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WHY DOES IT MATTER IF WOMEN ARE HUMAN?: CATHARINE MACKINNON’S CONTRIBUTIONS TO INTERNATIONAL LAW

Karima Bennoune*

It is an honor for me to take part in this event and I thank the organizers for inviting me. Catharine MacKinnon is one of the law professors I admire most and I am proud to be among the legion of former students who have learned so much from her. She convinces me by example that there is no reason one cannot be an advocate and an academic at the same time, however frowned upon that may be by some of our colleagues. That theory matters not for its own sake but in the lives of real women and men.1 That it is possible to be both erudite and relevant at the same time. She also forces me, in the healthiest way, to question every basic assumption that I make about what I do as a professor of international law and human rights by asking profound and destabilizing questions like, “are women human?”

Before I describe what I see as the far-reaching ramifications for international law of asking such a seemingly simple question, I should perhaps start by explaining how I first met Professor MacKinnon. Being an Arab American international lawyer in these times means that much of my career has been shaped by polarizing events. My first year of law school at the University of Michigan, back in academic year 1990-91, witnessed the birth of the fleeting New World Order proclaimed by President George H.W. Bush. Hence, I spent much of my first year at demonstrations, teach-ins, and endless meetings as a student activist in the anti-war movement during the (depending on how you count it) first Gulf War. As a result of this work, I appeared twice on the MacNeil-Lehrer NewsHour to discuss opposition to the conflict among students and Arab Americans.

Shortly thereafter, I began to receive a stream of bizarre, pornographic letters from a gentleman in Canada who was good enough to put his name and return address on each. These communiqués featured strange, explicit Orientalist fantasies, often involving veils and harems. They made me queasy, especially in the prevailing climate of heightened anti-Arab racism. They just kept arriving, appearing several times a week in my pendaflex in the law school basement. I went to the Ann Arbor police. I went to the federal postal inspector. I went to the dean’s office. No one seemed to be interested in

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1. She wrote perhaps my favorite thing ever said about theory: “It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?” Catharine A. MacKinnon, From Practice to Theory, or What Is a White Woman Anyway?, 4 YALE J.L. & FEMINISM 13, 13 (1991).
doing anything about this unless and until my correspondent actually showed up to try to carry out what he wrote about. The letters were of course "only words." I found that I could not stop reading them, fearing that I would miss the letter where he told me when and where he was going to show up.

One day, a kind secretary in an administrator's office heard my story. She said, "You should talk to Professor MacKinnon." "Right," I said, assuming that someone so famous would have little time for the travails of a first-year student. Unperturbed, the secretary got on the phone and, within five minutes, I had an appointment with Catharine MacKinnon. I was stunned. You have to picture how busy she is, in constant demand by students, colleagues, for speaking events, representation, etc. Yet, she simply made it a priority to help me. She had the letters analyzed by a forensic handwriting specialist and separately by a psychologist specializing in this sort of thing to determine the level of risk to me. She convinced the law school to begin sending them back marked "no longer at this address," which I had been unable to convince anyone to do. To my great relief, she offered to read any letters that did continue to come, and she did read them until they stopped coming.

I was deeply grateful for her belief that my sense of security was worth the investment of her time and for the visceral way in which she understood the injury to my sense of personhood from the assault by pornographic letters. All of these themes reverberate through her scholarship and are heard by the world, but she also took the time to recognize them in the life of one small person standing right in front of her, when no one was looking. In doing so, she earned my instant and profound respect. For MacKinnon, theory is about making women's lives better close to home and around the world. She talks the talk better than almost anyone can, but she walks the walk too.

Catharine MacKinnon is perhaps most famous in the United States for her ground-breaking, U.S.-focused writing on sex equality, her work on pornography, and her foundational work on sexual harassment. However, since late 1991 when she was galvanized by atrocities in Bosnia-Herzegovina and Croatia, she has also been an extraordinarily important international lawyer and human rights theorist and activist. In these capacities, she has litigated and shaped ground-breaking cases with transnational dimensions, authored numerous international law and human rights articles (my research assistant found about twenty-five articles just in these fields written since 1992), and

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2. On the refusal to recognize the harms that sometimes masquerade as "expression," see Catharine A. MacKinnon, Only Words (1993).
4. See, e.g., MacKinnon, supra note 2.
worked with the international women’s rights group Equality Now, and thus has helped to write a new feminist international law that is being increasingly accepted by mainstream institutions.

Her footprint is visible in the 1999 Optional Protocol to the U.N. Convention on the Elimination of All Forms of Discrimination Against Women, which creates an international complaints mechanism for individual women victims of discrimination. This instrument represents an important step toward the kind of legal accountability MacKinnon has sought to have afforded to women for years. The Protocol’s preamble indicates that its purpose is “to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms.” It is then about creating the new feminist jurisprudence at the international level that, as Catharine has written, “[e]quality will require” and that “must engage the world.” That equality is to be “understood substantively rather than abstractly,” the action taken to ensure it effective in result, all things she has long stressed. It is no accident that she organized one of the first major workshops on how to employ the Protocol, bringing together academics and practitioners at the University of Michigan.

