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DECOLONIZING THE CORPUS: A QUEER DECOLONIAL RE-EXAMINATION OF GENDER IN INTERNATIONAL LAW'S ORIGINS

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ABSTRACT

This article builds upon queer feminist and decolonial/TWAIL interventions into the history of international law, questioning the dominant discourses about gender and sexual victimhood in the laws of armed conflict. In Part One, I examine how early European international law writers (re)produced binary and hierarchical ideas about gender in influential legal texts, discursively creating a world in which wartime violence only featured men and women in strictly defined roles (a construction which continues to influence the practice of law today). In Part Two, I decenter these dominant discourses by looking outside Europe, questioning what a truly "international" law would look like if non-Western ideas about gender diversity and hierarchy had instead been allowed to contribute to its development. I demonstrate how gender diversity was the norm, not the exception, for multiple Indigenous and non-Western communities prior to colonization, drawing new connections between gendered oppression, colonial violence, and the continued practice of international law. This analysis provides an important bridge between queer and TWAIL critiques of international law, challenging lawyers and academics to think beyond mainstream ideas about binary gender when considering gender-based violence.

INTRODUCTION

The Rome Statute of the International Criminal Court ("ICC"), adopted in 1998 and now ratified by 123 states, defines gender as "the two sexes,

* PhD Candidate, London School of Economics. JD, Cornell Law School. I am grateful for the advice of many friends who read earlier drafts of this article, and particularly Drs. Sandra Duffy, Sabiha Allouche, and Sinja Graf who volunteered their time as discussants during three separate Zoom workshops. Thank you also to the wonderful staff of the Michigan Journal of International Law who put so much time and energy into revising this article.

male and female, within the context of society."[1] Such a definition problematically excludes the millions of intersex, transgender, non-binary, third-gender, gender-diverse, and otherwise queer individuals who do not fit neatly into "the two sexes, male and female."[2] The definition's language about gender "within the context of society" is also ambiguous,[3] creating additional questions about which societal context the ICC should use, who gets to decide about gender within a particular societal context, or why (if there are only two gender options) it would even matter which context was chosen!

How did such an enigmatic definition end up in the Rome Statute? Feminist international law experts have pointed to opposition from conservative states like the Holy See, which resisted the inclusion of gender in early drafts of the treaty.[4] A small number of fringe anti-feminist civil society groups similarly sought to block the inclusion of gender in the Rome Statute, warning that feminists, homosexuals, and other radicals were attempting to force social change by weaponizing international law.[5] Only after significant debate did feminist activists reach a compromise with these various conservative actors, with feminists successfully advocating for the

1. Rome Statute of the International Criminal Court art. 7(3), July 17, 1998, 2187 U.N.T.S. 3.

2. In this article I generally use the umbrella term "gender-diverse" to refer to people outside the gender binary; I discuss the problems with that (or any) label below. *See infra* note 133. "Gender" generally refers to the socially-constructed values assigned to ideas of sex in a particular cultural or societal context, whereas "sex" usually refers to socially-constructed categories regarding biological features like chromosomes, hormones, and morphology. Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, *in* TRANSGENDER RIGHTS 51–52 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006); *see also* Dianne Otto, *International Human Rights Law: Towards Rethinking Sex /Gender Dualism*, *in* THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 197, 198–204 (Margaret Davies & Vanessa E. Munro eds., 2013). Of course, there is significant overlap between sex, sexuality, and gender, and throughout this article I sometimes use the ideas interchangeably. *See* Sylvia Tamale, *Researching and Theorising Sexualities in Africa*, *in* AFRICAN SEXUALITIES: A READER 11 (Sylvia Tamale ed., 2011) ("Sexuality and gender go hand in hand; both are creatures of culture and society, and both play a central and crucial role in maintaining power relations in our societies. They give each other shape and any scientific enquiry of the former immediately invokes the latter. Hence, gender provides the critical analytical lens through which any data on sexuality must logically be interpreted. Things that impact gender relations, for instance history, class, age, religion, race, ethnicity, culture, locality and disability, also influence the sexual lives of men and women. In other words, sexuality is deeply embedded in the meanings and interpretations of gender systems.").

3. Tanja Altunjan, *The International Criminal Court and Sexual Violence: Between Aspirations and Reality*, 22 GERM. L.J. 878, 883 (2021).

4. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 335 (2000).

5. MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT 86–87 (2006).

addition of the phrase "in the context of society" after "the two sexes, male and female," creating the ambiguous definition that remains today.[6]

This historical moment, however, did not occur in isolation; rather, the debates and discourse used by the authors of the Rome Statute were grounded in a long European legal tradition of understanding gender as both binary (only men and women) and hierarchical (men as more important than women).[7] This tradition, in addition to being sexist against women and violently inaccurate for individuals outside the gender binary, has a particular history of being imposed upon the rest of the world through colonization and imperialism.[8] In other words, I argue that the feminist and anti-feminist lawyers who worked on the Rome Statute were not creating new legal categories out of thin air, but rather reproducing and reimposing a particular social reality that has been present in European ideas about gender and international law for hundreds of years.[9] Recognizing this discursive genealogy draws attention to the fact that the concept of binary and hierarchical gender (that is, the idea that "won" during the drafting of the Rome Statute) is not predetermined or universal, especially since many societies throughout human history have understood gender, sex, and sexuality as multi-faceted, fluid, and/or non-determinative of social hierarchy.[10]

In this article, I write a "history of the present"[11] about gender and international law, looking back at the historical conditions and discursive

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6. Valerie Oosterveld, *Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court*, 16 INT'L FEMINIST J. POL. 563, 564–68 (2014).

7. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 12 (2006) ("We don't choose to use the concepts of international law when we enter international legal discourse. Rather, we must take the preexisting language, a pre-existing system of interpreting the world and move within it if we wish to be heard and understood.").

8. *See* Liliana Obregón, *The Civilized and the Uncivilized*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 917, 919–20 (Bardo Fassbender & Anne Peters eds., 2012); Nan Seuffert, *Queering International Law's Stories of Origin: Hospitality and Homophobia*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 213, 224–26 (Dianne Otto ed., 2017). *But see generally* LEAH DEVUN, THE SHAPE OF SEX: NONBINARY GENDER FROM GENESIS TO THE RENAISSANCE (2021) (discussing how medieval Europeans understood and condemned intersex and non-binary identities).

9. *See also* Ratna Kapur, *Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India*, 14 MELB. J. INT'L L. 317, 320 (2013) ("[T]he stability of gender, and of gender categories based on the binary of male and female, has been an integral feature of international law ('IL') and has been maintained partly through an overwhelming focus on violence against women by states as well as non-state actors.").

10. *See infra* notes 129–74 and accompanying text.

11. David Garland, *What Is a "History of the Present"? On Foucault's Genealogies and Their Critical Preconditions*, 16 PUNISHMENT & SOC'Y 365, 373, 379 (2014). Patrick Thaddeus Jackson classifies approaches like this one as "reflexivist," arguing that the goal is not to make "falsifiable point-predictions about future events." PATRICK THADDEUS JACKSON, THE CONDUCT OF INQUIRY IN INTERNATIONAL RELATIONS 160 (2011). Instead, "[r]eflexivist scholarship is always historical, but in a specific sense: rather than simply re-

frameworks which allowed for the Rome Statute debate about gender to occur. I begin in Part I by focusing on the foundational corpus of European legal texts dating from roughly 1300 to 1800 which are commonly cited as the origins of international law.[12] These "teachings of the most highly qualified publicists"[13] have been tremendously influential in the creation of public international law and continue to be cited in international court judgments, academic commentaries, and classrooms around the world.[14] What often goes unrecognized in this citational practice, however, is the fact that these influential writers (all European men) were themselves simply (re)producing common discourse in Europe through their writing and declaring such rules to be universally binding upon all of humanity.[15] I build upon these ideas in Part II by drawing upon histories of global gender diversity as well as queer, feminist, and Indigenous/decolonial[16] critiques of in-

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cording what happens, reflexivists seek to bring to light an unfolding pattern that culminates in and clarifies the present." *Id.*

12. The limits of this "corpus" are difficult to ascertain, especially since not all international law writers from this period were aware of each other's work. MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300–1870 2–4 (2021). For the purposes of this paper, I have defined the "corpus" of texts using a number of sources, always seeking to identify texts which were considered authoritative or important by later generations of international law practitioners and academics in the 20th and 21st centuries. So, for example, the Oxford Handbook of the History of International Law lists a handful of key writers whose works I consulted. THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2012). Another list of "authoritative" works came from the Carnegie Institution of Washington, which published a "Classics of International Law" series in the early 20th century featuring some of the most accessible versions of these early texts. CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1950), http://www.lawbookexchange.com/carnegie.php. There were, of course, limits to what texts I could read or physically access (many texts remain in Latin or are otherwise not available in English as PDFs), but my focus on texts believed to be "authoritative" today was complemented by the fact that "authoritative" texts are the ones most likely to be available to a wider readership. *See* LENE HANSEN, SECURITY AS PRACTICE: DISCOURSE ANALYSIS AND THE BOSNIAN WAR 73–78 (2006) (discussing text selection strategies).

13. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

14. Sondre Torp Helmersen, *Finding 'The Most Highly Qualified Publicists': Lessons from the International Court of Justice*, 30 EUR. J. INT'L L. 509, 512, 534 (2019); *see also* Helen M. Kinsella, *Gendering Grotius: Sex and Sex Difference in the Laws of War*, 34 POL. THEORY 161, 167, 180–84 (2006) (connecting the work of Hugo Grotius to various treaties in the 20th century).

15. *See* Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 RECHTSGESCHICHTE 152, 154–55 (2011). Throughout this article I add parentheses to words like "(re)producing" to emphasize the fact that discourse both manifests and constructs social realities. For greater discussion on this poststructural writing practice, see LAURA J. SHEPHERD, GENDER, VIOLENCE & SECURITY: DISCOURSE AS PRACTICE 24–26 (2008).

