high productivity. Economic progress brings electricity, toilets, education, urbanization, medical services, longer lives, democracy, and human rights—in short, modernization.

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

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

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

162 Id. at 135.
The metanarrative of development has given rise to three major critiques. Each challenges one of its underlying premises. First, the ‘polarization critique’ argues that everyone does not end up in the same place. Rather, Europe developed, and as a result, nations polarized into developed and underdeveloped states. This result was set and unalterable by the end of the nineteenth century. As Sutcliffe explains, “Underdevelopment is, like Dorian Gray’s portrait, development’s alter ego.”

The underdeveloped states can never catch up, in part because of all of the trash—from environmental degradation to corrupt regimes—the developed states have left in their wake.

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

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

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

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163 Id. at 136 (emphasis omitted).
164 Id. at 137. See Jared Diamond, Collapse: How Societies Choose To Fail Or Succeed 498 (2005) (discussing how our society is on a non-sustainable course, leading to various environmental problems).
165 Sutcliffe, supra note 161, at 138.
166 See, e.g., Jane Jenson & Boaventura de Sousa Santos, Introduction: Case Studies and Common Trends in Globalization, in Globalizing Institutions: Case Studies in Regulations and Innovation 9, 11 (Jane Jenson & Boaventura de Sousa Santos eds., 2000) (defining globalization as “the process by which a given local condition or entity succeeds in . . . extending its reach over the globe and, in doing so, develops the capacity to designate a rival social condition or entity as local”).
point out that a significant portion of aid dollars never leaves the developed states. Instead, it pays the salaries of consultants, bureaucrats, and technical advisors in Washington and Geneva.

The IMF was revamped following the April 2009 meeting of G-20 leaders in London to address the “collapsing world economy.” Its resources were tripled to $750 billion and it was authorized to issue an additional $250 billion on its own. The focus, however, has been on rescue packages for Hungary, Iceland, Latvia, and other developed states. The LDCs are not its current priority. Even if they were, IMF resources amount to merely three percent of the world’s current account payments, in contrast to the more than fifty percent it controlled when it was established in 1944.

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

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167 See, e.g., OXFAM AMERICA, SMART DEVELOPMENT: WHY US FOREIGN AID DEMANDS MAJOR REFORM 22-24 (2008) (describing how the U.S. will tie its aid by requiring a recipient to spend some or all of its funding on American goods and services, sending the aid on a “round trip” back to the U.S.).
168 Id. at 22, 24 (pointing out that the United States frequently includes clawback provisions in aid packages). See also THE WORLD BANK, IMPLEMENTING THE BANK’S GENDER MAINSTREAMING STRATEGY: FY08 ANNUAL MONITORING REPORT 11 (2009) (“Competition for [Gender Action Plan (GAP)] funding elicits ‘new’ work on gender. In the first call for proposals, 66 percent of proposals submitted were from Bank staff who already worked on gender issues.”).
170 Id.
171 Id.
172 As one blogger suggests, this might require a transformation within the IMF, of ‘values’ (the “DNA, the assumptions, default solutions, and logic of its staff”) as well as institutional norms, arguably requiring a thorough house-cleaning, including “hir[ing] a load of feminists.” Duncan Green, IMF 2.0 or Same Old, Same Old - Has the Fund Really Changed Its Tune?, OXFAM BLOG (May 7, 2009, 12:05 PM), http://www.oxfamblogs.org/fp2p/?p=254.
173 Gumbel, supra note 169.
174 See supra notes 27-29.
175 Chen & Ravillion, supra note 27, at 1.
176 Id.
3.2.2. Free Trade

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

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

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


\textsuperscript{178} STIGLITZ, supra note 152, at 68.

\textsuperscript{179} Id. at 77.

\textsuperscript{180} Id.

\textsuperscript{181} The United States opened its markets to African cotton producers in 2005. \textit{Id.} at 80-81. But the United States does not import cotton. Indeed, cotton subsidies make it the world’s largest cotton exporter and effectively makes competition by the LDCs impossible. \textit{Id.} at 85-86. See also Kenneth A. Bamberger & Andrew T. Guzman, \textit{Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade}, 96 CAL. L. REV. 1405, 1445 (2008) (arguing that encouraging competition among United States and foreign companies, while simultaneously enforcing safety regulations, would significantly benefit U.S. consumers).
resulting gains in income could lift 128 million people out of poverty. . . . If the nations of the WTO were to adopt one and only one human welfare measure, elimination of [subsidies in trade barriers] should be the measure.182

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

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


183 STIGLITZ, supra note 152, at 78.


185 Some argued that the collapse of the Doha Round of WTO talks precluded agreement on effective measures to “lift millions out of poverty, curb rich countries’ ruinous farm support and open markets for countless goods and services.” The Future of Globalisation, THE ECONOMIST, July 29, 2006, at 11.
question how effectively the WTO could support the LDCs, and their people, even if that was its objective.  