MacKinnon’s concerns and contributions are also clearly reflected in the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa — one of the most cutting edge substantive standards on women’s human rights in the world today. The Protocol prohibits “unwanted or forced sex” in public and in private, and requires states to “take effective legislative and administrative measures

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7. For more information about this organization, see EQUALITY NOW, http://www.equalitynow.org/ (last visited Apr. 10, 2011).


9. G.A. Res. 54/4, supra note 8, at pmbl.


11. Id. at 244.

12. See, e.g., Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED, supra note 3, at 32.

to prevent the exploitation and abuse of women in . . . pornography.” 14 It also includes economic violence in its definition of violence against women. 15 This instrument makes the first explicit mention of abortion rights found in an international human rights treaty. 16 It requires states to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.” 17

This begins to do in international law what MacKinnon has described as “situat[ing] abortion and the abortion right in the experience of women.” 18 Abortion is not here an issue of privacy, a formulation she has critiqued, 19 but one of women’s substantive reproductive rights and rights to physical and mental health in a meaningful sense.

One can also see MacKinnon’s impact in the emergent jurisprudence of international criminal courts on sexual violence against women in armed conflict. 20 She is currently the Special Gender Adviser to the Prosecutor of the International Criminal Court and is carrying that endeavor forward on the front lines of international lawmaking. The fruits of her labor are also evident in numerous reports of U.N. experts, in parts of Amnesty International’s recent Stop Violence Against Women Campaign and the work of other NGOs, and in so many important international law venues. Of course, given the sensitivity of questions of authorship in international organizations, some of her contributions cannot be explicitly enumerated until that history is written at some more distant time in the future.

Like feminist international lawyers Hilary Charlesworth and Christine Chinkin, through her writing MacKinnon has forced a gendered rethinking of many international law notions. One of my favorite international human rights articles of all time is her Are Women Human?, first published in a volume entitled Reflections on the Universal Declaration of Human Rights. 21 It is a terse two-page piece, yet potentially more transformative of the way we talk about women’s human rights than many lengthy treatises. MacKinnon notes that fifty years before the time of her writing, the Universal Declaration told the international community what it means to be human. And she asks simply if “women [are] human yet.” 22

In 2006, she published an excellent book called Are Women Human?: And Other

14. Id. at art. 13(m).
15. Id. at art. 1(b). MacKinnon recognized this long before in Sexual Harassment of Working Women. See MACKINNON, supra note 5.
19. Id.
20. Along with her Bosnian clients, MacKinnon was among the first proponents of creating the mechanism that became the International Criminal Tribunal for the Former Yugoslavia, and she attended the early meetings that conceptualized this institution.
22. Id.
International Dialogues, bringing together this article and most of her other foundational writings in international law and human rights. For those of you only familiar with her more U.S.-focused works, I highly recommend this book. It is one of the most challenging and important works published in international law in the last decade — and is actually a good read because it is so well written. Martha Nussbaum has described it as “a sparkling book” (indeed a rare thing in the sometimes dour field of academic international legal writing) and as one which makes “a major contribution both to feminism and to international law.”

It has been an interesting experience traveling around with the book in tow, its title question, “Are Women Human?,” emblazoned on the cover. A businessman seated next to me on the train to Washington, D.C., looked smugly at the book, like the question in the title confirmed a view he had long held in secret that perhaps women are not human. Others have simply looked perplexed. Asking basic questions is often a threatening process. Nussbaum labels this questioning, “[u]nsettling in the best sort of way.”

Are women human? It sounds absurd at first. But stop and think about what that question means. Are women received as human? Are women yet permitted to live a life that meets international law’s “human” standards? It is a radical and destabilizing question. I want to use the rest of my space here to think about this question, about how we react to the question and how we answer it, and what all of this means for international human rights law in a wide range of areas, including violence against women, torture, and genocide.

If women were understood to be human, MacKinnon submits in the eponymous essay, they would not be trafficked into prostitution as they are everywhere, subjected to female genital mutilation in parts of Africa, burned when dowry money was not enough in India, sexually and reproductively enslaved in armed conflict in many places and in daily life everywhere, forced to work for terrible pay in terrible jobs in the United States, and prohibited from learning to read and write as the current Taliban campaign against girls’ schools in Pakistan seeks to ensure. While we are still beset by tired theoretical debates about whether or not human rights norms are actually universal despite the fact that this is a long settled question in law, the near universal nature of women’s second-class status, de jure or de facto, is unquestionable. The universality of human rights may be controversial; the universality of human wrongs is obvious to the honest observer.

