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Author

MacKinnon, Catharine A.

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CRIMES OF WAR, CRIMES OF PEACE*

Catharine A. MacKinnon**

Where, after all, do universal human rights begin? In small places, close to home . . .

Eleanor Roosevelt

I.

In reality begins principle. The loftiest legal abstractions, however strenuously empty of social specificity on the surface, are born of social life: amid the intercourse of particular groups, in the presumptive ease of the deciding classes, through the trauma of specific atrocities, at the expense of the silent and excluded, as a victory (usually compromised, often pyrrhic) for the powerless. Law does not grow by syllogistic compulsion; it is pushed by the social logic of domination and challenge to domination, forged in the interaction of change and resistance to change. It is not only in the common law that the life of the law is experience, not logic.¹ Behind all law is someone's story; someone whose blood, if you read closely, leaks through the lines. Text does not beget text; life does. The question — a question of politics and history and therefore law — is whose experience grounds what law.

Human rights principles are based on experience, but not that of women. It is not that women's human rights have not been violated. When women are violated like men who are

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1. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). ("The life of the law has not been logic, it has been experience.").

otherwise like them — when women's arms and legs bleed when severed, when women are shot in pits and gassed in vans, when women's bodies are hidden at the bottom of abandoned mines, when women's skulls are sent from Auschwitz to Strasbourg for experiments — this is not recorded as the history of human rights atrocities to women. They are Argentinian or Honduran or Jewish. When things happen to women that also happen to men, like being beaten and disappeared and tortured to death, the fact that it happened to women is not counted in, or marked as, human suffering. When no war has been declared and still women are beaten by men with whom they are close, when wives disappear from supermarket parking lots, when prostitutes float up in rivers or turn up under piles of rags in abandoned buildings, this is overlooked entirely in the record of human suffering because the victims are women and it smells of sex. What happens to women is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human.

Women are violated in many ways that men are not, or rarely are; many of these violations are sexual and reproductive.² Ranging from objectification to killing,³ from dehumanization and defilement to mutilation and torture to sexual murder, this abuse occurs in forms and settings and legal postures that overlap every recognized human rights convention but is addressed, effectively and as such, by none. What most often happens to women escapes the human rights net. Something — jurisdictional, evidentiary, substantive, customary, or habitual — is always wrong with it. Abuses of women as women rarely seem to fit what these laws and their enforcing bodies have in mind; the more abuses there are, the more they do not fit. Whether in war or in what is called peacetime, at home or abroad, in private or in public, by our side or the other side, man's inhumanity to woman is ignored.

Women's absence shapes human rights in substance and in form, effectively defining what a human and a right are. What does it mean to recognize a principle called human rights that does not really apply to the systemic and systematic violations of

2. CENTER FOR WOMEN'S GLOBAL LEADERSHIP, 1991 WOMEN'S LEADERSHIP INSTITUTE REPORT: WOMEN, VIOLENCE, AND HUMAN RIGHTS app. C at 77-80.

3. For a discussion of the killing of women as a systematic practice, see FEMICIDE: THE POLITICS OF WOMAN KILLING (Jill Radford & Diana E.H. Russell eds., 1992).

the dignity and integrity and security and life of over half the human race? It means that what violates the dignity of others is dignity for them; what violates the integrity of others is integrity for them; what violates the security of others is as much security as they are going to get. Even death to a full human being is less serious for them. Half of humanity is thus effectively defined as nonhuman, sub-human, properly rightsless creatures, beings whose reality of violation, to the extent it is somehow female, floats beneath international legal space.

For a compressed illustration of some current realities that are at once a hair's breadth and a gendered light-year away from the atrocities that ground human rights principles and fill the factual reports of Amnesty International,⁴ consider this communication from a researcher of Croatian descent gathering information in Croatia and Bosnia-Herzegovina:

Serbian forces have exterminated over 200,000 Croatians and Muslims thus far in an operation they've coined "ethnic cleansing." In this genocide, in Bosnia-Herzegovina alone over 30,000 Muslim and Croatian girls and women are pregnant from mass rape. Of the 100 Serbian-run concentration camps, about 20 are solely rape/death camps for Muslim and Croatian women and children. . . . [There are] news reports and pictures here of Serbian tanks plastered with pornography . . . [and reports that those who] catch the eye of the men looking at the pornography are killed. . . . Some massacres in villages as well as rapes and/or executions in camps are being videotaped as they're happening. One Croatian woman described being tortured by electroshocks and gang-raped in a camp by Serbian men dressed in Croatian uniforms who filmed the rapes and forced her to "confess" on film that Croatians raped her. In the streets of Zagreb, UN troops often ask local women how much they cost. . . . There are reports of refugee women being forced to sexually service them to receive aid. . . . Tomorrow I talk to two survivors of mass rape, thirty men per day for over three months The UN passed a resolution to collect evidence, a first step for a war crimes trial, but it is said there is no precedent for trying sexual atrocities.⁵

4. For the most advanced of Amnesty's efforts, see AMNESTY INTERNATIONAL, *RAPE AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION* (1992). The advance is that rape is noticed; the limitation remains that it is only noticed when women are in official custody, thus, in effect, raped by a state.

5. Letter from [name withheld], to Author (Oct. 13, 1992). Most of this information has since been independently corroborated by international reports and published accounts. HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH REPORT* (1992) ("A policy of 'ethnic cleansing' has resulted in the summary execution, disappearance, arbitrary detention, deportation, and forcible displacement of hundreds of

Human rights were born in a cauldron, but it was not this one. Rape, forced motherhood, prostitution, pornography, and sexual murder, on the basis of sex and ethnicity together, have not been the horrors which so "outraged the conscience"⁶ of the relevant legal world as to imprint themselves on the international legal order.

Formally illegal or not, as policy or merely as what is systematically done, practices of sexual and reproductive abuse occur not only in wartime but also on a daily basis in one form or another in every country in the world. Under domestic and international law, whether or not prohibited on their face, these practices are widely permitted as the liberties of their perpetrators, understood as excesses of passion or spoils of victory, legally rationalized or officially winked at or formally condoned.⁷ Even where international instruments could be interpreted to prohibit such practices, it is telling that their cultural supports are more likely to provide the basis for exempting states from their reach than the foundation for a claim of sex discrimination.⁸

thousands of people on the basis of their religion or nationality."); MASS KILLING AND GENOCIDE IN CROATIA 1991/92: A BOOK OF EVIDENCE (1992) [hereinafter MASS KILLING] (documenting genocide); Carl Gustaf Stroh, *Serben vergewaltigen auf obersten Befehl [Serbs Rape on Highest Orders]*, DIE WELT, Oct. 1, 1992 (30,000 women pregnant from rape); VECERNJI LIST, Sept. 11, 1992 (20 rape/death camps for non-Serb women); IBRAHIM KAJAN, MUSLIMANSKI DANAK U KRVI, SVJEDOCANSTVA ZLOCINA NAD MUSLIMANIMA (1992) (genocide of Muslims and rape camps documented).

The existence of rape/death camps must be understood as a . . . tactic of genocide, of a 'final solution' . . . a gender-specific onslaught that is systematic . . . [T]he tortures include rapes, gang-rapes, forced incest, the draining of the blood of captives to provide blood for transfusions for the needs of the criminals, setting children ablaze and drowning babies.

WOMEN'S GROUP "TRESNJEVKA" REPORT (1992). Given these reports, it is inexcusable that Amnesty International's October 1992 report on human rights violations in this war documents only three rapes, and these from an English newspaper rather than firsthand, as other atrocities are documented. Edith Niehuis, Head of the German Parliamentary Committee for Women and Youth, called the "systematic mass rapes" in Bosnia an "extermination war against women." Edith Niehuis, *Wir machen euch Kleine Tschetniks*, DIE TAGESZEITUNG, Dec. 8, 1992.

6. *Universal Declaration of Human Rights*, G.A. Res. 217A(III) U.N. Doc. A/810 (1948) pmbl. ("Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . .").