16. "Indigenous" is a broad term, encompassing a vast array of non-Western societies with diverse views of sexuality/gender, relationships to settler-colonist forces, and claims to legal and moral legitimacy. *See* Taiaiake Alfred & Jeff Corntassel, *Being Indigenous: Resur-*

ternational law to ask: What would have happened if non-Western communities had been afforded equal footing to write the rules of international law? How would that have affected how lawyers and academics understand gender in international law*?* And what do these different ideas about gender tell us about the current practice of international legal scholarship?[17]

These kinds of questions have provided important entry points for scholars on the fringes of mainstream discourse to intervene and decenter dominant narratives about law and history.[18] Queer researchers, for example, have worked to reimagine the conditions of international politics by asking what would have happened if conditions had turned out differently.[19] Instead of simply reinterpreting existing treaty language or adding additional gender identities to mainstream frameworks, these "what if" questions engage in a radical reimagining of law's origins from "a more fluid, non-binarised and multitudinous" historical perspective.[20] This article thus draws upon the work of queer and feminist legal historians who examine gender as a site of power affecting how laws are drafted, enforced, and (re)interpreted.[21] By asserting that ideas about gender, sex, and sexuality are

gences against Contemporary Colonialism, 40 GOV'T & OPPOSITION 597, 597, 599 (2005). Indigenous approaches to research assert the contingent nature of historical narratives, understanding the writing of history as a series of inclusions/erasures by hegemonic powers. LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 30–33 (1999). Decolonial perspectives, including the work of scholars from the Third World Approaches to International Law ("TWAIL") movement, also seek to deconstruct how law reproduces a "racialized hierarchy of international norms and institutions." Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L PROC. 31, 31 (2000). For a more thorough discussion of the relationship between TWAIL and Indigenous critiques of international law, see Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT'L L. 131, 150–159 (2012).

17. In addition to the queer and decolonial approaches I discuss below, this kind of counterfactual approach has seen increased use in other branches of critical scholarship. *See* Mala Loth, *It Could Have Been Worse*, Völkerrechtsblog (July 17, 2018), https://voelkerrechtsblog.org/de/it-could-have-been-worse/ (collecting examples).

18. *See, e.g.*, Hilary Charlesworth, *Law-Making and Sources*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 187–88 (James Crawford & Martti Koskenniemi eds., 2012); *see also* Kim Anderson, *Multi-Generational Indigenous Feminisms: From F Word to What IFs*, *in* ROUTLEDGE HANDBOOK OF CRITICAL INDIGENOUS STUDIES 37–38 (Brendan Hokowhitu, Aileen Moreton-Robinson, Linda Tuhiwai Smith, Chris Andersen & Steve Larkin eds., 2021) (asking "what if" questions while discussing the evolution of Indigenous feminism).

19. *See, e.g.*, Catherine Charrett, *Diplomacy in Drag and Queer IR Art: Reflections on the Performance, 'Sipping Toffee with Hamas in Brussels'*, 45 REV. INT'L. STUD. 280, 293 (2019).

20. Kathryn McNeilly, *Sex/Gender is Fluid, What Now for Feminism and International Human Rights Law? A Call to Queer the Foundations*, *in* RESEARCH HANDBOOK ON FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW 430, 436–437 (Susan Harris Rimmer & Kate Ogg eds., 2019).

21. *See* Maria Drakopoulou, *Feminist Historiography of Law: An Exposition and Proposition*, *in* THE OXFORD HANDBOOK OF LEGAL HISTORY 603, 610 (Markus D. Dubber & Christopher Tomlins eds., 2018).

not natural or universal but rather discursively (re)produced by human beings in a specific social and historical context,[22] queer feminist projects like mine "question the origins and effects of concepts and categories"[23] on empire, globalization, and the disciplining of societies.[24] These approaches also recognize the productive nature of law, since "[t]here is no natural subject who precedes representation in law"; rather, "legal texts and practices constitute the subjects of law, playing a particularly powerful role in the processes that (re)produce and naturalize dominant social norms and practices."[25]

My critique of international law's foundational corpus similarly draws upon the work of decolonial, Indigenous, and Third World Approaches to International Law ("TWAIL")[26] scholars who dispute the idea that there is one universal, totalizing historical narrative that can be known, told, and recorded without bias or interpretation.[27] Instead, by carefully questioning

22. Dianne Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, *in* INTERNATIONAL LAW AND ITS OTHERS 318–19 (Anne Orford ed., 2006); *see also* Emi Koyama, *The Transfeminist Manifesto*, *in* CATCHING A WAVE: RECLAIMING FEMINISM FOR THE 21ST CENTURY 244, 249 (Rory Dicker & Alison Piepmeier eds., 2016) ("Transfeminism holds that sex and gender are both socially constructed; furthermore, the distinction between sex and gender is artificially drawn as a matter of convenience. While the concept of gender as a social construct has proven to be a powerful tool in dismantling traditional attitudes toward women's capabilities, it left room for one to justify certain discriminatory policies or structures as having a biological basis. It also failed to address the realities of experiences for trans people, for whom biological sex is felt to be more artificial and changeable than their inner sense of who they are.").

23. Matt Brim & Amin Ghaziani, *Introduction: Queer Methods*, 44 WOMEN'S STUD. Q. 14, 16 (2016).

24. *See, e.g.*, David L. Eng, Jack Halberstam & Esteban Muñoz, *Introduction: What's Queer about Queer Studies Now?*, 23 SOC. TEXT 1, 2 (2005) (discussing how queer studies in international law address issues of empire and globalization); *see also* Dianne Otto, *"Taking a Break" from "Normal": Thinking Queer in the Context of International Law*, 101 AM. SOC'Y INT'L L. PROC. 119, 120 (2007 (noting how "international law provides a conduit for the micromanagement and disciplining of everyday lives"). For an example of this queer attention to discipline and sex, see, e.g., David Eichert, *Disciplinary Sodomy: Prison Rape, Police Brutality, and the Gendered Politics of Societal Control in the American Carceral System*, 105 CORNELL L. REV. 1775, 1777–92 (2020).

25. Otto, *supra* note 22, at 319–20.

26. Mutua, *supra* note 16, at 31; *see also* Giovanna Maria Frisso, *Third World Approaches to International Law: Feminists' Engagement with International Law and Decolonial Theory*, *in* RESEARCH HANDBOOK ON FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW 479, 488–98 (2019) (examining the relationship between TWAIL and feminist theory); E. Tendayi Achiume & Aslı Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 U.C.L.A. L. REV. 1386, 1388–90 (2021) (discussing the different kinds of scholarship under the TWAIL umbrella).

27. SMITH, *supra* note 16, at 30–33; Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 176–77 (2005); *see also* ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY 5–11 (2021) (critiquing the idea of an objective legal history that can escape political bias).

which stories get preserved, ignored, or erased, decolonial approaches to history attempt to deconstruct dominant historical narratives and examine the complex consequences of European colonization.[28] These "alternative visions of social relationships"[29] have presented powerful challenges to the mainstream Eurocentric history of international law: For instance, some scholars have demonstrated how communities outside of Europe developed "international laws" about war, asylum, the treatment of foreigners, the immunity of ambassadors, and even the use of the sea well before the imposition of European "international" law.[30] Others have argued against the self-proclaimed universal nature of international law, showing how many of international law's core tenants were specifically generated by Europeans[31] to further European imperial projects.[32] Similarly, decolonial scholars working on gender have described how many non-Western societies understood and continue to understand gender as dramatically different from what was imposed by European colonizers, with research often aimed at reviving pre-colonial ideas about gender,[33] challenging the dominance of mainstream Eu-

28. Qwo-Li Driskill, Chris Finley, Brian Joseph Gilley & Scott Lauria Morgensen, *Introduction*, *in* QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS AND LITERATURE 1, 5 (Qwo-Li Driskill, Chris Finley, Brian Joseph Gilley & Scott Lauria Morgensen eds., 2011); Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1034, 1037–38 (Bardo Fassbender & Anne Peters eds., 2012).

29. BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 10 (2003).

30. R. P. ANAND, INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES 2 (1987). TWAIL theory, and specifically TWAIL II theory, has moved beyond this kind of rediscovery /non-rejectionist approach to international law, and I acknowledge the significant nuance that I have excluded from this brief discussion of TWAIL scholarship. *See* Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 36 STUD. TRANSNAT'L LEGAL POL'Y 185, 186–95 (2004).

31. Frédéric Mégret, *From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"*, *in* INTERNATIONAL LAW AND ITS OTHERS 265, 270–71 (Anne Orford ed., 2006) ("Colonialism effectively defined the 'geography' of international law. . . . As late as 1945, while delegates assembled at Dumbarton Oaks in the wake of German capitulation to adopt the Charter of the United Nations, the French massacred tens of thousands of Algerians at Sétif under the pretence of 'maintaining order': for many, the Nuremberg trial, which was heralded as a turning point in the enforcement of the laws of war, would distinctly fail to introduce a new era.").

32. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 15 (2004). *See* Mohamed Bedjaoui, *Poverty of the International Order*, *in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 153 (R. Falk, F. Kratochwil, & S. Mendlovitz eds., 1985) ("[C]lassical international law thus consisted of a set of rules with a geographical bias (it was a European law), a religious-ethical aspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law).").

33. *See* Joanne Barker, *Introduction: Critically Sovereign*, *in* CRITICALLY SOVEREIGN: INDIGENOUS GENDER, SEXUALITY, AND FEMINIST STUDIES 1, 13 (Joanne Barker ed., 2017).

rocentric concepts,[34] and connecting gendered oppression to broader histories of conquest and settler colonialism.[35] Decolonial scholarship in all its forms is therefore motivated by the need to assert a counter-hegemonic political agenda, remaining suspicious of universal "truths" and re-examining history using a different set of tools and perspectives.[36]

In this article, I attempt to draw together these disparate strands of historical critique to produce a queer decolonial analysis of how ideas about gender have been (re)produced in the laws of armed conflict. Deconstructing this dominant binary idea of gender is crucial due to the ever-increasing attention (and donor money) being given to issues of gender-based violence in situations of armed conflict.[37] Despite the importance of such attention, however, "gender" is often only interpreted to mean "cisgender women," with the stereotypical discourse of "men as perpetrators, women as victims" dominating the practice of international criminal law.[38] While it is absolutely and incontrovertibly true that cisgender women experience tremendous sexual and gender-based violence during and outside of armed conflict, this mainstream discourse often sidelines or ignores cisgender and transgender men, transgender women, and people outside the gender binary who experience identical crimes.[39] As a result, practitioners of international law are often unequipped to respond to instances of sexual crimes committed against these victims, to say nothing of potential crimes committed by women or gender-diverse individuals.[40] My goal, therefore, is to shine a light onto the

34. This includes, for example, challenging mainstream white feminist and LGBTQIA+ discourse about identity and politics. Aniruddha Dutta & Raina Roy, *Decolonizing Transgender in India: Some Reflections*, 1 TSQ: TRANSGENDER STUD. Q. 320, 320–22 (2014); Mishuana R. Goeman & Jennifer Nez Denetdale, *Guest Editors' Introduction: Native Feminisms: Legacies, Interventions, and Indigenous Sovereignties*, 24 WÍČAZO ŠA REV. 9, 10 (2009).