MacKinnon asks,

[i]f women were human . . . [w]ould [they] be raped . . . in that undeclared war that goes on

23. See MACKINNON, supra note 8.
25. Id.
27. For an interesting account of this ongoing debate, see Andrew Anthony, Universalist or Relativist? These Are the U and Non-U of Modern Manners, THE OBSERVER, Apr. 9, 2006, at 11.
28. MacKinnon has noted that “[t]he first step [in ‘demanding actual equality through law’] is to claim women’s concrete reality.” MACKINNON, supra note 10, at 244.
every day in every country in the world in what is called peacetime? . . . And, if we were human, when these things happened, would virtually nothing be done about it?29

International human rights lawyers often ponder in frustration the question of why—despite norms banning violence against women in every conceivable context—such violence remains one of the most pervasive human rights violations in the world. On re-reading MacKinnon’s work, I think we have not adequately considered the underlying problem that women are not yet received and recognized as fully human. It is to that fundamental difficulty that Catharine seeks to redirect our attention.

The Committee on the Elimination of Discrimination Against Women ("CEDAW"), in its landmark General Recommendation Number 19, declared that "[g]ender-based violence is a form of discrimination" against women.30 Catharine had been making a similar, somewhat more sophisticated and forceful point for years when she spoke about “rape as a problem of sexism,”31 or when she explained that “[s]exual abuse works as a form of terror in creating and maintaining [sexism].”32 By asking if women are human, she is underscoring the point made delicately in General Recommendation 19, that is, that violence against women is a manifestation of the politics of male supremacy, a politics that often delineates what it means to be human.33

Violence against women occurs because of discrimination against women, is a form of discrimination against women, facilitates more such discrimination, and makes any available remedies inaccessible. What MacKinnon understands when she asks if women are human is that the relatively tame sounding term “discrimination against women” does not do justice to the ideas at play here which are often based on a perception of women as indeed a non-human category. There are perhaps the most egregious forms of this—say, the Jamiat Islami officials I met in 1996 Afghanistan as part of a human rights delegation who would not shake my hand or look in my direction or even acknowledge my presence, who literally could not hear any question I asked as the only woman in the delegation. There are every day forms of this radical denigration of women in U.S. contexts too—they look like Girls Gone Wild.

As MacKinnon says, “[t]o be a woman is not yet a name for a way of being human,”34 and alas this was true in the literal language of the important Universal Declaration of Human Rights (“UDHR”), the document in response to which MacKinnon first wrote Are Women Human?. While the UDHR proclaims equality and prohibits discrimination on the grounds of sex in its opening articles, it also guarantees a person “his rights and freedoms,”35 protection of his privacy, family and honour.36 “His,” as the late Katarina Tomaševski pointedly wrote, does not include “hers.”37 It

29. MacKinnon, Are Women Human?, supra note 6, at 171.
31. Catherine A. MacKinnon, A Rally Against Rape, in FEMINISM UNMODIFIED, supra note 3, at 81.
33. This is also a point she had made years before in MACKINNON, supra note 5.
34. MacKinnon, Are Women Human?, supra note 6, at 172.
36. Id. at art. 12.
37. KATARINA TOMAŠEVSKI, WOMEN AND HUMAN RIGHTS 8 (1993).
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seems like a trivial point, the sort of things feminists were laughed at in the 1970s for challenging. However, these are not "only words." And it is striking that as Catharine says "[t]o be a woman is not yet a name for a way of being human, not even in this most visionary of human rights documents."38 As she further notes, the opening articles of the UDHR encourage human beings "to 'act towards one another in a spirit of brotherhood.'"39 She asks "if we were all enjoined to 'act towards one another in a spirit of sisterhood,' would men know it meant them, too?"40

"The world needs to see women as human," Catharine writes in the concluding lines of the essay Are Women Human?.41 And what I find most poignant in her writing is her simple, unyielding commitment to taking seriously the notion that women are human, and that that reality must be reflected in all the ways we do law. Women are human. It is a belief less widely shared than one might think. If women were universally understood to be human, the adoption of the tautological (and untranslatable) "[w]omen's rights are human rights," would not have to have been recognized as a major victory of the U.N. Fourth World Conference on Women as recently as 1995.42 That would simply be a truism. It is not just that women have not yet been able to win the struggle for their human rights. The problem is graver still. It is that they have not yet won their struggle to be seen as entirely human in the first place.

Beijing was a significant step in women's struggle to be included in the human category — and a recognition of the need for that struggle.43 Moreover, there is no question that great progress has been made in recent years in some areas of the international law battle for sex equality — whether it is the plethora of norms that have been adopted or the mechanisms created or the cases won or the perspectives shifted.44 However, the problem of sex inequality, of women's subordination around the world, remains a grave and pervasive one.

Normatively, we have made a great deal of progress in the specialized field of women's human rights. We are allowed to have our focal points and our specialized units and mechanisms. Where we have not made as much progress is with the so-called mainstreaming of women's rights. There is a two-track approach. We can go off in our corner and work on women. But if you try to bring gender insights to bear and change the way they work on the rights of men, to reclaim what human rights itself means, you are in trouble. This is a reminder that we are still not quite clear that women are fully in the human category, rather than just in their own category. Or maybe we have begun to realize it, but simply cannot come to terms with its full implications which are

38. MacKinnon, Are Women Human?, supra note 6, at 172.
39. Id. at 171.
40. Id.
41. Id. at 172.
43. See, e.g., Friedman, supra note 43, at 18; Bunch & Fried, supra note 43, at 200.
complicated and, dare I say, radical. I think Catharine needs to keep asking us if women are human, challenging us to think about how we react to the question, how we answer it, and what our answers should mean about how we do human rights.