3.3. Doctrine

3.3.1. In the Courts

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

3.3.1.1. Forum Non Conveniens

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

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

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187 See supra Part 3.2.2.


189 Id. at 241.

190 See generally, Bi v. Union Carbide Chemicals, 984 F. 2d 582 (2d Cir. 1993) (affirming dismissal of the Bhopal case based on the doctrine of forum non
allows U.S. multinationals to avoid liberal American discovery rules and generous American juries. Following the accident at the Union Carbide plant in Bhopal, India, for example, methyl isocyanate gas was released, killing more than 2,000 people and injuring as many as 200,000. A lawsuit brought by the Indian government, along with 144 private lawsuits, was consolidated in a complaint filed in the Southern District of New York.

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

A few foreign courts have sought to provide alternatives. In Lago Agrio, Ecuador, for example, a court recently entered a judgment against Chevron in the amount of $9 billion for polluting remote tracts of the Ecuadorean jungle. Before the ruling could
be enforced, however, Chevron filed a suit in the United States alleging ‘conspiracy to extort.’ At the company’s request, the American judge issued a temporary restraining order and, a day later, international arbiters ordered Ecuador to suspend the enforcement of any judgment.

3.3.1.2. The Restrictive Theory of Sovereign Immunity

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

After World War I, however, states began using their own ships to trade, and there was widespread debate regarding the ongoing utility of the rule granting them absolute immunity in connection with their growing commercial enterprises. This debate resulted in the Brussels Convention on the Unification of Certain Rules Relating to Immunity of State-owned Vessels, adopting the restrictive theory of sovereign immunity. Under this theory, foreign sovereigns engaging in commerce are subject to suit as if they were private individuals or multinational corporations. In the United States, the restrictive theory of sovereign immunity has been codified in the Foreign Sovereign Immunity Act of 1976.

The restrictive theory originally gained a foothold in the United States during the Cold War and the rise of state-trading...
companies. 203 LDCs are more likely than the more affluent states to engage in such activities. 204 Many states in the developing world still claim absolute immunity for their state-trading companies 205 and the “number of FSIA cases is rising every year.” 206 As B.S. Chimni notes, the restrictive theory disadvantages LDCs, which, unlike private enterprises, cannot pass losses on to their shareholders. 207

3.3.2. The ‘War on Terror’

President George W. Bush declared ‘War on Terror’ after September 11, 2001. 208 Historically, terrorist attacks have been treated as crimes. 209 As Mary Ellen O’Connell explains, the use of the term ‘war’ represents a deliberate legal strategy with important legal consequences. 210 First, it legitimates extrajudicial killings. Second, it allows the U.S. military to detain ‘enemy combatants’ until the end of hostilities. 211 Third, it is open-ended, both temporally and in terms of the methods devised to address it. President Bush declared that, “[This War] will not end until every terrorist group of global reach has been found, stopped, and

203 See Changed Policy Concerning the Grant of Sovereign Immunity to Foreign Governments, in 26 Dep’t St. Bull. 969, 984 (1952) (“The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.”).
204 Chimni, supra note 190, at 75.
205 DAMROSCH ET AL., supra note 1, at 859.
207 Chimni, supra note 190, at 75.
208 Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 11, 2001).
210 Id. at 8.
211 It also elevates terrorists to the status of prisoners of war under the Geneva Conventions. Christopher Greenwood, Scope of Application of Humanitarian Law, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 39, 42 (Dieter Fleck ed., 1995). The United States has refused to treat them as POWs, however, on the ground that terrorists are in fact ‘unlawful combatants,’ since they are members of a ‘non-state terrorist group.’ O’CONNELL, supra note 209, at 604.
defeated.”212 As O’Connell observes, this goal could take some time.213

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

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


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


216 Warrior in Chief, supra note 215.

217 Id.

218 Id.

attacks, like those noted above, but also the Bush doctrine of ‘preemptive’ war, including the 2003 war in Iraq.\(^2\)