7. An example of formal condonation is the U.S. case in which pornography is recognized as promoting rape, battering, and unequal pay but protected as free speech. *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

8. For documentation of the use of "reservations" to the major convention prohibiting sex discrimination, see Rebecca Cook, *Reservations to the Convention on*

The war against Croatia and Bosnia-Herzegovina exemplifies how existing approaches to human rights can work to cover up and confuse who is doing what to whom and effectively condone atrocities. All state parties are apparently covered by most of the relevant international human rights guarantees and laws of war, certainly by customary international law.⁹ But nothing has yet been invoked to stop the abuses or to hold the perpetrators accountable.¹⁰ What is the problem? The fact of Serbian aggression is beyond question, just as the fact of male aggression against women is beyond question, here and everywhere. "Ethnic cleansing" is a Serbian policy of extermination of non-Serbs with the goal of "all Serbs in one nation," a "Greater Serbia" encompassing what was called Yugoslavia.¹¹ Yet this genocidal

the Elimination of All Forms of Discrimination Against Women, 30 VA. J. INT'L L. 632 (1990). A lawsuit may be brought to invalidate the ratifications of nations whose exceptions are said to be excessive, voiding their acceptance of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *Court Ruling Sought on Women's Convention*, HUM. RTS. TRIB., Winter, 1992, at 2.

9. Amnesty International says that all parties succeed to the international agreements that Yugoslavia ratified. AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: GROSS ABUSES OF BASIC HUMAN RIGHTS, INTERNATIONAL SECRETARIAT (1992). Helsinki Watch says that Croatia and Yugoslavia (the latter apparently referring to Serbia/Montenegro) are parties to the Geneva Conventions and their Protocols, Croatia by contract on May 11, 1992 and Serbia and Montenegro impliedly, by expressing its wish to be recognized as the successor state to what was called Yugoslavia. Ivana Nizich, *War Crimes in Bosnia-Herzegovina*, HELSINKI WATCH, August 1992, at 138-39. Bosnia-Herzegovina ratified the relevant provisions in 1992. Humanitarian law is customary law with universal jurisdiction, but human rights provisions require affirmative submission to secure jurisdiction.

10. Addressing the Conference on Security and Cooperation in Europe, U.S. Secretary of State Lawrence Eagleburger said that Serbian leaders were guilty of war crimes against humanity and should be prosecuted, "exactly as Hitler's associates were at Nuremberg." *Legal Commission to Start Investigation of Mass Graves in Former Yugoslavia*, AGENCE FRANCE PRESSE, Dec. 14, 1992. At the time they were publicly recognized, the atrocities had been going on for approximately a year. There is also some discussion of creating a permanent international war crimes court whose first task would be to try war criminals from this war. *U.S., France Discussing Permanent War Crimes Court*, REUTERS, Dec. 15, 1992.

11. See generally Roy Gutnam, *Mass Rape: Muslims Recall Serb Attacks*, NEWS-DAY, Aug. 23, 1992, at 5. A special mission of the European Council concluded, after a preliminary visit, that

the rapes [of Muslim women] are widespread and are part of a recognizable pattern The general view expressed by interlocutors whom the delegation considered responsible and credible was that a horrifying number of Muslim women had suffered rape and that this was continuing The most reasoned estimate suggested to the delegation indicated a figure in the region of 20,000 victims The indications are that at least some of the rapes are being committed in particularly sadistic ways The delegation also received information strongly suggesting that many women, and more particularly chil-

war of aggression has repeatedly been construed as bilateral, a civil war or an ethnic conflict, to the accompaniment of much international wonderment that people cannot get along and pious clucking at the behavior of "all sides"¹² reminiscent of blaming women for getting themselves raped by men they know. To call this a civil war is like calling the Holocaust a civil war between German Aryans and German Jews.

One result of this equalization of aggressor with aggressed-against is that these rapes are not grasped either as a strategy in genocide or as a practice of misogyny, far less as both at once, continuous at once with *this* ethnic war of aggression and with

dren, may have died during or after rape [T]he delegation frequently heard . . . that a repeated feature of Serbian attacks on Muslim towns and villages was the use of rape, or the threat of rape, as a weapon of war [D]ocuments from Serbian sources . . . very clearly put such actions in the context of an expansionist strategy [R]ape cannot be seen as incidental to the main purposes of the aggression but as serving a strategic purpose in itself.

INVESTIGATIVE MISSION INTO THE TREATMENT OF MUSLIM WOMEN IN THE FORMER YUGOSLAVIA 2-4 (1992).

12. Among the scores of examples of this seemingly requisite equalizing of oppressor and oppressed, although it is among the least egregious, is Amnesty International's *Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces*: "Reports indicate . . . that all sides have committed these abuses, but that Muslim women have been the chief victims and the main perpetrators have been members of Serbian armed forces." AMNESTY INTERNATIONAL, *BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES* 3 (1993). World War II atrocities against Serbs by Croats and Muslims are often cited by Serbs as historical justification for current Serbian "revenge." Nothing justifies genocide. There is also historical evidence that Serbian war losses have been greatly exaggerated and are being used as a pretext. Phillip J. Cohen, *Holocaust History Misappropriated*, MIDSTREAM: A MONTHLY JEWISH REVIEW, Nov. 1992, at 18-20; Phillip J. Cohen, *Exploitation of the Holocaust as Propaganda: The Falsification of Serbian War Losses* (July 18, 1992) (unpublished manuscript); see also WAR CRIMES INVESTIGATION BUREAU, *FOURTH EXODUS OF THE JEWS: WAR IN BOSNIA-HERZEGOVINA* (1992). Alain Finkelkraut comments on this in his *Comment Peut-on Etre Croate?*:

La Serbie falsifie le passe en disant que les Croates etaient tous nazis et les Serbes tous resistants, falsifie le present en disant que les Croates restent un 'peuple genocidaire,' et mene a l'abri de cette double falsification la premiere guerre raciale que l'Europe ait connu depuis Hitler. Pour le dire d'un mot: *les nazis de cette histoire ont voulu se faire passer pour les Juifs.*

Serbia falsifies the past in saying that the Croats were all Nazis and the Serbs all resisters, falsifies the present in saying that the Croats remain a 'genocidal people,' and carry out, in the shadow of this double falsification, the first racial war that Europe has known since Hitler. To put it in a word: *the Nazis of this history are trying to pass themselves off as the Jews.*

ALAIN FINKELKRAUT, *COMMENT PEUT-ON ETRE CROATE?* 50 (1992).

the gendered war of aggression of everyday life. This war is to everyday rape what the Holocaust was to everyday anti-Semitism. Muslim and Croatian women and girls are raped, then murdered, by Serbian military men, regulars and irregulars, in their homes, in rape/death camps, on hillsides, everywhere. Their corpses are raped as well.¹³ When this is noticed, it is either as genocide or as rape, or as femicide but not genocide, but not as rape as a form of genocide directed specifically at women. It is seen either as part of a campaign of Serbia against non-Serbia or an onslaught by combatants against civilians, but not an attack by men against women. Or, in the feminist whitewash, it becomes just another instance of aggression by all men against all women all the time, rather than what it is, which is rape by some men against certain women. The point seems to be to obscure, by any means available, exactly who is doing what to whom and why.¹⁴

When the women survive, the rapes tend to be regarded as an inevitability of armed conflict, part of the war of all against all, or as a continuation of the hostilities of civil life, of all men against all women. Rape *does* occur in war among and between all sides; rape is a daily act by men against women and is always an act of domination by men over women. But the fact that these rapes are part of an ethnic war of extermination, being misrepresented as a civil war among equal aggressors,¹⁵ means that Muslim and Croatian women are facing twice as many rapists with twice as many excuses, two layers of men on top of them rather than one, and two layers of impunity serving to justify the rapes: just war and just life.