She has asked other destabilizing questions like why deliberate attacks on women for the purpose of terrorizing their part of the civilian population are not considered terrorism. In another foundational piece of international law writing, *Women's September 11th*, Catharine wrote that if women were universally recognized to be human, the women killed by men each year — about the same number as the victims of September 11 in the United States alone — would give rise to a gendered version of U.N. Security Council Resolution 1373. In Resolution 1373, the Security Council, responding to the atrocities of September 11, acted under Chapter VII of the Charter, its most robust component, and ordered states to take effective, coercive action to combat terrorism — which under international law definitions is supposed to refer to deliberately targeting civilians for a political purpose or simply for the purpose of terrorizing them.

Instead, back in 2000, women got the tepid Resolution 1325 on women, peace, and security, which we were reduced to desperately celebrating notwithstanding its relative weakness, the lack of a Chapter VII mandate, the lack of specificity of obligations, and the lack of a Security Council-level compliance mechanism like Resolution 1373’s Counter-Terrorism Committee. Unlike Resolution 1373, Resolution 1325 was not adopted under Chapter VII because the systematic sexual abuse of women in war is not, after all, a threat to international peace and security, a breach of the peace or even an act of aggression. What else can we take away from this but the notion that women are not quite human yet and when targeted as women their security matters less? Women’s

47. *Id.* at pmbl. ("Reaffirming . . . that such acts . . . constitute a threat to international peace and security").
48. S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000). See Off. of the Special Adviser on Gen. Issues and Advancement of Women, Women, and Peace and Security, http://www.un.org/womenwatch/osagi/owo menPeaceSecurity.html (last visited Apr. 10, 2011) (The Office of the Special Adviser on Gender Issues monitors implementation of Resolution 1325 along with an Inter-Agency Task Force on Women, Peace, and Security). However, this is a far cry from the Counter-Terrorism Committee ("CTC"), which is a committee of the whole Security Council that receives regular reports from member states about their compliance with the resolution and can even conduct country visits as such. See Security Council Counter-Terrorism Committee, Our Mandate, http://www.un.org/en/sc/ctc/ (last visited Apr. 11, 2011). There has been a human rights critique of the impact of some CTC action so it is not being held up here as a model compliance mechanism. See, e.g., José E. Alvarez, *The 'Dark Side' of the UN's War on Terrorism, in Abuse: The Dark Side of Fundamental Rights* 163 (András Sajó ed., 2006). The point is, however, that state members of the United Nations are willing to give real teeth to the fight against the terrorism they are most concerned about. One merits an advisory approach, the other a compulsory approach. Of course, we also now have Security Council Resolution 1888 in which the U.N. member states seemed angrier about sexual violence against women in armed conflict, which they noted with concern "continue[s] to occur, and in some situations ha[ve] become systematic or widespread." S.C. Res. 1888, pmbl., U.N. Doc. S/RES/1888 (Sept. 30, 2009). Still, even this stepped up resolution does not invoke a Chapter VII mandate. *Id.* It largely "requests," "urges," and "encourages" various forms of action to combat sexual violence, whereas Resolution 1373 "decides" what action states must take. Compare *id.* at paras. 4-6, with S.C. Res. 1325, supra, paras. 1-2, 6.
49. These terms of art are the triggers for Security Council action under Chapter VII of the U.N. Charter. U.N. Charter art. 39. Even Resolution 1888 can still only manage to say that sexual violence "may impede the restoration of international peace and security." S.C. Res. 1888, supra note 48, at para. 1 (emphasis added). This is as much as the Security Council will say about violence against women in armed conflict recognized as such. It has nothing whatsoever to say about the violence against women in the time called peace, that ongoing and undeclared armed conflict happening every day around the world.
human rights activism is then a refusal to accept these denials of women's humanity and an insistence that their security matters just as much.

In addition to its profound substantive contributions, another interesting aspect of Catharine’s work is the reactions it sometimes provokes. It is often frightening to many men — and some women. I think this is precisely because she asks inconvenient and impertinent and embarrassing questions like “are women human?” When I was a legal advisor at Amnesty International back in the optimistic 1990s and working on what would become the organization’s third campaign against torture, a group of us were attempting to push the organization to adopt a gender-inclusive approach to the meaning of torture itself. A lengthy internal debate ensued in which I was told by a senior male colleague who was organizing that campaign that I could not even circulate a memo about the scope of the definition of torture that included part of the then-new report from the Special Rapporteur on Violence Against Women (“SRVAW”), Radhika Coomaraswamy.50 The SRVAW, building on the work of feminist scholars including Catharine, had in this report suggested diplomatically that NGOs and others should consider if in certain circumstances — with the consent or acquiescence of the state — domestic violence should be considered a form of torture or of cruel, inhuman, or degrading treatment or punishment.51 Radhika Coomaraswamy was basically telling the human rights movement to remember that if torture is a fundamental human rights violation, and human rights instruments apply to all by virtue of being human, then the infliction of severe suffering on women was as important as the infliction of severe suffering on men in how we define torture. In other words, women are human.