35. Sarah Hunt & Cindy Holmes, *Everyday Decolonization: Living a Decolonizing Queer Politics*, 19 J. LESBIAN STUD. 154, 156 (2015).

36. Oumar Ba, *Global Justice and Race*, INT'L POL. REV. 376 (2021); Mutua, *supra* note 16 at 35–38. As Audre Lorde famously phrased it, "[T]he master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change." AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 110–14 (2007).

37. *See* Sara Meger, *The Fetishization of Sexual Violence in International Security*, 60 INT'L STUD. Q. 149, 155 (2016).

38. Dubravka Žarkov, *The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media*, *in* VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE 69, 72 (Caroline O.N. Moser & Fiona C. Clark eds., 2001).

39. *E.g.,* David Eichert, *"Homosexualization" Revisited: An Audience-Focused Theorization of Wartime Male Sexual Violence*, 21 INT'L FEMINIST J. POL. 409, 421–26 (2019); Tamsin Phillipa Paige & Joanne Stagg, *Well-Intentioned but Missing the Point: The Australian Defence Force Approach to Addressing Conflict-Based Sexual Violence*, 29 GRIFFITH L. REV. 468, 470–74 (2020).

40. Anne-Marie de Brouwer & Laetitia Ruiz, *Male Victims and Female Perpetrators of Sexual Violence in Conflict*, *in* GENDER AND WAR 169, 190–93 (Solange Mouthaan & Olga

"extraordinary possibilities wiped out" by colonialism and question the ways in which gender can be understood as an oppressive, disciplinary, and /or emancipatory category in the hands of international lawyers and legal scholars.[41]

I. A HEGEMONIC HISTORY OF GENDER AND INTERNATIONAL LAW

International law's origins are European, or so goes the traditional narrative espoused by generations of (European) legal experts.[42] Mainstream histories of international law generally begin in antiquity (citing Sumer, Greece, and Rome) before jumping ahead to the School of Salamanca, the Protestant Reformation, the Peace of Westphalia, the consolidation of European public law in the nineteenth century, and the increased embrace of positivist sources of law.[43] Over time, this European "invention" of international law was imposed upon the rest of the world via colonization, with colocolonizers creating an exploitative binary of "civilized" Europeans ruling over the "uncivilized" nations of the world.[44] Such a racist hierarchy of nations and states meant that international law was "limited to the civilized and Christian people of Europe or to those of European origin,"[45] with "uncivilized" states like Persia, Siam, China, or Ethiopia (as well as less centrally-organized Indigenous groups throughout the world) being deemed as incapable of true participation in the Eurocentric international legal order.[46] This "messianic logic" of international law[47] thus sanctioned and encouraged violence against so-called "primitive" non-European peoples in order to bring them into conformity with European religious and societal norms,

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Jurasz eds., 2019); *see* KAREN ENGLE, THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW 11 (2020) (arguing that many cisgender women "actively participate in, are bystanders to, or benefit from nationalist, racist, and ethnic- and class-based politics and violence," rendering the mainstream binary understanding of victimhood problematic for describing the true nature of oppression).

41. AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM 43 (Joan Pinkham trans., 1972).

42. Martti Koskenniemi, *A History of International Law Histories*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 943, 944–45 (Bardo Fassbender & Anne Peters eds., 2012).

43. *Id.* at 944–45.

44. Obregón, *supra* note 8, at 918–20; *see* Neta C. Crawford, *Native Americans and the Making of International Society*, *in* THE GLOBALIZATION OF INTERNATIONAL SOCIETY 102, 109–12 (Tim Dunne & Christian Reus-Smit eds., 2017) (discussing how the practical concerns about colonization structured the development of international law).

45. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §11 (Richard Henry Dana Jr. ed., 8th ed. 1866).

46. ANAND, *supra* note 30, at 23–29; LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW: A TREATISE (VOL. 1 – PEACE) 33–35 (3rd ed. 1920).

47. Judith Grbich, *Secrets of the Fetish in International Law's Messianism*, *in* INTERNATIONAL LAW AND ITS OTHERS 197, 197 (Anne Orford ed., 2006).

including norms about gender.[48] While this civilized/uncivilized binary of nations is no longer openly accepted by mainstream international lawyers, the frameworks it established nevertheless continue to define how international law is practiced and taught today.[49]

The origins of this legal regime are traditionally traced to the writings of a number of prominent male European theorists between roughly 1300 and 1800 whose treatises and commentaries were widely cited for generations.[50] These thinkers were notable for being among the first Europeans to conceive of the idea of a legal system that applied across political boundaries and could bring some kind of order to the bloody process of colonization.[51] Of course, the norms and rules recorded by these early writers were not universally accepted outside Europe; rather, their texts simply (re)produced discourses that were commonly accepted in Europe at the time, "drawing upon or citing previously-coded ideas" that were regarded by many Europeans as self-evident or unquestionable,[52] such as the reality of Biblical legend or the legal authority of the Pope.[53] Despite the narrow

48. ANGHIE, *supra* note 32, at 9, 23. *See generally* Marcelle Burns, *The "Natural" Law of Nations: Society and the Exclusion of First Nations as Subjects of International Law*, *in* INDIGENOUS PEOPLES AS SUBJECTS OF INTERNATIONAL LAW 38 (Irene Watson ed., 2018) (examining how Indigenous communities were disenfranchised in the work of Vitoria and Grotius).

49. ANGHIE, *supra* note 32, at 8; NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 4–5, 7–8 (2020).

50. *See* Koskenniemi, *supra* note 42, at 946–48. Of course, another project could start earlier, looking at how the wider medieval European context of gendered discourse was later translated into early international law commentaries. However, I join with many poststructuralists in asserting the impossibility of identifying the true origin of a discourse. Instead, all actors are situated within larger political and social spheres that form (and are simultaneously formed by) the discourse of those actors. As such, it would be an exercise in futility to attempt to travel back to the true origin of discourse, since discourse is always being reproduced and reformed. HANSEN, *supra* note 12, at 6; Jacob Torfing, *Discourse Theory: Achievements, Arguments, and Challenges*, *in* DISCOURSE THEORY IN EUROPEAN POLITICS: IDENTITY, POLICY AND GOVERNANCE 1, 14 (David Howarth & Jacob Torfing eds., 2005); *see* Kinsella, *supra* note 14, at 167–68 (conducting a genealogical analysis of Grotius' influence on international law, while also not asserting that Grotius, or any text, could be considered the sole origin of law).

51. Martin Kintzinger, *From the Late Middle Ages to the Peace of Westphalia*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 607, 621–24 (Bardo Fassbender & Anne Peters eds., 2012).

52. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 13 (1995). Other poststructuralists would point to the intertextual nature of these works, which constantly refer back to previous texts to create legitimacy, but also create those texts as important sources. HANSEN, *supra* note 12, at 49–52. Alternatively, Koskenniemi has called this process "bricolage," or cobbling together meaning from existing vocabularies. KOSKENNIEMI, *supra* note 12, at 2.

53. *See* FRANCISCO DE VITORIA, POLITICAL WRITINGS 320 (Anthony Pagden & Jeremy Lawrance eds., 1991) (citing Deuteronomy as evidence of proper conduct during war); *see also* KOSKENNIEMI, *supra* note 12, at 9 ("The frame within which a Spaniard or a Frenchman

regional nature of these texts, however, European conquest allowed these ideas to obtain a kind of mythical "international" universalism, to the point that many law curriculums and judgments today accept them as the unquestionable origin of international law.[54]

A. *Male Soldiers and Female Civilians*

One of the most "self-evident" ideas (re)produced in these early international law texts was the belief that gender is binary, with strictly defined characteristics attributed to men and women. This led to an almost exclusive textual focus on the actions of men, who were discursively presented as soldiers, diplomats, kings, subjects, and more; when women appeared, it was only as a footnote to the larger machinations of men.[55] Men were also considered to be hierarchically superior to women in every political and military domain: Francisco de Vitoria (1483-1546), for example, argued that women were unable to conduct war because of their gender.[56] Other prominent early writers, including Alberico Gentili (1552-1608) and Hugo Grotius (1583-1645), agreed with this "self-evident" assessment, (re)producing the idea that women were naturally unable to participate in warfare due to what Grotius regarded as a universal and predetermined lack of military skill.[57] These views carried through to the writings of later theorists, including Emer de Vattel's (1714-1767) famous treatise which argued that while "[no] person is naturally exempt from taking up arms in defence of the state," women were not included in this category of personhood due to their alleged inability to support the fatigues of war.[58]

Some theorists asserted other non-combat uses for women in war, although these were mostly negligible since "the mixture of both sexes in armies would be attended with too many inconveniences."[59] Both Pierino Belli (1502-1575) and Balthazar Ayala (1548–1584) condemned soldiers who brought their wives with them into war, with Ayala declaring "women

thinks of the law abroad comes from that person's training in Spain or France. What they imagine as 'law of nations' is what Spaniards or Frenchmen imagine as such.").

54. *See* Koskenniemi, *supra* note 15, at 153–55.

55. *See* OYÈRÓNKẸ́ OYĚWÙMÍ, THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES 6 (1997).

56. DE VITORIA, *supra* note 53, at 315. Earlier texts also endorsed this perspective, including the work of Giovanni da Legnano (1320-1383). GIOVANNI DA LEGNANO, DE BELLO, DE REPRESALIIS ET DE DUELLO 259 (Thomas Erskine Holland ed., 1917).

57. DE VITORIA, *supra* note 53, at 315; ALBERICO GENTILI, DE IURE BELLI LIBRI TRES 251 (John C. Rolfe trans., 1933); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1439–1443 (Richard Tuck & Jean Barbeyrac eds., 2005).