Like all rapes, these rapes are particular as well as generic, and the particularity matters. This is ethnic rape as an official policy of war:¹⁶ not only a policy of the pleasure of male power unleashed; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side; not only a policy of men posturing

13. A. Kaurin, *VECERNJI LIST*, Sept. 11, 1991 ("They are even conducting orgies on the dead bodies of the torture victims, who are after that thrown [out].").

14. In addition, when the dead are counted, their rapes are not. When raped women are counted, their rapes are not.

15. ASJA ARMANDA, *THE WOMEN'S MOVEMENT, FEMINISM, AND THE DEFINITION OF WAR* (1992).

16. "In his own defense, one attacker told Rasema, 'I have to do it, otherwise they will kill me.'" Tom Post et al., *A Pattern of Rape*, *NEWSWEEK*, Jan. 4, 1993, at 32, 34. According to *Die Welt*, a rapist told his victim: "We have to do it, because our commanders ordered it, and because you are Muslim — and there are too many of you Muslims. We have to destroy and exterminate you, so that the heroic Serbian people can take over the reins in this area again." Strohm, *supra* note 5.

to gain advantage and ground over other men. It is rape under orders: not out of control, under control. It is rape unto death, rape as massacre, rape to kill and make the victims wish they were dead. It is rape as an instrument of forced exile, to make you leave your home and never come back. It is rape to be seen and heard by others, rape as a spectacle. It is rape to shatter a people, to drive a wedge through a community. It is the rape of misogyny liberated by xenophobia and unleashed by official command.¹⁷

It is rape made sexy for the perpetrators by the defenselessness and youth of many of the victims and the rapists' absolute power to select victims at will. It is rape made more arousing by the ethnic hostility against a designated enemy — "For Serbia" — and made to seem right by lies about the behavior of that enemy. It is rape made exciting by knowing that there are no limits on what can be done, that the women *can* be raped to death. Most of all, it is rape made sexually irresistible by the fact that the women *are* about to be sacrificed, by the ultimate power of reducing a person to a corpse, by the powerlessness of the women and children in the face of their imminent murder at the hands of their rapist. It is murder as the ultimate sexual act. Do not say it is not sex for the men. When the men are told to take the women away and not bring them back, they rape them, *then* kill them, then sometimes rape them again, cut off their breasts, and rip out their wombs.¹⁸ One woman was allowed to live so long as she kept her Serbian captor hard all night orally, night after night after night.¹⁹

This is rape as torture and rape as extermination. Some women who are not killed speak of wanting to take their own lives. It is at once mass rape and serial rape indistinguishable from prostitution. It is concentration camp as brothel: women impounded to be passed around by men among men.²⁰ It is also rape as a policy of ethnic uniformity and ethnic conquest, annex-

17. John F. Burns, *A Serbian Fighter's Path of Brutality*, N.Y. TIMES, Nov. 27, 1992, at A1, A12 (an indicted Serb terrorist says "he and other Serbian fighters were encouraged to rape women and then take them away to kill them. . ."); Gutman, *supra* note 11 (reports on rape as a tactic of war, where victims were told by Serbian forces they were under orders to rape them).

18. S. Dzombic, *Go and Give Birth to Chetniks*, VECERNJI LIST, Nov. 25, 1992.

19. The prior analysis and the facts underlying it are based on my reading of firsthand accounts provided by victims.

20. Many firsthand accounts report this. See also CENTER FOR ANTI-WAR ACTIVITIES, SAVE HUMANITY REPORT 6 (1992); Roy Gutman, *Victims Recount Nights of Terror at Makeshift Bordello*, NEWSDAY, Aug. 23, 1992, at 37. It is unclear

ation and expansion, acquisition by one nation of others, colonization of women's bodies as colonization of the culture they symbolize and embody as well as of the territory they occupy. It is rape because a Serb wants your apartment. Most distinctively, it is rape for reproduction as ethnic liquidation: Croatian and Muslim women are raped to help make a Serbian state by making Serbian babies.²¹

This is ethnic rape. If this were racial rape, it would be pure pollution, the children regarded as dirty and contaminated: their mothers' babies as in the American South under slavery, Black babies. Because it is ethnic rape, the children are regarded as clean and purified: their fathers' babies, Serbian babies, as clean as anyone with a woman's blood in them and on them can be. The idea seems to be to create a fifth column within Croatian and Muslim society, children (all sons?) who will rise up and join their fathers. Much Serbian ideology and practice simply takes a page from the Nazi book. Combining with it the archaic view that the sperm carries all the genetic material, the Serbs have achieved the ultimate racialization of culture, the (one hopes) final conclusion of Nazism: now culture is genetic.²²

The spectacle of the UN troops violating the population they are supposed to protect adds a touch of the perverse. My correspondent observes that "there are . . . reports of UN troops participating in raping Muslim and Croatian women from the Serb rape/death camps. Their presence has apparently increased trafficking in women and girls through the opening of brothels, brothel-massage parlors, peep-shows, and the local production of pornographic films."²³ A former United Nations Protection Force (UNPROFOR) commander reportedly accepted offers from Serbian commanders to bring him Muslim girls from the camps for orgies.²⁴ This paradigmatic instance of the male bond

whether the brothels simply organize serial rape or whether some men are being paid or receiving other benefits in exchange for access to the women.

21. Dzombic, *supra* note 18. My testimonies further support this.

22. Evidence indicates that Jewish babies born in concentration camps were drowned. 5 *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS* 188 (1946). No Jewish women were documented to have been impregnated, then released, to "bear German babies." However, the Nazis required special permission to be obtained before the fetuses of Eastern European women and German men could be aborted. For discussion of this, see *McRae v. Califano*, 491 F. Supp. 630, 759 (E.D.N.Y. 1980).

23. Letter from [name withheld], to Author (Oct. 13, 1992); see also *Schwere Vorwurfe gegen UN-Soldaten in Bosnien*, *DIE WELT*, Oct. 6, 1992.

24. *Investigation Against General MacKenzie*, *VECERNJI LIST*, Nov. 25, 1992. According to an interview with Ragib Hadzic, head of the Center for Research on

across official lines pointedly poses, in the gender context, Juvenal's question of who shall guard the guardians — especially when the guardians are already there to guard the other guardians. The Nazis took pictures, but in its sophisticated employment of media technology, in the openness of its use of pornography, in its conscious making of pornography of its atrocities, this is perhaps the first truly modern war.²⁵

Where do international human rights and humanitarian law stand on this? In real terms, the rules that govern the law's treatment of women elsewhere pertain here as well: a human is not one who is sexually and reproductively violated. One is not human "down there." Nor is a human right something a man in society or in a state of nature takes away from you and others like you. In fact, there are no others like you, because a "man" defines what an "individual" means, and human rights are "individual" rights. Men have their human rights violated; rather, when someone's human rights are recognized as violated, he is probably a man. Men are permitted to be individuals, so can be violated as individuals. If you are hurt as a member of a group, the odds that the group will be considered human are improved if it includes men. Under guarantees of international human

Genocide and War Crimes, Zenica, Bosnia, General MacKenzie visited the "Sonje" restaurant in Dobrinia, which was a brothel and had become a wartime rape/death camp. He reportedly loaded four Muslim women in his UNPROFOR truck, and drove away. The women have never been seen again. *Verwaltungen als eine Taktik des Krieges*, DIE WELT, Dec. 2, 1992.