Someone in the international secretariat of Amnesty International got a hold of Catharine’s *On Torture*, written in 1990, and panic ensued in certain quarters.52 In *On Torture*, MacKinnon argued that if, when women are tortured because they are women — through domestic violence and battering and rape and sexual abuse in a wide range of contexts, by being prostituted and made into pornography — if in those contexts “the law recognized that a human being had her human rights violated, the term ‘rights’ would begin to have . . . the content to which we might aspire, and the term ‘woman’ would . . . begin to be ‘a name for a way of being human.’”53 She has the audacity to suggest that in the accounts she includes in the article of women violated by pimps, spouses, and pornographers “*all the same things happen* as happen in the Amnesty International accounts of torture, except that they happen in homes in Nebraska or in pornography studios in Los Angeles rather than prison cells in Chile or detention centres in Turkey.”54

A senior male colleague at Amnesty, who had done important work on abuses at

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51. *Id.* at para. 50.

52. MacKinnon, *On Torture*, supra note 6, at 21-31. This article was based on a lecture delivered some years before which was one of the earliest instances in which the argument that rape constitutes torture was made.

53. *Id.* at 31 (paraphrasing in part from Richard Rorty).

54. *Id.* at 25.
the hands of the state, asked me in horror, "were we now going to be expected to go after husbands?" Somehow, I think that what was most alarming was the underlying notion that women are as human as men, meaning that their particular experiences of rights abuses are as core to what those abuses mean and how they should be defined as men's. Yet, we did treat this differently — the double standard MacKinnon alleges was real. In fact, it was considered a major step forward in the 1990s when rape of women in custody (meaning formal detention at the hands of the state because of course there are other forms of custody) was recognized as a form of torture by the U.N. Special Rapporteur on Torture. 55

It took a process of internal education and feminist struggle inside the "mainstream" human rights movement — and pressure from the women's human rights movement — to make this shift in perception happen and to move to accepting this formulation. Notable human rights experts had quietly explained in the past that it was different. Such abuse was terrible, but simply about individual guards gratifying themselves — what MacKinnon has called "this boys-will-be-boys theme, grown up into men-will-run-amok." 56 Catharine's vital work was a part of making this change happen because she demanded women's right to be as human as men — not simply added to a male category of human. Hence, torture must also mean what happens to women, must also include what mostly or only happens to women, not just what happens to some men that might sometimes also happen to some women, like violent interrogation by formal prison guards. And she urged human rights advocates to go farther, a challenge which Amnesty International began to fulfill with its recent, important global campaign entitled, Stop Violence Against Women. 57

Another of MacKinnon's critical achievements in the international law area is supporting the work of the International Criminal Tribunal for Rwanda ("ICTR") in its gender-sensitive definition of rape in the Akayesu case as "a physical invasion of a sexual nature ... under circumstances which are coercive." 58 The court also defined sexual violence more broadly as "any act of a sexual nature ... under circumstances

55. In his oral introduction to the Commission on Human Rights while presenting his annual report, Special Rapporteur on Torture, Peter Kooijmans, explained that "[s]ince it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." Special Rapporteur on Torture, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 16, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1995/34 (Jan. 12, 1995), citing with approval para. 35, E/CN.4/1992/SR.21.


57. See Stop Violence Against Women Campaign, AMNESTY INT'L USA, http://www.amnestyusa.org/violence-against-women/stop-violence-against-women-svaw/page.do?id=1108417 (last visited Apr. 11, 2011). This global campaign lasted from 2004 to 2010. The campaign broke ground in the organization for tackling abuses like domestic violence as human rights issues, and helped to raise the international human rights profile of the problem of violence against women. However, according to the organization's own internal review, an outstanding goal, as throughout the international legal system, is to mainstream a gendered approach across all areas of human rights work, not just in those silos where women's human rights advocates are in the lead. See Review of the Stop Violence Against Women Campaign, AMNESTY INT'L USA, http://www.amnesty.org/en/review-stop-violence-against-women-campaign (last visited Apr. 11, 2011).

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which are coercive." This went along with an affirmation that the “lack of consent as an element of the crime of rape . . . is immaterial within the supranational criminal law context, especially in light of the violent and oppressive context in which rapes take place during genocide, crimes against humanity or armed conflict, and should therefore be rejected.

While even the ICTR has not stayed strictly on this course, as MacKinnon herself lamented in a 2008 lecture on the ICTR’s legacy on sexual violence, the Akayesu approach has been incredibly powerful, and the ad hoc tribunals essentially returned to it, as she recommended. It has brought to the international criminal law stage ideas that Catharine pioneered about coercive circumstances and the politics of female subordination, which may render consent meaningless, and simply an alibi for abuse. It is also beginning to move international criminal law away from male-centered definitions of rape that are all about penetration and enumeration of body parts. Let us hope that the International Criminal Court will carry this jurisprudence forward, a hope that is more likely to be realized with Catharine as the Prosecutor’s Special Gender Adviser and with the brilliant Gambian international lawyer Fatou Bensouda as its current Deputy Prosecutor. As Catharine wrote, “Akayesu’s legs are only beginning to walk all over the world,” and this is true of her own work as well, and of the glimmer of that work in Akayesu itself.