58. EMER DE VATTEL, THE LAW OF NATIONS 295 (Béla Kapossy, Richard Whatmore, & Thomas Nugent eds., 2008).

59. *Id.* at 295.

camp-followers" to be "a great disgrace and matter of severest reproach."[60] However, women did have some utility for men as diplomatic representatives: Samuel Rachel (1628-1691), for instance, pointed out that women could be given in marriage to strengthen alliances between nations.[61] In other rare cases, exceptional women could act as diplomats or envoys despite their alleged inferiority: Richard Zouche (1590-1661), for example, cited one episode from Roman history of a female envoy.[62] Cornelius van Bynkershoek (1673-1743) also agreed, stating,

> Surely reason does not prohibit women from serving as envoys . . . I do not, to be sure . . . consider women the equals of men in all respects, for I know that men and women have certain qualities peculiar to each, certain common to both. One would not with good success have women bear arms, for there is not to be found in women as often as in men the invincible courage that provides the greatest protection in time of war. The peculiar qualities of women are tenderness, mercy, pity, virtues which even in a most successful war are oftentimes dangerous. Men are peculiarly qualified for the application of vigour and force. However, on embassies one does not apply force, but rather intelligence, diligence, alertness, threats, and flattery, of which women are capable, sometimes even to a greater degree than men. Learning is, to be sure, a special honour of men, but who requires this of ambassadors?[63]

Of course, in addition to (re)producing a "natural" and "self-evident" binary between men and women, such a declaration was nevertheless steeped in sexism, with van Bynkershoek concluding that he was afraid of further complimenting women for fear of "encourag[ing] the vanity of women, a failing to which they are usually prone."[64]

Some of these early writers did recognize a woman's limited ability to engage in armed combat, although these comments focused largely on mythical stories of female warriors like the Amazons, whom Gentili believed still existed in parts of Ethiopia, or legendary commanders like Artemisia of Caria.[65] Ayala similarly recounted how the ancient Celts allowed women to join in peace negotiations because "at an earlier date, when a

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60. BALTHAZAR AYALA, DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III 174 (John Pawley Bate trans., 1912); PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS 211 (Herbert C. Nutting trans., 1936).

61. SAMUEL RACHEL, DISSERTATIONS ON THE LAW OF NATURE AND OF NATIONS 189 (John Pawley Bate trans., 1916).

62. RICHARD ZOUCHE, AN EXPOSITION OF FECIAL LAW AND PROCEDURE, OR OF LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME 92 (J. L. Brierly ed., 1911).

63. CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO 168 (Tenney Frank trans., 1930).

64. *Id.* at 168–69.

65. GENTILI, *supra* note 57, at 252.

grave and implacable discord had plunged them into civil war, their women flung themselves into the thick of the fight and settled all the disputes."[66] For the most part, however, these legendary stories of female combatants were the exceptions that justified the rule,[67] with de Vattel declaring, "Although there be some women who are equal to men in strength and courage, yet such instances are not usual; and rules must necessarily be general, and derived from the ordinary course of things."[68] Moreover, such acknowledgments were often internally inconsistent with blanket declarations made in the same texts that women were, as a whole, unfit for military service, further emphasizing the anomalous status of any mythical female soldier.[69]

B. *Male Perpetrators and Female Victims*

While these early writers asserted that women in general could not take up arms, they did acknowledge that women were very often victims of armed conflict. These discursive representations of women thus drew important contrasts between men and women:[70] for example, in Belli's treatise on the rules of war, men could be soldiers engaged in conquest and kidnapping, while women were the ones being kidnapped.[71] Of course, men were also sometimes represented as hostages or victims, but whereas men in these texts could be hostages, hostage-takers, bystanders, and more, women were singularly resigned to nothing more than the role of the victim.

Such a constructed binary and hierarchy between men and women was further emphasized by writers who debated whether wartime violence against women could be contrary to the Law of Nations. Gentili, for example, argued that the weakness of women meant that they should be wholly spared from violence, while Christian Wolff (1679-1754) declared that women, as subjects of a belligerent party, were valid military targets.[72] Ayala also differentiated between male and female victims in his text, citing an episode from the Bible where God commanded the Jews to "slay all ene-

66. AYALA, *supra* note 60, at 92.

67. This resonates with Laclau and Mouffe's argument that while discursive regimes strive toward closed, concrete meanings, such a fixity is impossible, and fringe countermeanings will always challenge the core meanings that are dominant in a particular context. At the same time, however, dominant discourses can adapt to incorporate challenging evidence without threatening the underlying discourse. *See* ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS 111–12 (2nd ed., 2001).

68. DE VATTEL, *supra* note 58, at 474.

69. *See* GENTILI, *supra* note 57, at 251.

70. *See* HANSEN, *supra* note 12, at 17–19 (discussing the poststructural idea of "logics of linking" and "logics of differentiation").

71. BELLI, *supra* note 60, at 80.

72. GENTILI, *supra* note 57 at 256; CHRISTIAN WOLFF, THE LAW OF NATIONS TREATED ACCORDING TO THE SCIENTIFIC METHOD 539 (Thomas Ahnert ed., Joseph H Drake trans., 2017).

mies who resisted," leaving only the women and children who were instead "to be taken as spoil and made slaves."[73] Grotius acknowledged a similar rule, quoting a different Biblical episode in which all Midianite women were slain except for the virgins, who were then distributed among the Israelite men; the virgins, Grotius suggests, were somehow more "innocent" or less deserving of death by virtue of their sexual inexperience.[74]

This discursive positioning of women as weak victims of war is perhaps best seen in early debates about wartime rape (or, "the violation of a woman's honour"),[75] where the concept of "rapeability" is assigned exclusively to women.[76] While all early writers agreed that wartime rape was violent and repugnant, they were divided on whether the wartime rape of women could be a violation of the Law of Nations.[77] Vitoria, for example, argued that it is sometimes necessary to "strike terror into the enemy or enflame the passions of soldiers," while also acknowledging that acts like "deflowering young girls" should only be allowed in the most necessary of circumstances.[78] Grotius disagreed, declaring that the Law of Nations forbade the "Ravishing of Women" among the most "civilized" and "Christian" nations.[79] Grotius also called for the punishment of soldiers who committed wartime sexual violence,[80] as did Wolff, who further emphasized that the rape of "honourable women" would be even more abhorrent than other forms of sexual violence against women.[81]

De Vattel, however, was less convinced of this argument, conceding that while officers should "exert their utmost efforts" to stop wartime rape, perhaps women were to blame for sexual assault, since "if the women wish

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73. AYALA, *supra* note 60, at 45.

74. GROTIUS, *supra* note 57, at 1441; *see* Kinsella, *supra* note 14, at 175.

75. GENTILI, *supra* note 57, at 95.

76. *See* Kapur, *supra* note 9, at 320.

77. It is vital to note that these prohibitions on wartime violence against women were not inspired by a woman's inherent right to bodily autonomy or dignity. Rather, they were motivated by a logic of property, in which violence against a woman would be an injury done to her husband or father. As such, this discourse reproduced and reinforced ideas about male supremacy, the centrality of the heterosexual order, and women's inherent inferiority. Kinsella, *supra* note 14, at 172.

78. DE VITORIA, *supra* note 53, at 323.

79. GROTIUS, *supra* note 57 at 1300–01. In another publication, Grotius condemns violence against women and children, citing an episode where the Portuguese attacked Dutch colonists in Indonesia and "searched with their swords both the wombs of pregnant women and bodies that were unquestionably innocent." HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 292 (Martine Julia van Ittersum ed., Gwladys L. Williams trans., 2006); *see also* Kinsella, *supra* note 14 at 171 (arguing that Grotius' work "is not at all concerned with the fate of women. It is foremost concerned with creating and regulating a particular hierarchy of relations among nations in accordance with the modalities (the divine, natural, and jus gentium) of law. Therefore, although it is tempting to also paint [Grotius] as defending women, such strokes are too sweeping.").

80. GROTIUS, *supra* note 57, at 1300.

81. WOLFF, *supra* note 72, at 425, 647.

to be spared altogether, they must confine themselves to the occupations peculiar to their own sex, and not meddle with those of men, by taking up arms."[82] A similar attitude was present in Belli's writing when he condemned sexual violence while simultaneously acknowledging "how few there are – even common and ordinary soldiers – who do not have an eye upon the mother or daughter of the family, plotting to defile her, and, though guests, leaving no stone left unturned until the thing is accomplished!"[83] Such language excuses the seeming inevitability of rape while simultaneously establishing men as uncontrollable rapists and women as seductresses or "meddlers" who are in some way responsible for the attacks. Additionally, these binary understandings of rape perpetration/victimhood further ignore other kinds of sexual crimes (for example, wartime sexual violence against men) which have been present throughout human history.[84]

Of course, some writers also outlined a specific case in which wartime rape was acceptable under the Law of Nations—when rape was meant to propagate the nation.[85] In particular, the rape of the Sabine women (an episode in Roman mythology where Roman men kidnapped women from a neighboring city) was referenced by multiple authors as a justification for, or at least an exception to the rule against, wartime sexual violence.[86] For example, de Vattel argued,

> A nation cannot preserve and perpetuate itself except by propagation. A nation of men has therefore a right to procure women, who are absolutely necessary to its preservation: and if its neighbours, who have a redundancy of females, refuse to give some of them in marriage to those men, the latter may justly have recourse to force. We have a famous example of this in the rape of the Sabine women.[87]

Samuel von Pufendorf (1632-1694) similarly noted that "many are willing to defend, or at least to excuse the famous Exploit of *Romulus*, the *Rape* of the *Sabine Women*," since "to live without the Assistance of the other Sex, is what the Frame and Temper of few Men can bear."[88] Women, therefore, were a tool for men to facilitate the biological reproduction of the state,

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82. DE VATTEL, *supra* note 58 at 549.

83. BELLI, *supra* note 60, at 178.

84. Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT'L L.J. 639, 640–48 (2015).

85. *See infra* notes 86–91 and accompanying text.

86. *See, e.g.,* GROTIUS, *supra* note 57, at 450–51 (citing Romulus while conducting a thought experiment about what would happen if a nation of only men needed to reproduce).

87. DE VATTEL, *supra* note 58, at 321.

88. SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS 200–01 (2nd ed., 1710).

since "[a] State made up of one Sex, can last but one Age."[89] Wolff went even further, arguing that the seizure of "maidens" could be a right and legal necessity because "a people cannot preserve itself without marriage."[90] Thus, in the same way that imminent famine could justify the seizure of another nation's grain, or imminent military invasion justify the seizure of another nation's ships, Wolff argued that the inability to propagate the nation could very well justify the kidnapping and rape of women.[91] In other words, emergencies could justify stealing another nation's property, with women discursively reduced to the same state of ownership as other objects.

C. *The Heterosexual Binary Order*

While not all writers went to quite the same lengths as Wolff,[92] the underlying heterosexual order envisioned by these kinds of comments nevertheless remained central to the worldview of early European international law writers. This is particularly evident in their interpretations of Biblical stories and Christian theology to espouse a divinely-sanctioned social order structured around the gender binary and hierarchy.[93] For these early writers, the Law of Nations had been ordained by God since the beginning of mankind and structured around hetero-patriarchal supremacy. For example, Zouche argued that the Law of Nations was simply the natural outcome of Biblical legend and genealogy:

> [The community between nations]… was at first the government of parents, which was derived from the procreation of children and propagation of families, and belonged absolutely to the "pater familias" . . . Later, when by the propagation of numerous descendants nations were formed, and power over their descendants belonged to the chiefs – (for under the names of parents are included grandfather, great-grandfather, and all generations of ascendants) –

89. *Id.* at 201.