As Antony Anghie observes, “[t]he debate surrounding [nuclear] non-proliferation has [also] now acquired a very different complexion . . . .”\(^2\) While the West insists that it must retain nuclear capacity for self-defense (in case terrorists obtain nuclear weapons), it seeks to limit the right of self-defense to “certain civilized states.”\(^2\) Anthony Carty, similarly, suggests that, the ‘War on Terror’ is simply the most recent iteration of the U.S. project to “restore political control over the [global] South.”\(^2\)

This is a recurring theme in a recent symposium, *Third World Approaches to International Law After 9/11*.\(^2\) A group of distinguished contributors situate the Western response to 9/11 in a broader global context. They note, with trepidation, that some in the West seem to regret the end of colonialism. Indeed, as Anghie concludes, the ‘War on Terror’ has given rise to “the argument made by influential academics and diplomats . . . that what this disordered and unstable world requires is in fact a return to an imperial system.”\(^2\)


\(^2\) Id. at 55.


\(^2\) See Okafor, *supra* note 219 (presenting the overarching themes as a guest editor for the symposium issue); Osgoode Hall Law Journal – Special Issues, Osgoode Hall Law School (2006), http://www.ohlj.ca/english/specissues.htm (providing the name and date of the symposium along with the corresponding journal issue and volume numbers).

\(^2\) Anghie, *supra* note 221, at 65. For a sharp and provocative analysis of the impact of the ‘War on Terror’ on women’s human rights in the United States, see
4. **HOW FRAGMENTATION AFFECTS WOMEN’S HUMAN RIGHTS IN LDCS**

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

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


229 See supra note 5.

Social safety nets were abandoned and the rhetoric of ‘freedom’—especially free markets—prevailed.\footnote{See Barbara Stark, At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement, 20 TRANSNAT’L L. & CONTEMP. PROBS. 107, 133-135 (2011) (noting historical changes in the way political administrations responded to international treaties).}

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

This Part first explains why the fragmentation of law that has been used to promote women’s rights elsewhere is less effective in LDCs.\footnote{As a recent U.N. study explains, global wealth is distributed so that “the richest 2 percent of adult individuals own half of all global wealth . . . .” James B. Davies et al., World Distribution of Household Wealth, UNU-WIDER 2008, Discussion Paper No. 2008/03 7 (Feb. 2008).} This Part then explains why women in LDCs are more likely than men to feel the brunt of the consequences when fragmentation disadvantages LDCs.

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

4.1.1. A Pinched Conception of ‘Rights’

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

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

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\text{[T]he paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm. This . . . insists . . . upon the promotion and protection of the collective rights of global capital in ways that “justify” corporate well-being and dignity over that of human persons.}\(^{238}\)
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This narrow conception of human rights is especially hard on women in LDCs.

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

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

\(^{236}\) Id. at 2008 (“As a consequence, the failure of a country to comply with its treaty obligations is, in most cases, unlikely to be revealed and examined except by already overtaxed NGOs.”).\(^{237}\) P AUL C OLLIER, T HE B OTT OM B ILLION: W HY T HE P OO REST C OUNTRIES A RE F AIL IN G A ND W HAT C AN B E D ON E A B O UT I T 4 (2007) (“The World Bank has large offices in every major middle-income country but not a single person residing in the Central African Republic.”).\(^{238}\) Upendra Baxi, V OICES OF SUFFERING AND T HE FUTURE OF HUMAN R IGHTS, 8 T RANSNAT’L L & C ONTEMP. P RORS. 125, 163-164 (1998).\(^{239}\) W ORLD’S W OMEN 2010, s upra note 25, at vii-viii.
breathtaking strides have been taken, and women’s rights in LDCs may in fact improve the lives of women as compared to the lives of men. But LDCs lack the requisite infrastructure—the courts, lawyers, and critical mass of rights-literate women for whom civil and political rights are a priority—that make these rights so useful in better-off states.

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

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

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

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

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

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


245 D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY 797-98 (2d ed. 2009).
the new laws often co-exist with more traditional regimes in yet another example of the fragmentation of law. While the new law may formally assure equality, for example, customary regimes, under which all property belongs to the husband, may well persist.

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

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

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

247 Nicholas D. Kristof, The D.I.Y. Foreign-Aid Revolution, N.Y. TIMES MAG., Oct. 24, 2010, at 48, 49. There are, of course, scores of well-intentioned and effective efforts to promote well-being throughout the LDCs that benefit women, even if they do not focus on them. Nor are these efforts necessarily grounded in ‘rights’ claims. See, e.g., Michael Kimmelman, Rescued by Design, N.Y. TIMES, Oct. 23, 2011, at A1 (reviewing a show in the U.N. visitors’ lobby showcasing projects, from a community cooker fueled by refuse in Kibera, Kenya to floating community lifeboats that serve as schools, libraries, and health clinics in Bangladesh); Small Fixes, N.Y. TIMES (SPECIAL ISSUE), Sept. 27, 2011, at D1 (describing “low-cost innovations that are making a big difference” from biodegradable toilet bags to drinking straws that filter out pathogens). See also Scott L. Cummings, 61 J. LEGAL EDUC. 711 (2012) (reviewing STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Lucie E. White & Jeremy Perelman eds., 2012) (sharing inspiring accounts of self-help activity by Africans).