25. Nazis documented many atrocities with photographs, including those shown in the *Trial of German Major War Criminals*: "these naked women are being taken to the execution ground. Condemned to death, these women have been forced, by the same Obergruppenfuhrer, to pose before the camera." 7 TRIAL OF GERMAN MAJOR WAR CRIMINALS 99-101 (1946) (photographs presented by Soviet prosecution team). See also HELKE SANDER, BEFREIER UND BEFREITE 131-34 (1992) (photographs of dead raped German and Russian women). On the point of media manipulation, my correspondent from Croatia notes: "The manipulation of film documentation of atrocities in which Muslim and Croatian victims of Serb aggression have fallaciously been presented as Serb victims of Muslims and Croats has been a notable strategy of the war against Croatia and Bosnia-Herzegovina." Letter from [name withheld], to Author (Nov. 28, 1992); see also KAJAN, *supra* note 5, at 31-34, 51-52; MASS KILLING, *supra* note 5, at 234 (dead Croatian boy presented as dead Serbian boy); A. Kaurin, *War Crimes Against Young Girls*, VECERNJI LIST, Sept. 11, 1992 (pictures and videotapes of the concentration camps exist); Stephen Engelberg, *Villagers in Croatia Recount Massacre by Serbian Forces*, N.Y. TIMES, Dec. 19, 1991, at A1.

rights, as well as in everyday life, a woman is “not yet a name for a way of being human.”²⁶

A right, as this legal definition is lived in reality, becomes something no woman, as a member of the group women, has to lose. A right is also something only an entity with the power of a nation can violate; it is a duty of government not to interfere with civil and political liberties as they socially exist. The role of international law has been largely, in Isaiah Berlin’s sense,²⁷ negative. It could be more, but it fosters human rights less by mandating governmental intervention than by enforcing governmental abstinence. In other words, if your human rights are going to be violated, pray it is by someone who looks like a government, and that he already acted, and acted wrong.

In Europe, some basis exists for interpreting international law to require that governments act; the affirmative state is more congenial to the European legal tradition in any case.²⁸ Sometimes international human rights law is stretched to countenance action against private violations, but this is pursued selectively. Honduras was held responsible for murders by private death squads that both acted as if they were official and were officially permitted to operate.²⁹ “Mainstream human rights groups have taken on the phenomenon of ‘disappearances’ in Argentina, murder of indigenous rubber tappers in Brazil, and racially-motivated hate crimes — all abuses perpetrated by private individuals,” notes Lori Heise, “but when it comes to the beating and murder of millions of women each year, their hands are tied.”³⁰

Male reality has become human rights principle, or at least the principle governing human rights practice. Men have and take liberties as a function of their social power as men. Men have often needed state force to get away with subjecting other men; the legalization of slavery and segregation in the United States and Hitler’s persecutions were legalized. So the model of human rights violation is based on state action. The result is, when men use their liberties socially to deprive women of theirs,

26. “MacKinnon’s central point is that ‘a woman’ is not yet the name of a way of being human.” Richard Rorty, *Feminism and Pragmatism*, 30 MICH. L. REV. 234, 234 (1991).

27. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).

28. *Belgian Linguistics Case*, 6 Eur. Ct. H.R. 832 (1968).

29. *Velasquez-Rodriguez v. Honduras*, 4 Inter-Am. C.H.R. 28, ser. C (1988).

30. Lori Heise, *quoted in* CENTER FOR WOMEN’S GLOBAL LEADERSHIP, *WOMEN, VIOLENCE AND HUMAN RIGHTS* 17 (1992).

it does not look like a human rights violation. But, when men are deprived of theirs by governments, it does. Men's violations fit the paradigm of human rights violations because that paradigm has been based on the experiences of men.

In the case of women, by contrast, because male dominance is built into the social structure, social force is often enough. States collaborate elaborately, not just by abdicating social life but by intervening legally to entitle men to much of the power they socially exercise, legitimating what men can get away with in fact. Even recognizing active state involvement, most women are not directly raped, forcibly impregnated, and trafficked by state policy, at least most of the time. Although the state in some way stands behind most of what they do, men typically have enough power to control and violate women without the state explicitly intervening to allow it. To this extent women are not seen as subjected by the state as such, so their condition is regarded as pre-legal, social hence natural, so outside international human rights accountability.

Now consider that most human rights instruments empower states to act against states, rather than individuals or groups to act on their own behalf. Given that only state violations of human rights are recognized, this is very odd. States are the only ones recognized as violating human rights, yet states are also the only ones who are empowered to redress them. Not only are men's so-called "private" acts against women left out; power to act against public acts is left exclusively in the hands of those who commit those acts. No state effectively guarantees women's human rights within its borders. No state has an incentive to break ranks by setting a human rights standard for women's status and treatment that no state yet meets. Internationally, men's states protect each other the way men protect each other from accountability for violations of women within states. At least this is one explanation for the failure of international human rights law effectively to empower individuals or groups of women to enforce their own human rights against individuals and states alike.³¹ Which state is in a position to challenge another state on women's human rights? Which state ever will?

31. For illuminating background, see M.E. TARDU, 2 HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM 45 (1985) ("The potential of [divisive postwar] U.N. debates for conflict escalation was so obvious that all governments became fiercely determined to keep the process under their own control through rejecting individual complaint systems."); see also Louis B. Sohn, *The New International Law:*

Wartime is largely exceptional in that atrocities by soldiers against civilians are always state acts. But men do in war what they do in peace, only more so. When it comes to women, at least to civilian casualties, the complacency that surrounds peacetime extends to war, however the laws read. And the more a conflict can be framed as *within* a state, as a civil war, as social, as domestic, the less human rights are recognized as being violated. In other words, the closer a fight comes to home, the more “feminized” the victims become no matter what their gender, and the less likely international human rights will be found to be violated, no matter what was done.³²

II.

The received concepts at work here have a complex history, mostly a Western one, which can be read and compressed as follows. The contractarian liberals, building on Greek and Roman antecedents, opposed medieval status notions that assigned human value within a rigid hierarchy based on birth. Seeking to secure human freedom against state tyranny, they posited the radical notion that each person, qua human, had, meaning had by nature, irrevocable and equal entitlements to life, liberty, security, dignity, property, and so on. Through the American and French revolutions, this idea of inalienable human worth called individual rights was entrenched, checking organized power in the form of government. Subsequently, some transnational agreements further elevated and enshrined the same recognitions as binding among state parties.

Then the Third Reich utterly violated all such rights — *inter alia* by manipulating the pre-1945 system which left minority protection exclusively to states³³ — isolating and liquidating those it saw as inferior or polluting or oppositional. In particular, the official attempted extermination of the Jews as a people galvanized the notion of supranational guarantees of human rights with a survival urgency. This organized genocide by government policy

Protection of the Rights of Individuals Rather Than States, 32 AM. U. L. REV. 1 (1982).

32. For an example of the inability to see a violation of a woman's human rights to the degree the abuse is deemed “personal,” see *Lazo-Majano v. INS*, 813 F.2d 1432, 1436–41 (9th Cir. 1987) (Poole, J., dissenting).

33. See ALESSANDRA LUINI DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 32 (1971) (nations realized that individual protections cannot be left solely to states); TARDU, *supra* note 31, at 44 (German-speaking minorities used as a propaganda base in other countries by insisting on minority rights).

indelibly marked and fundamentally shaped the content, priorities, sensitivities, and deep structure of the received law of human rights in our time. In a reading of this reality, more than any other, contemporary human rights finds its principled ground.

Largely beneath notice in this tradition has been the status of women as such, socially subordinated to men and excluded or ignored, marginalized or subjected by state policy. Women's enforced inequality has been a reality on which all these systems are materially predicated, so seamlessly it has been invisible. Women were not citizens in Greek democracy; they were wives, slaves, prostitutes.³⁴ In this setting, Aristotle formulated his equality principle as treating likes alike and unlikes unlike — a concept fundamentally unquestioned since, including in the international human rights context. In this approach, it does not matter whether one was hurt or helped, permitted to dominate or kept subordinated; all that matters is that empirical condition, no matter how created, fits normative treatment.³⁵ That women were apparently so different to Aristotle as not to be treated unequally under his principle when excluded from citizenship has not been regarded as a drawback or an indication that something is amiss.