90. WOLFF, *supra* note 72, at 251–52.

91. *Id.* at 250–52.

92. While most writers excused or agreed with the Rape of the Sabine Women, one writer, Johann Wolfgang Textor (1638-1701), specifically argued against the idea that such actions could be acceptable in a Christian international law. He argued that "just as no law compels an individual man and woman to marry each other apart from their consent, so also there is no compulsion on States to allow interstate marriages. . . . The Romans, therefore, in their rape of the Sabine virgins, acted wrongfully, whatever justice there may have been in Romulus' complaint that the refusal of the virgins in marriage was due to the haughtiness of their fathers. And the unions in question could not be classed as true marriages, at any rate before the virgins who had been so seized gave their assent." Such a consent-affirming declaration was however tempered later in the same treatise when Textor argued against giving diplomatic duties to women, calling them "naturally shifty, and fickle in judgment." JOHANN WOLFGANG TEXTOR, SYNOPSIS JURIS GENTIUM 27, 103 (Ludwig von Bar ed., John Pawley Bate trans., 1916).

93. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 10–12 (1996).

> it came to pass that government of this kind was diffused over whole nations; and hence, as in sacred literature those who are chiefs over several families are distinguished by the name of "patriarchs."[94]

The centrality of this heterosexual order was also (re)produced in other ways. Several writers devoted significant attention to how heterosexual marriages should be structured in a Christian Law of Nations, with Vitoria arguing that marriage's central goal should be the procreation of children.[95] Grotius similarly cited Christian theology when arguing that "[p]arents, both Father and Mother, acquire a Right over their Children; but if their Commands should run counter, the Father's Authority is to be preferred in Regard to the Dignity of the Sex."[96] This husbandly supremacy also extended to the battlefield: Belli, for example, wrote that male soldiers and diplomats who brought their wives along with them should be liable for any wrongs they might commit.[97]

It is important to note that, despite these discursive representations of a world in which gender only operated along binary and hierarchical lines, medieval and early modern Europeans would have actually been well acquainted with intersex, transgender, and gender-diverse people who frequently crossed gender lines in complex and nuanced ways.[98] One example of this (among many) would have been the widely-discussed case of Eleanor Rykener, an English sex worker arrested in 1394 whose gender transition from her previous life as "John" was recorded by a baffled London court.[99] Historians of Europe are continually uncovering stories like these, providing further evidence of the complicated genderqueer lives of many pre-modern Europeans.[100] The complete discursive absence of these people from the central corpus of international law texts therefore reveals how the writers often credited with "creating" international law were not unbiased in what they chose to include; rather, their work (re)produced a particular binary and hierarchical worldview motivated by the hetero-patriarchal values that predominated in European legal discourse at the time.

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94. ZOUCHE, *supra* note 62, at 4.

95. DE VITORIA, *supra* note 53, at 171–72.

96. GROTIUS, *supra* note 57, at 508–09.

97. BELLI, *supra* note 60, at 43, 211. Belli also understood the sexual control of women to be key to a military's proper functioning, encouraging the dismissal of any soldier who allows his wife to engage in sexual intercourse with another man. *Id.* at 246.

98. *See* DEVUN, *supra* note 8, at 5; Gabrielle Bychowski, *Were There Transgender People in the Middle Ages?*, THE PUBLIC MEDIEVALIST (Nov. 1, 2018), http://www.publicmedievalist.com/transgender-middle-ages.

99. Bychowski, *supra* note 98.

100. *See generally* Alicia Spencer-Hall & Blake Gutt, *Introduction*, *in* TRANS AND GENDERQUEER SUBJECTS IN MEDIEVAL HAGIOGRAPHY 11–15 (Alicia Spencer-Hall & Blake Gutt eds., 2021) (reflecting on how the modern category of "transgender" can be used to understand different gender norms and violations in medieval Europe).

In summary, a strict gender binary and hierarchy were central to the writings of these early international law theorists. Throughout their works, the categories of "man" and "woman" were constantly (re)produced by discursively linking and differentiating multiple binary qualities to create seemingly stable, biologically determined identities.[101] For instance, while women were represented as physically weak + victims of rape, men were represented as physically strong + perpetrators of rape. The following table displays a list of dichotomous qualities that were used to order the European hierarchical gender binary in these texts:

Women	Men
Physically weak	Physically strong
Incapable of military/diplomatic action	Capable of military/diplomatic action
Victims of rape	Perpetrators of rape
Tempting to men	Tempted by women
Able to propagate the nation	In need of women to propagate the nation
Subservient to fathers/husbands	Able to lead family
Property	Property owner
Tender and vain	Courageous and forceful

Of course, as I noted above, these binary and hierarchical collections of gendered ideas did not originate with writers like Vitoria or Grotius; rather, early theorizations of international law were purposeful reflections of "self-evident" ideas that were common throughout Christian Europe at the time.[102] Subsequent writers like Emer de Vattel then (re)produced and expanded upon this discourse in their later writings, creating a corpus of sources which heavily influenced later international legal thought about women and men.

D. *Citation and (Re)production in Later Writing*

These discursive representations of gender and victimhood remained salient over the next three centuries, with new lawyers citing earlier texts in a way which (re)produced a strict binary and hierarchical vision of gender in

101. *See* HANSEN, *supra* note 12, at 17–19 (discussing how processes of linking and differentiation reproduce identity); *see also* CYNTHIA WEBER, QUEER INTERNATIONAL RELATIONS: SOVEREIGNTY, SEXUALITY AND THE WILL TO KNOWLEDGE 194–95 (2016) (demonstrating how the sum of binary qualities is used to discursively constitute a particular identity category).

102. *See* Kintzinger, *supra* note 51, at 608.

treaties, state practice, and university lectures.[103] A future project of mine examines how this European gender binary was (re)produced in the international law of the nineteenth and twentieth centuries, but for the purposes of this article it is worth highlighting two key developments which perpetuated the ideas recorded by early international law writers.[104]

First, later texts about the laws of armed conflict (re)produced the patriarchal, heteronormative, and cissexist order of earlier thinkers by creating protections for "family rights" and the chaste "honour" of women, underscoring the fact that women were still largely considered to be the property of their fathers and husbands in nineteenth century Europe.[105] For example, the Lieber Code (written for troops during the American Civil War and later adapted by a number of European states) asserted the importance of protecting "religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations,"[106] while the Declaration of Brussels (1874) similarly called for parties to respect the "honour and rights of the family."[107] Similar language about the "honour" of women and the sacredness of the family would be reproduced in the Hague Conventions[108] and ultimately incorporated into the Geneva Conventions, enshrining an unequal and binary understanding of men as protectors of women's purity and of women as in need of protection from men.[109] Other nineteenth and twentieth century treaties, written almost

103. *See* NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 4–9 (1983). *See also* HANSEN, *supra* note 12, at 51 ("Rather than seeing new texts as depending on older, one should therefore see the two as interacting in an exchange where one text gains legitimacy from quoting and the other gains legitimacy from being quoted. This construction of an intertextual link produces mutual legitimacy and creates an exchange at the level of meaning. No quote or rendition of an original text is ever a complete reproduction of the original, and the meaning of original texts will therefore always be read and re-read through new texts. Even a direct quote is situated inside a new textual context, reconstructed by it, and meaning is therefore never seamlessly transmitted from one text to another.").

104. Manuscript on file with author.

105. TUBA INAL, LOOTING AND RAPE IN WARTIME: LAW AND CHANGE IN INTERNATIONAL RELATIONS 77–80 (2013); Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC J. HUM. RTS. 299, 302 (2015).

106. ADJUTANT GEN. OFF., GEN. ORDS. NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (LIEBER CODE) art. 37 (1863), https://ihl-databases.icrc.org/ihl/INTRO/110.

107. YOUGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 7–8 (1982). The Oxford Manual similarly encouraged soldiers to respect "female honour" and avoid "[i]nterference with family life." OXFORD MANUAL, THE LAWS OF WAR ON LAND (1880), https://ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument.

108. KHUSHALANI, *supra* note 107, at 9–10; *see also* Inal's excellent analysis of the debates and normative ideas which influenced the drafting of the Hague Conventions. INAL, *supra* note 104, at 63–91.

109. CHARLESWORTH & CHINKIN, *supra* note 4, at 314–15.

entirely by European men,[110] sought to "protect" women by forbidding them from certain kinds of employment or making it illegal for them to consent to sex work.[111] Notably, such masculine prohibitions were not motivated by a belief in the dignity and autonomy of women, but rather sought to perpetuate the rights and social standing of male family leaders that early writers like Vitoria had understood as central to the international order.[112] As queer feminist legal theorist Dianne Otto argues,

> There is a remarkable stability in the female subjects produced by these and other early legal instruments, who were valued for their chastity, their prioritization of motherhood and domesticity, their acceptance of the heterosexual family hierarchy and the paternal protection of the state, its law and its wars. In contradistinction, male figures were produced as women's defenders and moral superiors (apart from the racialized criminals who trafficked them) and the active, public, protecting masculine subject was fashioned as the marker of full humanity, autonomous and self-determining, and in no need of special rules for his protection.[113]

A second main development was the success of feminist international law interventions in the second half of the twentieth century. These feminist activists drew from the history of international criminal law, turning to writers like Gentili and Grotius for proof that wartime rape and other crimes against women had long been prohibited, or at least discouraged, by international law.[114] One consequence of this strategy, however, was a continued reliance on the binary understanding of gender that had ordered international law for centuries.[115] Moreover, while these feminist activists challenged

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110. *See* Immi Tallgren, *Absent or Invisible? "Women" Intellectuals and Professionals at the Dawn of a Discipline*, *in* THE DAWN OF A DISCIPLINE: INTERNATIONAL CRIMINAL JUSTICE AND ITS EARLY EXPONENTS 381, 389–91 (Frédéric Mégret & Immi Tallgren eds., 2020).