In another example of how international law has not recognized that being a woman is a fully equal way of being human, the Genocide Convention, while importantly prohibiting various forms of the most heinous, purposive, decimating violence against certain protected human groups — national, ethnical, racial, or religious groups — does not include sex as one of those enumerated groups. In other words, women qua women are not a protected group under the Genocide Convention. Moreover, rape is not one of the explicitly enumerated acts constituting genocide, though these do include a general category of “[c]ausing serious bodily or mental harm to members of the group,” which can be interpreted to cover it.

At the time the 1948 Genocide Convention was written, it did not occur to the drafters to think of women as a human category in the same way, or at least as one worthy of specific mention. Perhaps this was because, to borrow from MacKinnon again, their targeting is so often invisible precisely because it is so pervasive. This is so much

59. Id.
62. Id. at 219-20.
63. Id. at 220.
64. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045. According to the Convention, “genocide means a list of prohibited atrocities like killings committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Id. at art. II.
65. Id. at art. II(b). The other enumerated acts include killings, inflicting conditions of life calculated to destroy the group, preventing births, and forcibly transferring children to another group. Id. at art. II.
the case that we have almost no post-World War II jurisprudence about the ghastly rapes that were also a core part of the Holocaust or about the systematic sexual enslavement of the so-called comfort women across Asia by the Japanese military in the same time period.\textsuperscript{66} In remarks to the 1997 Hague Joint Conference, MacKinnon noted that there is no international crime of what Andrea Dworkin calls ‘gynocide’ or what Diana Russell and others call ‘femicide’— terms that point to the destruction of women as women, as a group or as members of a group. As one consequence of this absence, the sex-specific destruction of women, including in genocide, is largely ignored in international law.\textsuperscript{67} MacKinnon’s argument that rape can constitute a form of genocide is an attempt to rectify those terrible omissions and also a reminder that women are as constitutive of the other kinds of protected human groups — racial, ethnical, religious — as men, not an add on. She describes rape as genocide as “the rape of misogyny liberated by xenophobia and unleashed by official command.”\textsuperscript{68} The highly successful civil suit MacKinnon brought against Bosnian Serb leader Radovan Karadzic on behalf of Bosnian Muslim and Croat survivors of mass rape established sexual acts of violence against women as legally genocidal under international law for the first time.\textsuperscript{69} This preceded the landmark ICTR case \textit{Akayesu} in which one can see the influence of the \textit{Kadic} case when the court recognizes rape and sexual atrocities against Tutsi women as genocidal.\textsuperscript{70} This jurisprudence she conceived and unleashed is, at its core, an affirmation of the notion that being a woman is a way of being human and a way of being human whose existence is as deserving of protection from extinction.

Moving beyond the realm of jurisprudence, I should say here that I am deeply grateful to Catharine MacKinnon for her rage, the measured and supremely eloquent rage that echoes in every letter she sometimes seems to have hammered out in angry typing on the page to describe the myriad, creative ways that women’s lives are destroyed because they are not deemed human. To give but one example from \textit{Women’s September 11th}, her outrage oozes out of each carefully chosen word of sentences like this these:

The battle of the sexes simply does not look the way a war is supposed to look . . . .
Women get no quarter; surrender means more force. Because so much violence against women takes place in what is called peacetime, its atrocities do not count as war crimes unless a war among men is going on at the same time.\textsuperscript{71}

I find her tone so important as in the human rights world, over time, we learn to speak of horror clinically or even matter-of-factly, and at some point the ghastliness is lost.

\begin{itemize}
\item \textsuperscript{66} See \textsc{Kelly Dawn Askin}, \textit{War Crimes Against Women: Prosecution in International War Crimes Tribunals} 73-74, 97 (1997). For documentation of these two sets of atrocities and interpretation of their relationship to the broader horrors of that war-time context, see MacKinnon, \textit{Genocide’s Sexuality}, supra note 6, at 327-28.
\item \textsuperscript{68} \textsc{MacKinnon}, \textit{supra} note 8, at 145.
\item \textsuperscript{69} \textsc{Kadic v. Karadzic}, 70 F.3d 232 (2d Cir. 1996). For a discussion of the case’s impact on alien tort statute jurisprudence, see \textsc{Peter Henner}, \textit{Human Rights and the Alien Tort Statute: Law, History and Analysis} 7 (2009).
\item \textsuperscript{70} See Prosecutor v. \textit{Akayesu}, Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf; \textsc{Kadic}, 70 F.3d. 323.
\item \textsuperscript{71} \textsc{MacKinnon}, \textit{Women’s September 11th}, \textit{supra} note 6, at 5-6.
\end{itemize}
I admire the fact that MacKinnon does not pull any punches, even when it may be politically correct to do so. For example, she reminds our post-modernist friends that “defenses of local difference . . . are often simply a defense of male power in its local guise.”72 She goes on to say that “[w]hat postmodernism gives us . . . is a multicultural defense for male violence.”73 MacKinnon’s obvious indignation at this is crucial in a world where sophisticated academics can still worry about whether or not it is cultural imperialism to support women across Africa74 and beyond who are campaigning against the destruction of their own genitalia through female genital mutilation (“FGM”).75 It would seem that the real imperialism is to be found instead in the practice of those who define culture76 in terms of the cutting off of a clitoris, the excision of a labia, or the sewing up of a vaginal opening; the relegation of millions to infection, fistula, and higher risk of HIV;77 dangerous and horrific childbirth; and inherently painful intercourse.