249 Id. at 49.

250 Id. at 50.

251 Id. at 51.
around the world, so 220 kids in Doyne’s school constitute the teensiest drop in the bucket.

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

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

4.1.2. ‘Rights’ as Claims Against the State

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

253 Id.
254 See supra Part 3.2.
255 See Lydia Polgreen, Scaling Caste Walls With Capitalism’s Ladders, N.Y. TIMES, Dec. 22, 2011, at A1, A12 (“[A] Dalit entrepreneur is still much more likely to be a poor woman who has no choice but to start a small, low-profit margin business because so few other options are open to her, said Annie Namala, a researcher and activist who has worked on Dalit issues. A survey completed this year of Dalit women entrepreneurs in Delhi and Hyderabad found that most made less than $100 a month from their business. ‘These are basically survival enterprises,’ Ms. Namala said.”).
rights described above, women in LDCs can only get more if others in LDCs get less. ‘Rights’ can only be asserted against their own state; there is no ‘common heritage,’ as envisioned in the NIEO, from which women may draw, benefiting their states as well as themselves.

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

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

257 See supra Part 4.
258 See supra Part 3.1.
259 This is not limited to LDCs, of course. See, e.g., Ethan Bronner & Isabel Kershner, Israeli Women Core of Debate on Orthodoxy, N.Y. TIMES, Jan. 15, 2012, at A1 (describing how successive Israeli governments have made deals with an ultra-Orthodox group that insists on the exclusion of women).
260 See supra Part 2.3.
In addition, a state may claim that women’s human rights conflict with its own ‘culture,’ and represent a Western imposition. This response may generate a backlash against women. Charges that women are rejecting their culture may also spur them to form alliances with groups outside the state, raising further questions about their loyalty. As Chandra Mohanty notes, the meanings of cultural expression may well change over time in response to such backlashes or alliances.

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

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

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

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

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

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

See CHARLESWORTH & CHINKIN, supra note 25, at 267-268 (“The General Assembly and Security Council have denounced discrimination against women and girls in Afghanistan . . . . Some Western aid agencies have discontinued operations in Afghanistan. With different political agendas, some states have also
documented in many LDCs, such sanctions have never been considered.268 Indeed, no state refuses to have diplomatic relations with any other state on this ground. No boycotts have even been threatened.

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

4.2. Women in LDCs

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

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

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

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

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

271 See World Bank, Women’s Economic Empowerment, supra note 256 (“The World Bank identified 33 developing countries where women and girls in poor
women’s human rights, moreover, often affect all women in a particular state, such as across-the-board lower pay for comparable work or lack of access to reproductive healthcare.

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

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

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

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

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


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


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

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

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

\textsuperscript{278} See U.N. Resolution on World Economic Crisis, supra note 26.

\textsuperscript{279} Id. at 2.

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

with countries with lax regulation competing to attract financial services.”

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

5. CONCLUSION

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

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

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283 See Rosin, supra note 26 (noting the erosion of the preference for male children).
284 See Donald G. McNeil, Jr., Very Poor Women Are Smaller, As Are Their Chances at a Better Life, N.Y. TIMES, April 26, 2011, at D6 (quoting the lead author of the Harvard study, S. V. Subramanian, and summarizing the study’s findings). But see Roderick Floud et al., THE CHANGING BODY: HEALTH, NUTRITION, AND HUMAN DEVELOPMENT IN THE WESTERN WORLD SINCE 1700 (2011) (describing a different, more comprehensive study of how technological progress has ‘supersized’ those in the affluent West).
women are asserting them, especially in those states that are no longer among the world’s poorest. In Egypt, for example, thousands of women recently took to the streets to demonstrate against the abuse of an earlier wave of female protesters. At the same time, however, many women are worse off.

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

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

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

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

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

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


[289] See supra note 241 (noting the lack of awareness of CEDAW’s potential uses in amending national legislation).
litigation.\textsuperscript{290} These are all in short supply in LDCs, especially for women.\textsuperscript{291}

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