111. *See, e.g.,* International Convention for the Suppression of the Traffic in Women of Full Age art. 1, Oct. 11, 1933, 150 L.N.T.S. 431; Convention (No. 45) Concerning the Employment of Women on Underground Work in Mines of All Kinds, June 21, 1935, 40 U.N.T.S. 63; Convention (No. 89) Concerning Night Work of Women Employed in Industry (revised 1948), July 9, 1948, 81 U.N.T.S. 147. For excellent commentary on these treaties, see KAUFMAN HEVENER, *supra* note 103, at 9–12; Otto, *supra* note 22, at 324–25. For additional discussion of how the category of victimhood is constructed in debates about human trafficking, see David Eichert, *"It Ruined My Life": FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics*, 26 VA. J. SOC. POL'Y & L. 202, 209–16 (2020).

112. *See* Otto, *supra* note 105, at 302.

113. Otto, *supra* note 22, at 324–25.

114. *See, e.g.,* KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 26–31 (1997).

115. *See* Otto, *supra* note 105, at 302; *see also* RAJAGOPAL, *supra* note 29, at 10 (noting a "somewhat tragic reality that resistance must work, to some extent, within the parameters established by that which is being resisted. This has the constant danger of making resistance a cooptive/coopted enterprise.").

certain sexist ideas about women's inequality to men, some also pushed for a structural understanding of gender which (re)produced ideas about "women" being universally dominated and victimized by "men."[116] This understanding of gender in war perpetuated the idea that cisgender women were always innocent civilians and/or victims of gender-based violence who lacked any military or political role in armed conflict, essentially replicating many of the binary beliefs recorded by male writers centuries earlier.[117] This perpetuation of the gender binary and hierarchy by many international lawyers[118] was particularly problematic for women living in the "Third World," who were constructed as urgently needing masculine intervention from a Western regime of protective international law.[119] Such a discursive understanding of gendered victimhood has led to the tremendous institutionalization of a narrow carceral feminist narrative in international criminal law,[120] as well as the marginalization of victims who do not fall into such a binary and hierarchical worldview.[121]

II. RE-EXAMINING GENDER IN INTERNATIONAL LAW

Having properly centered Europe in the canon of international law (like any good legal academic), I now want to decenter the continent and ask: What if non-Western communities had been allowed equal footing to write the rules of international law instead? How would that affect how gender is understood and put into practice by lawyers and academics? What assumptions and self-evident ideas would be different if non-European societies had been the ones dictating the norms of international law? And what would it look like if "international" law had truly drawn from all corners of the

116. *See* Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 2–8 (2008).

117. ENGLE, *supra* note 40, at 10.

118. I do not mean to suggest here that feminist international law activists were solely responsible for perpetuating these ideas—notably, many diplomats and international law actors remain(ed) ambivalent or openly hostile to even the most incremental changes espoused by feminist activists. *See generally* Oosterveld, *supra* note 6 (examining one episode of hostility to feminist advances). Instead, a better explanation would be that few international law actors in the twentieth century were challenging the main "nodal point" of binary gender, so it remained as a partially fixed nodal point against which actors could contest other ideas. *See* LACLAU & MOUFFE, *supra* note 67, at 112. I explore this further in forthcoming publications.

119. Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 30 FEMINIST REV. 67, 67–68 (1988).

120. Heidi Matthews, *Redeeming Rape: Berlin 1945 and the Making of Modern International Criminal Law*, *in* THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS 90, 91–92 (Immi Tallgren & Thomas Skouteris eds., 2019).

121. Philipp Schulz & Heleen Touquet, *Queering Explanatory Frameworks for Wartime Sexual Violence against Men*, 96 INT'L AFFS. 1169, 1186 (2020) (discussing how binary framings of conflict-related sexual violence marginalize some survivors' perspectives).

planet?[122] Of course, my goal in asking these questions is not to provide any kind of clear answer or roadmap for an alternative version of international law. Rather, I intend for these questions to provoke further discussion about the self-evident and commonplace ideas that go unnoticed in many discussions about international law. The remainder of this article thus challenges academics writing about gender, law, and international politics to question many of the stable categories that structure the literature on the topic, with the goal of moving toward a more liberatory and non-binarized future.

Before beginning, however, I want to note that I myself am a queer white Westerner with no personal experience of colonial oppression,[123] and as such am always at risk of reproducing the faults of other white scholars who have exoticized, misinterpreted, and/or misappropriated Indigenous and non-Western concepts to fit into Western knowledge regimes.[124] I similarly worry here about mythologizing non-Western gender diversity or romanticizing an idyllic pre-colonial Indigenous world free from conflict, since pre-colonial societies often experienced war, internal divisions, and gendered violence.[125] At the same time, however, even as an outside ob-

122. To cite Sandberg, a counterfactual history "uses history subversively to question the past and to liberate the future of law. By exploring alternative realities – each hinged upon a plausible 'what if' . . . – greater light is shed not only on what might have been but also what actually happened." Russell Sandberg, *Counterfactual Legal History: Why Legal Scholars Should Enter the 'What If' Multiverse* (unpublished manuscript) (on file with author).

123. *See* Chris Finley, *Decolonizing the Queer Native Body (And Recovering the Native Bull-Dyke): Bringing "Sexy Back" and Out of Native Studies' Closet*, *in* QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS AND LITERATURE 31, 34 (Qwo-Li Driskill et al. eds., 2011) ("The logics [of sexuality and gender] governing Native bodies are the same logics governing non-Native people. Yet the logic of colonialism gives the colonizers power, while Native people are more adversely affected by these colonizing logics. The colonizers may feel bad, stressed, and repressed by self-disciplining logics of normalizing sexuality, but Native people are systematically targeted for death and erasure by these same discourses.").

124. Lina Sunseri, *Indigenous Voice Matters: Claiming our Space through Decolonising Research*, JUNCTURES: J. THEMATIC DIALOGUE 93, 95 (2007). This notably includes queer Westerners who have looked to Indigenous pre-colonial histories to "rediscover" or justify current Western queer debates about gender and sexuality. Evan B. Towle & Lynn M. Morgan, *Romancing the Transgender Native*, 8 GLQ: J. LESBIAN & GAY STUD. 469, 469–71 (2002). For an excellent discussion of the need for, and perils inherent to, this turn toward non-Western thought, see generally Robbie Shilliam, *The Perilous but Unavoidable Terrain of the Non-West*, *in* INTERNATIONAL RELATIONS AND NON-WESTERN THOUGHT: IMPERIALISM, COLONIALISM AND INVESTIGATIONS OF GLOBAL MODERNITY 12 (Robbie Shillam ed., 2011).

125. JOHANNA SCHMIDT, MIGRATING GENDERS: WESTERNISATION, MIGRATION, AND SAMOAN FA'AFAFINE 37–38 (2010). Towle and Morgan outline five flaws in Western academic approaches to studying Indigenous "third-gender" identities, which I have attempted to avoid in this article. These are (1) restricting third-gender identities to a "primordial location"; (2) reductively lumping all non-binary gender variations into one universal category; (3) glossing over differences in experience and the contentious ways in which gender variations are (re)created; (4) the inconsistent use of the anthropological "culture concept"; and (5) creating a binary in which third-gender identities are absent from the West. Towle & Morgan, *supra* note 124, at 477; *see also* RAHUL RAO, OUT OF TIME: THE QUEER POLITICS OF

server I can understand how centering non-Western perspectives reveals the contingent and artificial nature of Western cultural hegemony, especially for a field like international law which has been so painfully centered around Europe for centuries.[126] As such, in order to reveal the contingent nature of Western hegemony while also (hopefully) avoiding as many reductive problems as possible, I have attempted to be carefully reflexive in my analysis here, seeking to continuously contextualize and reassess my own perspective and biases as a white outsider who is choosing what to (re)produce or silence in this specific discursive project.[127] Whether I am successful in treading this line is of course left up to the reader, but I am indebted to the many scholars of color, Indigenous researchers, and TWAIL theorists whom I have cited here and whose perspectives have been central to this project.[128]

A. *Diverse Forms of Gender Diversity*

That said, what might be different if non-Western perspectives about gender had equal footing in the history of international law? Whereas Europeans were accustomed to a highly dichotomized legal reality in which men strictly dominated women and children, European colonists arriving in new

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POSTCOLONIALITY 33-34 (2020) (discussing the difficult task of navigating "between the Scylla of homonationalism and the Charybdis of homoromanticism" when trying to identify the source(s) of anti-queer discourse).

126. Goeman discusses the importance of distinguishing between "an additive or lip-service model of Indigenous feminist inclusion" in academic writing and the more powerful methodology, which I have attempted to do here, of using Indigenous perspectives in diverse academic fields to highlight ongoing settler violence and its reliance upon Western European ideas about sex, gender, and race. Mishuana Goeman, *Indigenous Interventions and Feminist Methods*, *in* SOURCES AND METHODS IN INDIGENOUS STUDIES 185, 192 (Chris Andersen & Jean M. O'Brien eds., 2017); *see also* Tamale, *supra* note 2, at 25–27 (discussing how to avoid "reinventing the wheel" when studying non-Western queer subjects, while also not improperly reproducing Western categories and perspectives). I feel even more like an outsider because of my International Relations/International Law disciplinary training, which makes me relatively unqualified to discuss or assess the quality of anthropological methods or ancient historical discoveries. I am also limited, of course, by the literature that is available in languages I speak, as well as the flawed ways in which non-European concepts have been translated into languages like English. I have attempted to cite rigorous and appropriate research here in Part II, but I of course apologize if my interpretations of non-Western cultures are incorrect or lack proper nuance.

127. PEREGRINE SCHWARTZ-SHEA & DVORA YANOW, INTERPRETIVE RESEARCH DESIGN: CONCEPTS AND PROCESSES 47 (2011). I also draw inspiration from Miranda's "indigenous reading" of queer histories and the need to affirm the lives and continued practice of vibrant Indigenous gender identities. Deborah A. Miranda, *Extermination of the Joyas: Gendercide in Spanish California*, 16 GLQ: J. LESBIAN & GAY STUD. 253, 254–56 (2010).