Building on this tradition, the original liberals formulated their social compacts in and for societies in which women could not even vote. With the exception of John Stuart Mill,³⁶ they did not see a problem in this, projecting their purportedly universal notions of what have come to be called human rights in ways that did not explicitly include women and effectively kept most women from access to them. Humans own property; women mostly cannot; more often they are property. Humans are equal because they can kill; women are socialized not to kill and are punished, not glorified, when they do so. Humans consent to a regime or leave it; women have no voice to dissent, no place to go, and no means of leaving.³⁷ At the same time, guarantees wo-

34. EVA KUEHLS, *THE REIGN OF THE PHALLUS* (1985); ELIZABETH SPELMAN, *INESSENTIAL WOMAN* (1988).

35. This is discussed further in my *TOWARD A FEMINIST THEORY OF STATE* 215-35 (1989).

36. John Stuart Mill, *On the Subjection of Women*, in *ESSAYS ON SEX EQUALITY* (Alice Rossi ed., 1970) (1869).

37. See THOMAS HOBBS, *LEVIATHAN* (Blackwell 1946) (1651); JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* (Blackwell 1966) (6th ed. 1764); SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* (1980).

men specifically need due to sex inequality in society, in order to live to a standard defined as human — like freedom from being bought and sold as sexual chattel, autonomous economic means, reproductive control, personal security from intimate invasion, a credible voice in public life, a non-derivative place in the world — were not considered at all.

What women need for equality was not only not guaranteed; much of women's inequality was guaranteed in the form of men's individual civil liberties.³⁸ In these theories, abuses of women were tacitly if not explicitly condoned in individual rights. What were called individual rights have become, in life, rights of men as a group over women individually and as a class. Women's rape becomes men's liberty, gang rape their fraternity, prostitution their property, forced pregnancy their family and their privacy, pornography their speech. Put another way, whatever their rebellions accomplished for human freedom, and it was substantial, the American Revolution did not free the slaves, and the French Revolution did free the Marquis de Sade — facts connected by legitimating a traffic in human beings and the sexual abuse of women for economic gain. Understand: this is what the received concept of equality meant and largely still means.

Because women are a group whose claim to human status is tenuous and denied, the attempt to apply human rights law to women as such makes two more general problems worse. Human rights have no ground and no teeth. As to teeth, human rights are enforced internationally primarily between states, states that agree to them. Many, such as the United States, do not agree to many of them. Enforcement is mainly through reporting, meaning moral force, meaning effective non-enforcement. Signatory countries are even permitted formal excuse from compliance, a practice disproportionately used to evade sex equality provisions.³⁹ The covenants against trafficking women, for example, are many and venerable,⁴⁰ yet the traffic continues

38. This point is made unintentionally by Theodor Meron in his attack on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for conflicting with existing notions of human rights in various areas. THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 53–82 (1986)

39. *Court Ruling Sought on Women's Convention*, HUM. RTS. TRIB., Winter, 1992, at 1, 21.

40. Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others (1949); Convention on the Elimination of all Forms of Discrimination Against Women, art. 6; *see also* U.N. Convention Against Sexual Exploitation (draft), *reported in Ms.*, Sept/Oct. 1991, at 13.

unabated, untouched, flourishing. Thailand even trafficks in women by policy.⁴¹ China may officially force abortions and sterilizations,⁴² yet nothing is done. Enforcement of human rights against states' lack of action and against private parties may be possible in principle but is virtually absent in practice. For women, international human rights present the biggest gap between principle and practice in the known legal world.

Many existing international instruments guarantee sex equality.⁴³ Yet so little of women's experience of violation of human rights has been brought under them that it becomes necessary to inquire into the foundations of human rights to explain why. The primary foundation of human rights has been natural law, a secular religion that moves only those who believe in it. Its content tends to redescribe the social status quo and attribute it to nature. (Emphatic use of the existential verb to affirm loudly and often that women "are" human beings carries only the clout of its speaker's decibel level.) Positive law helps little more, since women have had little voice in its formulation in most places. Morality, an alternative ground, can be moving, but does not mean anyone has to do anything, as illustrated by the use of the phrase "moral victory" to refer to an actual defeat. All these grounds come down to social power in the end. If you have it, you can meet the tests for "human"; but power is exactly what women are socially denied, which is why their human rights can be violated and why they need them recognized.

At its philosophical foundations, the natural law tradition on which human rights remain primarily based has never been clear

41. In 1966, Thailand enacted the Service Establishments Act which gives a specific legal status to "special service girls." The women had to turn to the establishments for protection from prosecution under prostitution laws, which exempt the customers but not the women. THANH-DOM TRUONG, *SEX, MONEY AND MORALITY: PROSTITUTION AND TOURISM IN SOUTHEAST ASIA* 155 (1990).

42. U.S. STATE DEPARTMENT, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991* (1992)

Physical compulsion to submit to abortion or sterilization is not authorized, but continues to occur as officials strive to meet population targets. Reports of forced abortions and sterilizations continue, though well below the levels of the early 1980s. While recognizing that abuses occur, officials maintain that China does not condone forced abortion or sterilization, and that abuses by local officials are punished. They admit, however, that punishment is rare and have yet to provide documentation of any punishments.

Id. at 818-19.

43. An intelligent discussion of these provisions can be found in Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992).

on whether women are men's natural equals. Rather, to oversimplify a complicated debate, it has been relatively clear that they are not, and has provided no method for resolving different conclusions, each equally firmly said to be predicated on the law of nature. Nor has it reconciled its observation that sex is a natural difference with its view that equality is predicated on natural identity. To those who ground human rights in the opportunity to live out one's life project rationally,⁴⁴ it should be pointed out that, socially speaking, women as women have not been permitted a life project⁴⁵ and are widely considered as not possessed of rationality, or of what passes for reason among men. Others ground human rights in basic personal liberty⁴⁶ or in fundamental human dignity,⁴⁷ the problem being that you already have to have them to have a human right violated when you are denied them. So, it's back to nature.

Mortimer Adler exemplifies rather than exposes this circularity: "If there are no natural rights, there are no human rights; if there are no human rights, there cannot be any crimes against humanity."⁴⁸ Women's problem has been that society and law do not agree that nature made them human, so nothing that is done to them is a crime against humanity, because they have none. If society gives you no rights, such that a state need never deny them to keep you from having them, it may do you little good to have them formally guaranteed in international law. Free of this essentialist circularity, the task is to ground a claim to crimes against humanity clear of natural rights, which are not recognized to exist in nature unless they are recognized to exist in society. In other words, all discourse about nature is a social discourse.

44. E.M. ADAMS, *THE METAPHYSICS OF SELF AND WORLD: TOWARD A HUMANISTIC PHILOSOPHY* (1991).

45. SIMONE DE BEAUVOIR, *THE SECOND SEX* (H. M. Parshley trans. & ed., 1952).

46. JACQUES MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (Doris Anson trans., 1943)

[The] human person possess[es] rights because of the very fact that it is a person, a whole, a matter of itself and of its acts . . . by virtue of natural law, the human person has to have the right to be respected, is the subject of rights, possesses rights. These are things which are owed to a man because of the very fact that he is a man.

Id. at 65.

47. HERBERT C. KELMAN, *CRIMES OF OBEDIENCE* (1989); MYERS J. McDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

48. Mortimer Adler, *Robert Bork: The Lessons to be Learned* (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990)), 84 Nw. U. L. REV. 1121, 1132 (1990).

Horror at the Holocaust grounds modern morality. No one knows what is good, but nearly everyone knows the Holocaust was evil. We may not know what human is; but the Holocaust was inhuman. Jewish women were distinctively abused in ways that connect to anti-Semitic misogyny to this day and startlingly resemble the tortures of Croatian and Muslim women by Serbs. The horrific tortures and extermination of millions of Jews of both sexes because they were Jews has overshadowed everything then and since.

Considered in terms of equality theory, the Third Reich can be seen to follow an unbroken line from Aristotle through American segregation of treating "likes alike and unlikes unlike" — Jews having been rendered "unlike" Aryans.⁴⁹ Yet human rights law still uses the same equality concept, without reassessment. The dominant lesson that seems to have been learned instead was that Jews could be and were annihilated because they were "different," not that something is wrong with an equality standard that permits extermination for "differences." The Jews failed the equality test — not the equality test failed the Jews. Not that a better equality theory would have stopped Hitler. But what is one to make of an equality principle apparently logically consistent with, and undisturbed by, genocide? If equality's abstractions are so receptive to Nazi substance, are they perhaps a flawed vehicle for social justice? The fact that international law pervasively guarantees sex equality, yet there is no sex equality, while mass rape and forced childbearing go on both in peacetime and in war, including in genocidal wars, suddenly begins to make sense.