I am grateful for her rage in a world where the United Nations Human Rights Council (the Human Rights Council!) has in the last year passed — at the instigation of Russia — a resolution extolling the virtues of “traditional values” which apparently all societies share though the resolution does not specify what they are.78 In the same year, at the urging of the Organization of the Islamic Conference, the same Human Rights

72. Catharine A. MacKinnon, Postmodernism and Human Rights, in ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES, supra note 8, at 3.
73. Id. at 54.
74. See, e.g., EFUA DORKENO, FEMALE GENITAL MUTILATION: POLITICS AND PREVENTION (2007). See also Muslim Women: Past and Present, WISE MUSLIM WOMEN, http://www.wisemuslimwomen.org/muslimwomen/bio/djingarey_maiga/ (last visited Apr. 11, 2011) (describing the work of human rights defender Djingarey Maiga). Some African men are also campaigning in important ways against FGM. See, e.g., No to FGM: A Song from Kenya, YouTube (Aug. 21, 2010), http://www.youtube.com/watch?v=uj_Bzo6v9ZI (2010). There is no question that FGM can be discussed in ways that are sensationalizing, racist, and unhelpful. But there are stances that are neither apology nor hegemony — that is precisely what universal human rights discourse and practice are supposed to be about. It is those stances, which reject both relativism and racism, which can offer the most concrete solidarity to advocates like these.
75. Of course, the foundational expression of this worry was found in Isabelle R. Gunning, Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189 (1992). The “world-travelling” approach favors deference to what may be deemed “culturally challenging practices in an ‘other’s’ culture,” like female genital mutilation. Id. at 194.
76. Note the powerful slogan of the Global Campaign to Stop Violence Against Women in the Name of Culture: “Violence is not our culture.” See Violence Is Not Our Culture: The Global Campaign to Stop Violence Against Women in the Name of Culture, VIOLENCEISNOTOURCULTURE.ORG, http://www.violenceisnotourculture.org/ (last visited Apr. 11, 2011). This campaign is carried out by an international network of women’s human rights defenders from many countries, especially from Muslim majority countries in Asia and Africa, who “demand[] an end to violence against women justified in the name of ‘culture,’ ‘religion’ or ‘tradition.’” Id.
77. On the medical consequences of FGM, see Martin Donohoe, Female Genital Cutting: Epidemiology, Consequences, and Female Empowerment as a Means of Cultural Change, MEDSCAPE (Nov. 11, 2006), http://www.medscape.com/viewarticle/546497.
Council passed another resolution condemning “defamation of religion” without actually saying what that is.  


A similar debate played out in 2010 after Amnesty International suspended the head of its gender unit, Indian feminist Gita Sahgal, after she publicly criticized the organization for its overly close relationship to a British Muslim former Guantánamo detainee Moazzam Begg. Begg had indeed been victimized by the U.S. government, but had his own nasty track record of running an extremist bookshop and frequenting jihadi training camps. He was invited to keynote Amnesty International conferences, to judge children’s poetry readings, and to visit 10 Downing Street with representatives of the organization, all while describing himself as “leftwing on equality and conservative on family values.” (Imagine if he said he was leftwing on equality but conservative on race relations.) When Gita Sahgal went public with her concerns about this relationship (while defending the organization’s work on Begg’s behalf whilst he was in detention), several of South Asia’s leading women’s human rights defenders wrote an open letter to Amnesty International in support of Sahgal. It became a global petition and was signed by several thousand people around the world. Global Petition to Amnesty International: Restoring the Integrity of Human Rights, HUMAN RIGHTS FOR ALL (Feb. 13, 2010), http://www.human-rights-for-all.org/spip.php?article15. The petition’s originators were then critiqued by British journalist Victoria Brittain, who co-authored Begg’s book about his detention. See, e.g., Victoria Brittain, Dangerous Game: A Reply to Gita Sahgal and Her Supporters, OPEN DEMOCRACY (June 30, 2010), http://www.opendemocracy.net/victoria-brittain/dangerous-game-reply-to-gita-sahgal-and-her-supporters. The most delightful part of Britain’s piece comes when she lectures the signatories of the global petition (some of whom live in places like Algeria, Bangladesh, and Pakistan, or are originally from Iran, while the initiators of the petition are all from and living in South Asia) that they should be working on real abuses like those committed by the U.K. government in the “War on Terror,” rather than worrying about relatively trivial matters like fundamentalism or women’s rights. “The only good outcome from this whole unnecessary saga would be a new focus on what those petition signers, so keen to support human rights, can do about the on-going excesses of the war on terror.” Id. Are these alternatives between which one must somehow choose?