128. In particular I am inspired by Linda Tuhiwai Smith's questions for understanding the utility and benefit of Indigenous research: "Whose research is it? Who owns it? Whose interests does it serve? Who will benefit from it? Who has designed its questions and framed its scope? Who will carry it out? Who will write it up? How will its results be disseminated? . . . Is her spirit clear? Does he have a good heart? What other baggage are they carrying? Are they useful to us? Can they fix up our generator? Can they actually do anything?" TUHIWAI SMITH, *supra* note 16, at 10.

lands were frequently confronted with gender norms and practices that disgusted, baffled, and titillated them.[129] These settlers frequently wrote about the "deviant" gender practices they observed,[130] using the religious condemnation of "sodomy" and "transvestitism" to justify violent conquest and forced conversion.[131] As the process of colonialism continued, European missionaries, soldiers, and settlers often brutally enforced their understanding of gender onto various Indigenous societies, seeking to assimilate them into a Christian, Eurocentric, and hetero-cissexist world order.[132] This oppression frequently took the form of violence directed specifically at gender-diverse people.[133] As Professor Deborah Miranda notes in her examination of the genocidal violence used against the *joyas* (Two-Spirit people in colonial California):

> Spanish soldiers . . . threw the *joyas* to their dogs. Shouting the command "Tómalos!" (take them, or sic 'em), the Spanish soldiers ordered execution of *joyas* by specially bred mastiffs and greyhounds. The dogs of the conquest, who had already acquired a taste for human flesh (and were frequently fed live Indians when other food was unavailable), were the colonizer's weapon of mass destruction . . . Now that the Spaniards had made it clear that to tolerate, harbor, or associate with the third gender meant death, and that nothing could stand against their dogs of war, the indigenous community knew that demonstrations of acquiescence to this force were essential for the survival of the remaining community—and both

129. Sandra Slater, *"Nought but Women:" Constructions of Masculinities and Modes of Emasculation in the New World*, *in* GENDER AND SEXUALITY IN INDIGENOUS NORTH AMERICA 1400–1850, at 30, 31 (Sandra Slater & Fay A. Yarbrough eds., 2011).

130. Mohammed Elnaiem, *The "Deviant" African Genders That Colonialism Condemned*, JSTOR DAILY (2021), https://daily.jstor.org/the-deviant-african-genders-that-colonialism-condemned/.

131. BRIAN JOSEPH GILLEY, BECOMING TWO-SPIRIT: GAY IDENTITY AND SOCIAL ACCEPTANCE IN INDIAN COUNTRY 13 (2006); *see also* Seuffert, *supra* note 8, at 224–25 (discussing how the Spanish used the accusation of "sodomy" to mobilize and justify violence against non-Christian outsiders).

132. Maria Lugones, *The Coloniality of Gender*, 2 WORLDS & KNOWLEDGES OTHERWISE 1, 12 (2008).

133. Of course, any short examination like mine risks homogenizing and erasing important differences in how different non-Western societies treated gender, or even how members of one community understood the many nuanced meanings of gender within that society. The question of labeling Indigenous identities has been particularly difficult, since grouping all gender-diverse people into a single category ignores the variability across and within non-Western Indigenous communities. Driskill et al., *supra* note 28, at 14. For this article I have chosen to use the umbrella term "gender-diverse" to describe pre-colonial Indigenous gender categories whose existence defied the dichotomous European gender binary, although such a term obviously fails to capture the nuances the complexities and variations among these many groups and individuals. *Id.* at 3.

> the community and the Spaniards knew exactly which people were marked for execution.[134]

In stark contrast to such episodes of brutal violence, some Indigenous communities accepted and internally (re)produced cultural ideas about multi-faceted gender identities.[135] While much of the detail about the nuanced day-to-day lives of gender-diverse Indigenous people has been lost to history, remaining evidence suggests a broad range of gendered categories that differed significantly from European norms.[136] Sometimes these ideas could be concretely delineated, as in the case of the five gender categories which still exist in Bugis society in parts of modern-day Indonesia.[137] In other cases, gender identity could be fluid and change throughout a person's lifetime. In the arctic and subarctic regions of North America, for example, Indigenous parents could choose one or more gendered names for their children, who would then be raised with mixed- or cross-gender identities that they could later change or adapt.[138] Alternatively, gender categories could be connected to sexual roles or relational identities: The Māori of New Zealand, for example, had (and still have) a number of terms to refer to gender-diverse people such as *takatāpui* ("intimate companion of the same sex"), *whakawāhine* ("like a woman"), and *tangata ira tāne* ("spirit of a man").[139] Writing about this diversity of gendered ideas, Professor Manuela Lavinas Picq explains:

> Indigenous societies were never straight. Hundreds of languages across the Americas had words referring to same-sex practices and non-binary, fluid understandings of gender long before the emergence of international sexual rights frameworks. The *muxes* in Juchitán are neither men nor women but a Zapotec gender hybridity. Across the Pacific in Hawaii, the *māhū* embrace both the feminine and masculine. Aymara activist Julieta Paredes claims Indige-

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134. Miranda, *supra* note 127, at 257–59.

135. Manuela L. Picq, *Decolonizing Indigenous Sexualities: Between Erasure and Resurgence*, *in* THE OXFORD HANDBOOK OF GLOBAL LGBT AND SEXUAL DIVERSITY POLITICS 169, 169–70 (Michael J. Bosia, Sandra M. McEvoy, & Momin Rahman eds., 2020).

136. For more context on the loss of non-European archival sources, see Neta C. Crawford, *A Security Regime Among Democracies: Cooperation Among Iroquois Nations*, 48 INT'L ORG. 345, 351–52 (1994).

137. Sharyn Graham, *It's Like One of Those Puzzles: Conceptualising Gender Among Bugis*, 13 J. GENDER STUD. 107, 114–15 (2004).

138. WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 14–15 (1998).

139. Elizabeth Kerekere, Part of The Whānau: The Emergence of Takatāpui Identity, 17–18 (Apr. 2017) (Ph.D. dissertation, Victoria University of Wellington). These terms continue to be used and adapted by gender and sexual minorities in New Zealand today. Elizabeth Kerekere, Tīwhanawhana Trust & RainbowYOUTH, *Growing Up Takatāpui: Whānau Journeys*, TAKATĀPUI | A RESOURCE HUB, https://takatapui.nz/growing-up-takatapui#resource-intro (last visited Mar. 10, 2022).

> nous languages in Bolivia comprise up to nine different gender categories. Varying forms of non-monogamy are still practiced among the Zo'é people in Amazonia as well as in the Tibetan Himalayas. Indigenous youth in Brazil defend LGBT rights and participate in gay pride celebrations. Indigenous sexualities are as diverse as the peoples who practice them, ranging from non-monogamous relations and crossdressing to homo-affective families. Sexual [and gender] diversity has historically been the norm, not the exception.[140]

This is of course not to say that all non-European societies understood gender in these terms, nor am I arguing that all Europeans viewed gender as binary.[141] As I mentioned above, historians are increasingly coming to terms with the tremendous gender diversity that existed in Europe for centuries.[142] Inversely, many individuals outside of Europe, including some in the Islamic world, East Asia, or elsewhere, would have understood gender in binaristic and/or hierarchical terms, albeit along a slightly different binary or hierarchy than that which was self-evident to certain European communities.[143] Moreover, in some cases gender-diverse people could face persecution from within their own communities while still occupying socially-recognized roles, as in the case of the effeminate *mukhannathūn* in early Islamic society.[144] I focus on non-binary gender diversity in this article to

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140. Picq, *supra* note 135, at 169–70. For a greater discussion of the connections between sex, sexuality, and gender, *see supra* note 2.

141. I obviously acknowledge the inaccuracies inherent in dividing up the world into "Europe" and "non-Europe," and regret the impossibility of providing the nuance and detail necessary in such a short article. *See* Audrey Alejandro, *Diversity for and by Whom? Knowledge Production and the Management of Diversity in International Relations*, 9 INT'L POL. REV. 280, 282 (2021).

142. *See supra* notes 98–100 and accompanying text.

143. *See, e.g.,* Emily Snyder, *Indigenous Feminist Legal Theory*, 26 CAN. J. WOMEN & L. 365, 377–78 (2014) (discussing how some Indigenous North American communities had what appear to be male-female hierarchies); *see also* Saadia Yacoob, *Islamic Law and Gender*, *in* THE OXFORD HANDBOOK OF ISLAMIC LAW 76, 77–87 (Anver M. Emon and Rumee Ahmed eds., 2018) (discussing how Islamic law has been interpreted as patriarchal and/or feminist, further demonstrating the impossibility of attributing one gendered discourse to any community or legal tradition).

144. Rowson provides more context about this, writing, "Unlike other men, these effeminates or *mukhannathūn* were permitted to associate freely with women, on the assumption that they had no sexual interest in them, and often acted as marriage brokers, or, less legitimately, as go-betweens. They also played an important role in the development of Arabic music in Umayyad Mecca and, especially, Medina, where they were numbered among the most celebrated singers and instrumentalists. Although they were subject to periodic persecution by the state, such measures were not based on any conclusions about their own sexual status – they were not assumed to be homosexual, although a few were – but on their activities as musicians and go-betweens, which were seen as corrupting the morals of society and especially of women." Everett K. Rowson, *The Effeminates of Early Medina*, 111 J. AM. ORIENTAL SOC'Y 671, 671–77 (1991).

make a point about the narrow discourse of Eurocentric international law, but a truly comprehensive (and much longer) account of gender throughout the world would be better able to avoid the romanticization of pre-colonial gender ideas while also being attentive to the many ways in which individuals from even the same community disagreed with their neighbors about the importance or meaning of gender in their day-to-day lives.[145]

That said, how does the existence of non-binary gender-diverse people affect our understanding of warfare and peace? In addition to well-documented evidence of cisgender women as warriors,[146] historical texts also reveal that many gender-diverse non-Europeans fought in wars or supported war parties, including individuals with both "male" and "female" genitalia.[147] For example, Two-Spirit people from various North American Indigenous communities (including the Dakota, Crow, Ojibway, and Southern Piegan) fought against violent colonization, much to the dismay and confusion of the white men they were fighting.[148] In the words of historian Roger Carpenter:

> The participation of [Two-Spirit people] in warfare baffled Europeans, primarily because they considered war an exclusively male occupation, and one reserved for manly men at that. In many native societies [Two-Spirit people] doffed their feminine attire in wartime, picked up their weapons, and accompanied the other men into battle. Warriors regarded [their] presence as beneficial, with whatever prowess [they] had with weapons or [their] other military skills as secondary benefits. A [Two-Spirit person's] special connection with the supernatural and [their] ability to marshal spiritual power on their behalf held far more importance to members of a war party.[149]

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145. *See* RAO, *supra* note 125, at 33–34. As another example, take twenty-first century American ideas about gender. What does it mean, for instance, for a person to be a "man" in the United States today? Every American will have a slightly different understanding of what that word means, and whether it refers to biological features like genitalia, social roles like being a husband and father, and/or stereotypical practices like hunting and fishing. If we cannot today agree on gender categories, how can we expect to find universal agreement in the incomplete archival records of other societies? *See* HEIKO MOTSCHENBACHER, LANGUAGE, GENDER AND SEXUAL IDENTITY: POSTSTRUCTURAL PERSPECTIVES 7–8 (2010).