49. MAX SOLOMON, *DER BEGRIFF DER GERECHTIGHEIT BEI ARISTOTELES* 26 (1937); E.W. VIERDAG, *THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW* 8, 26 (1973). Illustrating equality thinking during the Nazi period, leading constitutional scholar Ulrich Scheuner states in 1939 that the substance of the equality right is "Artgleichheit" of Aryans. Ulrich Scheuner, *Der Gleichheitsgedanke in der Volkischen Vergassungsordnung*, 99 *ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT* 245 (1939). From the "volkisch" tenets of contemporary German law "[daraus] folgt notwendig die Absonderung der artfremden Elemente, insbesondere der Juden, aus dem deutschen Volkskörper, und ihre . . . differentielle Behandlung." (follows necessarily the extraction of elements of alien blood, particularly Jews, from the body of the German people, and their . . . differential treatment). *Id.* at 267. How the Jews were treated is thus rendered "differential treatment." See also the use of the Aristotelian principal. *Id.* at 260. Scheuner cites the U.S. Supreme Court with approval with regard to racial segregation and miscegenation laws, noting that this leads to "Benachteiligung" (disadvantage) of people of color, which is exactly what is intended. *Id.* at 265–66. He also notices the Court beginning to weaken in its defense of segregation. *Id.*

III.

[T]he refusal to demand . . . one absolute standard of human dignity is the greatest triumph of antifeminism over the will to liberation A universal standard of human dignity is the only principle that completely repudiates sex-class exploitation and also propels all of us into a future where the fundamental political question is the quality of life for all human beings.

Andrea Dworkin⁵⁰

One approach to this problem might be to interpret existing international sex equality guarantees as grounded in the global women's movement against sex inequality, including sexual and reproductive abuses, and apply the resulting concepts in peace and in war. A right to equality, both as a right in itself and as a basis for equal access to other rights, would ground its definition of inequality, and by implication its concept of the human, in the universal — meaning worldwide and everywhere spontaneously indigenous — movement for women's rights. The reality recognized by this movement is generating new principles: new in content, form, reach, operation, and relation to social life.

In law, the principles of this movement are best approximated in North American equality law, pioneered by the Black movement in the United States in the 1960s and 1970s and the women's movement in Canada in the 1980s and 1990s. These equality rights are implemented by individuals and groups against other individuals and groups as well as by and against governments. They allow governments to proceed but do not limit to governments the ability to act against discrimination. They allow complaints for indirect and systemic inequality. To be fully realized, they call for relief against state inaction as well as action. Such devices add enforcement potential rather than let states off the hook.

In the received international human rights tradition, by contrast, equality has been more abstract than concrete, more transcendent than secular, more descended from natural law than admittedly socially based. The Universal Declaration of Human Rights grants equality "without distinction of any kind,"⁵¹ as if distinction were the problem and lack of distinction were the solution. The Convention on Elimination of All Forms of Discrimination Against Women defines discrimination against women in largely gender neutral and referential terms, guaranteeing enjoy-

50. ANDREA DWORKIN, *RIGHT-WING WOMEN* 219-20 (1983).

51. *Universal Declaration of Human Rights*, *supra* note 6, art. 2.

ment of all other rights "on a basis of equality of men and women."⁵² This has mostly been interpreted non-substantively, has not allowed claims by individuals or groups, claims against government inaction, or against private parties. The committee that oversees it is coming to recognize, however, that violence against women is a form of sex discrimination and seeks to make states responsible for "private acts" if they fail to prevent, investigate, or punish discriminatory acts of violence.⁵³ All the committee does is report.⁵⁴

As a basis for an expanded equality principle, women's resistance to sex inequality is ubiquitous and everywhere concrete and socially specific. It is not based on being the same as men but on resistance to violation and abuse and second-class citizenship because one is a woman. It starts close to home. African women oppose genital mutilation. Philippine, Thai, Japanese, and Swedish women organize against the sex trade. Women in Papua New Guinea, the United States, and workers at the United Nations resist sexual harassment. Brazilian and Italian women protest domestic battery and "honor" as a male excuse for killing them. Indian women protest "dowry" and "suttee" as a male excuse for killing them. American women protest domestic battery and romantic love as a male excuse for killing them. Canadian women protest the use of "feminism" as a male excuse for killing them. Women everywhere rise up against rape, even in cultures where women have recently been regarded as chattel. Women in the United States, Scandinavia, and the Philippines resist pornography. Forced motherhood is opposed from Ireland to Germany to Bangladesh. Female infanticide and objectifying advertising are legislated against in India. Everywhere women seek access to literacy, which they have

52. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 317, U.N. GAOR, 4th Sess., (1949), pt. I, art. 1, Dec. 18, 1979.

53. *General Recommendation No. 19, Violence Against Women*, Committee on the Elimination of Discrimination Against Women, *supra* note 52, U.N. Doc. CEDAW/C/1992/L/1/Add.15 (1992). This document goes very far in recognizing the scope of the problem and in adapting sex equality as a concept to addressing violence against women. For a useful discussion see Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 483 (1990).

54. Many other human rights documents, notably Art. 3 and Art. 26 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, guarantee sex equality. This covenant stands out in allowing, through an Optional Protocol, complaints by individuals as well as state parties, but only applies to those who have accepted it specifically. Yugoslavia did not. Enforcement includes denunciation of violators.

often been denied as women, and to survive based on the work they do, as well as to access to doing all kinds of work.⁵⁵

One feature of this movement is its combination of socially-specific comparison — men are not treated this way — with its refusal to be limited to imitating or emulating men. Women's diversity is extraordinary, yet everywhere, with social particularity, below some man. This produces an appreciation for the fact that difference by itself is certainly not the excuse for second-class citizenship it has become, but that imposed inferiority is everything. The movement criticizes socially-organized power itself, as well as its excesses.

This movement has produced a rich concept of equality as lack of hierarchy, not sameness. Its everywhere-relative universality, its refusal to settle for anything less than a single standard of human dignity and entitlement, and its demand for an elevation in that standard, has left Aristotle in the dust. The scope and depth of this uprising for social equality offers a neglected ground for sex equality as a human right. The movement provides a principled basis in social reality for women's human rights, for a positive equality. Its principles include: if you do not do it to each other, you cannot do it to us; and in ending the subordination of women because they are women.

"Civil rights" has been considered a subprovince of human rights, typically distinguished from political, social, economic, and cultural rights, as well as rights of personhood. A more embracing sense of equality is developing and being applied in North America, originating in the civil rights struggle of Blacks for social equality through legal equality in the United States and extending to its current pinnacle formulation in the Supreme Court of Canada's equality jurisprudence originating in the women's movement. This equality is not confined to equal access to other rights, as it is in international human rights law⁵⁶ and most

55. These movements are well documented. CENTER FOR WOMEN'S GLOBAL LEADERSHIP, *supra* note 2; SISTERHOOD IS GLOBAL: THE INTERNATIONAL WOMEN'S MOVEMENT ANTHOLOGY (Robin Morgan ed., 1984). See also MARILYN WARING, *IF WOMEN COUNTED* (1990) (economic discrimination against women including exclusion of women's work from international accounting systems). The reference to Canada is to the "Montreal Massacre," in which 14 young women were murdered by a man screaming he hated feminists. Jane Caputi & Diana E. H. Russell, "Femicide" *Sexist Terrorism Against Women*, in *FEMICIDE: THE POLITICS OF WOMEN KILLING* 13-14 (Jill Radford & Diane E. H. Russell eds., 1992).