WHY DOES IT MATTER IF WOMEN ARE HUMAN?

unencumbered by the burqa as they shopped for Eid gifts. There had been a terribly high rate of injury during the period the burqa was imposed on women unused to wearing it. When men too are expected to walk around in opaque shrouds that inhibit breathing, seeing, and keeping yourself from falling over, we will know that women are human. These same academics who are so enamored of veils are there to tell us also that the Muslim fundamentalists who seek to impose ever more “modest” garments are in fact the authentic voices of the downtrodden — never mind those upon whom they trod. The Taliban are now touted as potential partners as long as they do not engage in terrorism against America, never mind the Afghan women they would systematically enslave.

The identity politics of all of this are fraught. It is still true, as Catharine noted back in 1991 in From Practice to Theory: Or What Is a White Woman Anyway?, that the recurring trope is to denounce almost anyone who raises these kinds of questions as either a White Western Woman (meaning someone unreliable, alienated, or who just does not understand) or a dupe of White Western Women. We are too often told that our only choices are accepting Western imperialism or local, and of course “authentic,” misogyny. To deal with these sorts of charges, I often tell the story of my father who came from an Algerian Muslim peasant family and was imprisoned and tortured by the French colonial military in the 1950s during Algeria’s national liberation struggle. He wrote that in prison he came to think about the situation of women, for his own powerless condition came to resemble that of women in his society though they were not formally detainees.

I think I should be telling my Aunt Zohra’s story too. My father’s beloved elder sister Zohra died at the hands of her husband’s family under circumstances that were never clear and for which there was never any accounting. My father never got over this atrocity — it was perhaps even harder to bear than the horrible deaths of his two brothers at the hands of the French military, because this martyrdom was not even spoken about. Hence, I utterly reject the notion that we have to choose only to oppose imperialism or sexism, or that we should tolerate one hegemony because of another. In his last revolutionary act, my father openly dedicated his final book, Les Algériennes: Victimes d’une Société Néopatriarcale (which was on the situation of women in Algeria and

82. See, for example, the accounts of Pakistani women from the Swat valley who suffered injuries due to obstructed vision during the imposition of the burqa by the Pakistani Taliban. These women expressed joy at being able to remove the garment and shop freely for Eid gifts following the government’s offensive against the Taliban. See, e.g., Sabrina Tavernise, New Wardrobe Brings Freedom to Women in Swat, N.Y. TIMES, Sept. 23, 2009, at A13, available at http://www.nytimes.com/2009/09/23/world/asia/23burqa.html.

83. In August 2010, Time magazine featured a devastating picture of an Afghan woman on its cover whose nose had been cut off on orders from the Taliban after she fled abusive in-laws. Aryn Baker, What Happens If We Leave Afghanistan, Time, Aug. 9, 2010, at cover page. Much of what passed for progressive commentary in the U.S. was primarily concerned with whether or not this image was being used to justify U.S. military action in Afghanistan and whether or not there is similar violence elsewhere. See, e.g., Kavita N. Ramdas, Violence Against Women Is no Rationale for Military Violence, HUFFINGTONPOST (Aug. 3, 2010), http://www.huffingtonpost.com/kavita-n-ramdas/violence-against-women-is_no_rationale_for_military-violence-b_672387.html. While these are both legitimate concerns, it was notable how little response there was to the specific grim reality that picture illustrated — that Afghanistan is today plagued by an armed group seeking power that not only wants to (and has) practiced gender apartheid but will mutilate women to enforce that apartheid. The fact that the U.S. army happens to be fighting against that armed group does not mitigate this harm and does not justify attempts to minimize it. In such an environment, I am again grateful for Catharine’s utter lack of equivocation, for her “feminism unmodified.”

84. MacKinnon, supra note 1, at 18-20.
Since then, I have often wondered what my Aunt Zohra looked like for there is no single picture of her that survives. I grieve that the record of her existence is now only in my dad’s angry inscription. But as I wrote this lecture, I realized that she lives on in Catharine’s work too; in Catharine’s rage and clarity, in her commitment to the idea that the history of all the forgotten Zohra Bennounes, wherever they lived and whichever culture or tradition was used as the excuse for their misery, must be remembered and that none of our other sisters should be left to meet such a fate whether the prisons in which they are confined are formal or not. Zohra Bennoune lives on in Catharine’s basic conviction that women are human, and that the ways that they suffer are inhuman, and that she will not stop writing and militating until these simple truths are actually universally recognized and their implications effectively addressed. Because Catharine, more than almost any scholar I can think of, understands the truth of a quote I often cited back during my Gulf War activist days when I first met her. It is from Palestinian filmmaker Mai Masri’s film about the brutal 1982 Israeli invasion of Lebanon. The words also apply to my Aunt Zohra and to the myriad women who have perished because they were women, those ghost-women who haunt Catharine’s every eloquent and angry page: “The dead do not sleep. They are watching us, lest we should sleep.”