56. In this sense, equality is derivative in virtually all legal systems. See Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 14, 213 U.N.T.S. 221, E.T.S. 5, U.K.T.S. 71 which has been held to permit

domestic equality law, but is a principle in its own right. This equality looks to social context, broadly and in each particular, to eliminate imposed stratification. It envisions an active role for equality law in implementing the necessary changes.

In Canada, the approach takes the form of requiring that laws "promote equality." This "entails the promotion of a society" of equal dignity and respect. "It has a large remedial component."⁵⁷ It recognizes that social inequality *exists* and must be changed, rather than assuming a neutral and equal social world and avoiding legal differentiation to preserve it. It is based on noticing the reality of inequality in order to end it, rather than on enforcing a "colorblindness" and gender neutrality, which has often meant a blindness to the unequal realities of color and gender. This mandate is interpreted with particular sensitivity to, and priority upon, eliminating the inequality of groups that have traditionally been socially disadvantaged.

This equality looks to "civil society" on the level of ordinary transactions and interactions: buying and selling, work and education and accommodations, home and the street, communications and insurance, as well as voting, elections, and juries. It encompasses segregated toilets and teaching racial hatred, sexual coercion by doctors, and denials of pregnancy benefits. It is rooted in everyday life, looking beyond the legal formalism of formal equality to social consequences. It understands that although inequality hurts individuals, it only hurts them as members of social groups. It addresses the most systemic of inequalities, as well as ones that happen only to a few individuals. It practices a social, contextual, relational, anti-hierarchical equality jurisprudence.

As currently defined, international human rights are so abstract that people who concretely believe polar opposites can agree on them on principle and give them equally to no one. Both a Stalin and a Solzhenitsyn embrace them. That neither would likely favor civil rights as described here suggests the tension between "civil rights" and "human rights," in particular between abstract "human rights" equality and substantive "civil rights" equality. Civil rights begin at home or close to it; human rights seem to improve the further one gets from home. By a preference for direct civil remedies in the hands of the unequal,

no complaints on its own, but merely refers to equal access to other rights. X and Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) at 32 (1985).

57. Andrews v. Law Soc'y of British Columbia, 1 S.C.R. 143, 171-82 (1989).

civil rights distribute power from government to people as they redistribute power among people. Human rights tend to see the state as the enemy of equality; civil rights see it as their potential promoter. Human rights locates equality in eliminating irrational differentiation; civil rights see equality as much in affirmative claims of cultural particularity, in ending oppression whether based on real differences or not, and in altering the mainstream to accommodate an uncompromised diversity.

The current political force of the mainstream human rights view takes its deep text, on my analysis, from a reading of the Nazi experience: survival lies in blending in, in being indistinguishable from one's surroundings, in nondifferentiation. Cast in equality terms, instead of criticizing the view that killed you for being different, you fight for the right to be recognized as the same and to become the same because it will keep you alive. So many Polish Jews died, it is said, because they only spoke Yiddish. They could not "pass" as not Jews. Aryan-appearing German Jews were more likely to survive. It should follow that assimilation — sameness — guarantees an equal right to live, not to be exterminated because of who you are. This is non-arbitrary recognition for meeting the dominant standard, integration over self-determination. Do not think about whether integration is ultimately possible; do not think about those who will never be permitted to meet the standards; do not challenge the standards themselves.

An analogy could be drawn to the psychology of battered women, which is also a dimension of femininity more generally. The only reality is the power of the abuser; keeping your head low keeps you alive. This, too, acquiesces in the dominant standard and concedes the permanent powerlessness of an underclass. The shame of being who you are — as if that is validly and forever the real reason for subordination — leads to always wanting and trying to become who you are not, which women know is a living lie until you become it. This is the victim-side adaptation to the perpetrator-defined reality. It converges with the final solution to the inequality problem: annihilation.

This is the equality of Aristotle, of the Enlightenment, of the Nazis, of the mainstream U.S. equality jurisprudence today, and of international human rights law. It seems rather late in the pursuit of equality to seek fair conditions of extermination on the basis of speaking Polish or looking German. It is like a battered woman seeking not to be beaten by serving dinner on time and

providing regular sex. Such equality does nothing about the annihilation machine itself, so long as it sorts likes from unlikes accurately. It may mean survival for some under unequal conditions, but do not call it equality. Such equality means conceding the standards under which one is measured, monitoring only their recognition without irrational distinction. One can understand trying to construct an equality principle to ensure survival under conditions of genocide; yet this is very close to conceding genocidal conditions in the construction of the equality principle, with the result that, so far as the equality principle is concerned, we will never live under any but genocidal conditions.

How equality is defined in the North American movements, by contrast, is self-respecting but not isolationist, self-determinant but not segregationist, uncompromised but not absolutist, solid at the core but forgiving at the edges. Its equality is not absolute but relative to the best society has to offer, insisting on an expanded role for the subordinated in redefining standards from the point of view of those living under them. Such a theory may appear to lack principled definition, grounded as it is in response to an unprincipled social world. Perhaps if white men had been lynched, as Black men were in the American South, this would be more of a problem; the fact is, they were not. Given that no society systematically trafficks men as men for sex, rapes men at will and with impunity, forces men to reproduce, batters men in homes, sometimes to death, on an everyday basis, pays men as a group less than women, or presents male sexuality in demeaned ways for entertainment and profit on a large scale, some comparative dimension to the standard has a lot to offer. It also helps avoid imposing foreign cultural standards in diverse social settings.

In legal practice in Canada, this approach has proven capable of addressing a substantial number of realities of sex inequality that have eluded prior attempts. A woman has been permitted to sue her city police force for failure to warn of a serial rapist.⁵⁸ Sexual harassment⁵⁹ and pregnancy discrimination⁶⁰ have been recognized as human rights violations. Under the tutelage if not the direct control of this approach, common

58. *Doe v. Board of Comm'rs*, 72 D.L.R.4th 580 (1990).

59. *Janzen v. Platy Enterprises*, 1 S.C.R. 1252 (1989) (sexual harassment is sex discrimination under the Manitoba human rights code).

60. *Brooks v. Canada Safeway*, 1 S.C.R. 1219 (1989) (pregnancy discrimination is sex discrimination).

law remedies for sexual abuse have recognized inequalities of power⁶¹ and statutes of limitations for incest have been revised based on the experience of victims.⁶² Criminal laws against wife battering have been interpreted to recognize the woman's reality⁶³ and publication of the names of sexual assault victims has been prohibited.⁶⁴ When the court refused to recognize women's equality rights to keep their sexual histories out of rape trials,⁶⁵ a whole new rape law was introduced to remedy it.⁶⁶ Significant decisions have also been made in light of this approach in the area of reproductive rights, preventing men from gaining a veto over women's abortions⁶⁷ and recognizing women's rights in and over their fetuses.⁶⁸ Perhaps more tellingly, when the rights to freedom of expression of anti-Semites and pornographers were balanced against the equality rights of their targeted victims, equality won.⁶⁹ In Canada, some of the reality of inequality is becoming the basis for the legal equality principle.

IV.

Against the backdrop, what will become of the Muslim and Croatian women violated by the Serbs? The basis in a women's movement for a meaningful equality interpretation exists. Since November 1991, feminists in Zagreb in particular have been working with refugee survivors of the sexual atrocities of genocide through war. Their accountability to the victims has been continuous and absolute, their documentation and relief effort committed and accurate.⁷⁰ If jurisdiction can be secured, and it should be able to be, laws do exist to cover many of the atroci-

61. *Norberg v. Wynrib*, 2 S.C.R. 224 (1992).

62. *K.M. v. H.M.*, 96 D.L.R. 4th 289 (1992).

63. *R. v. Lavallee*, 55 C.C.C.3d 97 (1990).

64. *R. v. Canadian Newspapers Co.*, 2 S.C.R. 122 (1988).

65. *R. v. Seaboyer*, 2 S.C.R. 577 (1991).

66. Less positive results occurred in the prostitution cases, *R. v. Skinner*, 1 S.C.R. 1235 (1990) and *R. v. Nguyen*, 2 S.C.R. 906 (1990). No sex equality argument was made in either case.

67. *Tremblay v. Daigle*, 2 S.C.R. 530 (1989).

68. On women's rights in childbirth see *R. v. Sullivan* No. 21080, 21494 (S.C.C. March 21, 1991).

69. *R. v. Butler*, 2 W.W.R. 557 (1992); *R. v. Keegstra*, 3 S.C.R. 697 (1990).

70. Natalie Nenadic, *How Do You Get Rid of the Guns?*, *EVERYWOMAN*, July-August 1991, at 19; *WOMEN'S HELP NOW & KARETA, WHO ARE WE? WHERE ARE WE?* (1992); Katja Gattin for Kareta, *Where Have All the Feminists Gone?* (Jan. 20, 1992) (unpublished manuscript) ("In 1991-1992, Croatia is a woman.").

ties.⁷¹ Rape, enforced prostitution, and indecent assault are already recognized as war crimes.⁷² There is even precedent for trying them.⁷³ After World War II, Japanese generals were tried for sexual atrocities committed under their command: rape, imprisonment of girls in hotels and subjecting them to repeated rape, mass rape, cutting off breasts, killing women civilians and raping their corpses.⁷⁴ Other than the breeding aspect, this has happened in wars before, right down to tortures of fingers and feet.

There are many more examples in which nothing was done: "the mass rapes of women during the war for independence in Bangladesh, the systematic rape of women suspected of complicity in the insurgency in Kashmir, and the belated but growing scandal concerning the 'comfort women' who were abducted and forced into prostitution by the Japanese army during the Second World War."⁷⁵ Evidence on rape was presented by the French and Soviet prosecutors at Nuremberg.⁷⁶ Sexual forms of torture

71. A useful review is YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS (Martinus Nijhoff ed., 1982).

72. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, Protocol I, art. 76(1), reprinted in 72 AM. J. INT'L. L. 457 (1978) (victims of international armed conflict protected against "rape, forced prostitution and any other form of indecent assault."); *id.* at Protocol II, art. 4(e) (victims of non-international armed conflicts protected against "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."). Murder and torture are prohibited under many international conventions, with additional protections for doing so on ethnic grounds.

73. *In re Yamashita*, 327 U.S. 1 (1946). COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA: A MEMORANDUM 5-16 (1950), contains detailed excerpts from the record of the trial revealing many rapes. The U.S. Supreme Court upheld the decision of the military tribunal. *See also* ARNOLD BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS 179-80 (1987); LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 227-28 (1985); RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 83-84 (1982). Brackman discusses the death sentence of General Iwane Matsui, who was convicted of "failing to take adequate steps to secure the observance and prevent breaches of conventions and laws of war in respect of prisoners of war and civilian internees" in the mass rapes that were called the Rape of Nanking. BRACKMAN, *supra*, at 419; *see also id.* at 108, 409.

74. LAEL, *supra* note 73, at 83. All that is distinguishable in the Japanese accounts is the pornography and the intention to create pregnancies.

75. Joan Fitzpatrick, The Use of International Human Rights Norms to Combat Violence Against Women (1992) (unpublished manuscript). This is a lucid, informed treatment. On the rapes in Bangladesh, see SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 78-87 (1976).

76. 5 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS 159, 325-27 (evidence of French prosecutors); 6 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS 303 (evidence of Soviet prosecutors).

were documented,⁷⁷ but sexual assault was not charged in the indictments. One can only speculate that it was not seen to be within the tribunal's emphasis "not on individual barbarities and perversions" but only on the Nazi "Common Plan."⁷⁸ Rape has so often been treated as extra-curricular, as just something men do, as a product rather than a policy of war.

Proceeding through war crimes tribunals on behalf of Muslim and Croatian women would create accountability but it would not redistribute power to women in situations other than war. On the civil side of human rights, these atrocities violate every sex equality guarantee in international law, properly interpreted, and they do not fail to do so because this is wartime. Surely this is a "consistent pattern of mass violation of human rights."⁷⁹ Perhaps this would be a good occasion to use equality guarantees to address violence against women; there is no state action problem. Such an approach could establish precedents for use by women in peacetime as well.

As a practical matter, it helps that these incidents happened in a war. Men know men hurt men in war, so maybe there is an

77. "One hundred and thirty-nine women had their arms painfully bent backward and held by wires. From some their breasts had been cut off, and their ears, fingers and toes had been amputated. The bodies bore the marks of burns." 1 *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS* 24 (Russian women's bodies in Stalin-grad region after German expulsion).

78. Justice Jackson, Opening Statement, *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS* 53 (1946). One exhibit of a Soviet official documenting "revolting acts of rape" by the German invaders observed this:

Unquestionable facts prove that the regime . . . did not consist of certain excesses of individual undisciplined military units, or individual German officers and soldiers. Rather does it point to a definite system, planned far in advance and encouraged by the German Government and the German Army Command, a system which intentionally unleashed within their army the lowest animal instincts among the officers and men.

79 *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS* 26 (Notes of V.M. Molotov, National Commissar for Foreign Affairs in USSR, Exhibit USSR 51, dated as early as 6 January 1942). The Nuremberg trial was conducted under the common law of war, even though the violations of the Geneva Conventions under which the Nazi leadership was charged had not been made a specific penal offense. HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 862 (1986).

79. A "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms" violates Resolution 1503 (XLVIII) of the Economic and Social Council authorizing the establishment of a subcommission on Prevention of Discrimination and Protection of Minorities. It is empowered to appoint a group to determine violations and bring them to the attention of the subcommission and it enables the U.N. to interfere in "domestic" matters. See Felix Ermacora, *Human Rights and Domestic Jurisdiction*, 124 *RECUEIL DES COURS* 375, 436 (1968).

analogy? It does not help for recognizing them now, or for creating a precedent that could affect non-war interpretations, that similar acts are common everywhere in peacetime and are widely understood as sex. Yugoslavia's pornography market was "the freest in the world"⁸⁰ before this male population was officially mobilized to commit the atrocities they had already been sexually conditioned to enjoy. It does help that men did these acts in declared military groups, instead of one on one everywhere at once and all the time, or in small packs, murdering, raping, pimping, and breeding but not recognized as an army of occupation. Will there be command responsibility for these rapes? Will women have to identify each individual man, often numbering in the hundreds, who raped them? It does not help that no state raped these women and got them pregnant; it does help that a state's men did.⁸¹

Will these atrocities be seen as human rights abuses? If the Muslims were Jews, would the world be allowing this to happen? Must a group first survive genocide for it to be recognized the next time? Will principle see reality? Will it connect with similar acts in everyday life? The murders maybe; the rapes possibly, and if so, probably because they are ethnic, hurting a group that includes men; the pregnancies, less likely, (and what to do with the children?); the prostitution, for all the twenty-two treaties against it, little chance; the pornography never, meaning if ever, probably not soon.

Or will this situation and these women, here and now, be the time and place in which the word "woman," like the word "Jew," will finally come to stand, among its meanings, for a reality of abuse that cannot be forgotten, a triumph of survival against all that wanted you dead, a principle of what cannot be done to a human being? Will women, at last, get amnesty?

80. Michael Moorcock, *Working in the Ministry of Truth: Pornography and Censorship in Contemporary Britain*, in *PORNOGRAPHY: WOMEN, VIOLENCE, AND CIVIL LIBERTIES* 536 (Catherine Itzen ed., 1992)(quoting Bogdan Tirranic). As Moorcock then asks, "Have sex crimes dropped in Serbia?" *Id.* at 550.

81. It should be noted that the Serbs consider the Serbian occupied areas of Croatia and Bosnia-Herzegovina to be Serbian states, parts of the United States of Serbia. So the Serbian military forces, in addition to being state actors under orders from Belgrade, function under color of official authority of the self-declared Serbian mini-states within and against the established governments of Croatia and Bosnia-Herzegovina. In addition, the local Serbian irregulars, termed "chetnicks," provide yet another layer of actual and apparent state authority.