146. Leanne Betasamosake Simpson, *Not Murdered, Not Missing: Rebelling against Colonial Gender Violence*, *in* BURN IT DOWN! FEMINIST MANIFESTOS FOR THE REVOLUTION 314, 316 (Breanne Fahs ed., 2020).

147. Roger M. Carpenter, *Womanish Men and Manlike Women: The Native American Two-Spirit as Warrior*, *in* GENDER AND SEXUALITY IN INDIGENOUS NORTH AMERICA 1400–1850, at 146, 158–59 (Sandra Slater & Fay A. Yarbrough eds., 2011).

148. ROSCOE, *supra* note 138, at 11.

149. Carpenter, *supra* note 147, at 149. Perhaps problematically, in this quote I have substituted Carpenter's use of masculine pronouns for "they" and "their" in order to emphasize the particular non-binary situation of Two-Spirit North Americans. Part of this linguistic confusion is due to the fact that English (similar to other colonial languages like French and

Many non-Western societies similarly believed in some kind of connection between non-masculine gender and spiritual power, and this belief often structured how these groups conducted important political and military processes.[150] For example, some non-Western cultures did not understand men and women as existing in a hierarchy, but rather as complements in a dual-sex spiritual and political system in which women had important roles.[151] Similarly, many societies connected non-binary gender diversity to ideas about life and death, creation, and proximity to divinity.[152] This connection between gender diversity and culturally-specific spiritual roles has been recorded across a number of Indigenous societies in places as diverse as the Philippines,[153] Eastern Siberia,[154] the Congo,[155] Borneo,[156] the Indian subcontinent,[157] the Incan Empire,[158] the Yucatan peninsula,[159] and California,[160] and ongoing research into pre-colonial gender norms continues to reveal how gender was often closely connected to spiritual power in some non-Western communities.

In addition to these religious roles, women and gender-diverse people also often held important political positions in pre-colonial societies, serving as matriarchs, rulers, chiefs, lawmakers, or leaders on the battlefield.[161] For

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Castilian) lacks the breadth of expression about gender pronouns present in many Indigenous languages. *See* TUHIWAI SMITH, *supra* note 16, at 46. I have also used the word "Two-Spirit" in this quote to reflect the language now used by Indigenous scholars. QWO-LI DRISKILL, ASEGI STORIES: CHEROKEE QUEER AND TWO-SPIRIT MEMORY 30 (2016).

150. LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO DENNIS RODMAN 40–47 (1996).

151. *See, e.g.,* IFI ADAMIUME, REINVENTING AFRICA: MATRIARCHY, RELIGION, AND CULTURE 110–12 (1997).

152. DRISKILL, *supra* note 149, at 47.

153. J. NEIL C. GARCIA, PHILIPPINE GAY CULTURE: BINABAE TO BAKLA, SILAHIS TO MSM 162–65 (2008).

154. STEPHEN O. MURRAY, PACIFIC HOMOSEXUALITIES 160–61 (2002).

155. Stephen O. Murray & Will Roscoe, *Africa and African Homosexualities: An Introduction*, *in* BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES 1, 8–10 (Stephen O. Murray & Will Roscoe eds., 1998).

156. MURRAY, *supra* note 154, at 212-13.

157. DEVDUTT PATTANAIK, THE MAN WHO WAS A WOMAN AND OTHER QUEER TALES FROM HINDU LORE 10–12 (2002).

158. MICHAEL J. HORSWELL, DECOLONIZING THE SODOMITE: QUEER TROPES OF SEXUALITY IN COLONIAL ANDEAN CULTURE 2 (2005).

159. Matthew G. Looper, *Women-Men (and Men-Women): Classic Maya Rulers and the Third Gender*, *in* ANCIENT MAYA WOMEN 171, 176 (Traci Ardren ed., 2002).

160. Miranda, *supra* note 127, at 266.

161. Josephine Jarpa Dawuni, *Matri-Legal Feminism: An African Feminist Response to International Law*, *in* RESEARCH HANDBOOK ON FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW 445, 454 (Susan Harris Rimmer & Kate Ogg eds., 2019). For examples of Indigenous leaders who were/are not men, see Leonie Pihama, *Māku Anō e Hanga Tōku Nei Whare: I Myself Shall Build My House*, *in* ROUTLEDGE HANDBOOK OF CRITICAL INDIGENOUS STUDIES 162, 165–66 (Brendan Hokowhitu et al. eds., 2021); Niara Sudarkasa,

example, Portuguese colonizers faced four decades of military resistance from Nzinga, the ruler of Ndongo (in modern-day Angola), who was born with "female" genitalia but dressed in both men's and women's clothing, led their troops into battle, and only responded to the title "King."[162] Nzinga was also married to female wives and had a harem of gender-diverse individuals (called "chibados" or "quimbandas" by the Portuguese) who likely fulfilled some kind of spiritual or political role.[163] Similar examples could include the crossdressing Haitian-Kongolese leader Romaine-la-Prophétesse, whose fiery religious speeches emboldened thousands of freed slaves during the Haitian Revolution,[164] or Malik Kafur, the queer[165] Hindu general who defeated the Mongol army in 1306 and later attempted to usurp control of the Delhi Sultanate.[166] Examples like these illustrate the arbitrary citational choices made by early writers who cited primarily Biblical or Roman sources in their "international" law, as well as the tremendously narrow concept of "men as soldiers, women as victims" that dominated early European thought about war.

In other communities, gender might not even be understood as a relevant category for creating social hierarchies, entirely putting into question the Eurocentric reliance upon gender as a marker of strength, vulnerability, or usefulness in war.[167] Oyěwùmí, for example, argues that the "physicality" of gender did not create social categories in pre-colonial Yorùbá societies; instead, interpersonal relationships, age, and kinship were the distinctions

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"The Status of Women" in Indigenous African Societies, 12 FEMINIST STUD. 91, 91–92 (1986); Saylesh Wesley, *Twin-Spirited Woman: Sts'iyóye Smestíyexw Slhá:li*, 1 TRANSGENDER STUD. Q. 338, 339 (2014).

162. Murray & Roscoe, *supra* note 155, at 1–2. For a much more thorough discussion of Nzinga's life, see Queer as Fact Podcast, *Njinga of Ndongo*, PODBEAN (Dec. 15, 2019), http://queerasfact.podbean.com/e/njinga-of-ndongo.

163. Shantala Thompson & Megan Rolfe, *Queering History, Queering Africa*, MIDDLE PASSAGES: GENDERED DIASPORAS BLOG (Jan 14, 2022), http://www.albany.edu/faculty /jhobson/ middle_passages/queerafrica/essay.html. Other pre-colonial African societies had similar roles for men who were effeminate and/or engaged in sexual relations with men. *See* Sylvia Tamale, *Confronting the Politics of Nonconforming Sexualities in Africa*, 56 AFR. STUD. REV. 31, 35–36 (2013).

164. CAROLYN E. FICK, THE MAKING OF HAITI: THE SAINT DOMINGUE REVOLUTION FROM BELOW 128–29 (1990); Maria Christina Fumagalli, Bénédicte Ledent & Robert Del Valle Alcalá, *Introduction*, *in* THE CROSS-DRESSED CARIBBEAN: WRITING, POLITICS, SEXUALITIES 1, 5 (Maria Christina Fumagalli et al. eds., 2013).

165. Sources disagree whether Kafur was a hijra (a gender-diverse identity in southern Asia), a eunuch, transgender, and/or the sultan's lover. In any case, Kafur does not fit into early modern European norms about the type of person who conducts war. *See* Vivek Pachauri & Vandana Singh, *Beyond Binaries: Dawn of the Rights of Transgenders*, 4 RES. REV. INT'L J. MULTIDISCIPLINARY 505, 506 (2015); Ajay K. Rao, *From Fear to Hostility: Responses to the Conquests of Madurai*, 32 S. ASIAN STUD. 68, 69 (2016).

166. PETER JACKSON, THE DELHI SULTANATE: A POLITICAL AND MILITARY HISTORY 175–77 (1999); JOHN KEAY, INDIA: A HISTORY 257–60 (2018).

167. ROSCOE, *supra* note 138, at 5.

which structured social hierarchies.[168] Similarly, some gender-diverse Indigenous people in North America did not always present themselves as gender-diverse or wear clothing that would mark them as such, suggesting further fluidity in how gender could be interpreted or asserted in a particular context.[169]

Finally, many non-Western mythologies included tales of female or gender-diverse actors engaged in important political or military tasks. While these stories do not necessarily tell us about the daily lives of individual people, myths and legends nevertheless "capture the collective unconscious of a people" and reveal the worldview through which a society understands life, death, and society.[170] In the Hindu epic "The Mahābhārata," for example, a character named Shikhandi is born a woman and transitions to become a man before fighting in the weeks-long Battle of Kurukshetra.[171] In ancient Mayan society, political leaders participated in complex gender rituals, including crossdressing as third-gender/mixed-gender deities.[172] And in Samoan legend, the female/crossdressing warrior Nafanua won many battles, established Samoan political norms, and after her death was deified, continuing to advise the chiefs of Samoa as a goddess.[173] These sources stand in stark contrast to the very binary and hierarchical interpretations of Biblical myth employed by the European writers listed in Part I, and highlight the choices made by Vitoria, Grotius, and others in their intertextual reliance on stories which (re)produced a very narrow view of gender and politics.

I acknowledge that this section has been an extremely brief overview of many complex cultures and societies, and much more research is needed to give voice to the vibrant and multi-faceted gender identities that were repressed by European colonization. This is particularly true given the sheer amount of oral tradition, communal practice, archival material, and other historical records which have been lost to time or purposefully destroyed by colonizers.[174] Nevertheless, I hope that this short survey has demonstrated the intensely narrow and provincial assumptions which form the traditional basis of international law, and how any modern reference back to early European legal theorists will be inescapably intertwined with a certain colonial agenda as well as binary, hierarchical, and hetero-cissexist ideas of gender.

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168. OYĚWÙMÍ, *supra* note 55, at 13–14.

169. SABINE LANG, MEN AS WOMEN, WOMEN AS MEN 9 (1998).

170. PATTANAIK, *supra* note 157, at 3.

171. *Id.* at 19–20.

172. Looper, *supra* note 159, at 199–201.

173. Dan Taulapapa McMullin, *Fa'afafine Notes: On Tagaloa, Jesus, and Nafanua*, 37 AMERASIA J. 114, 130 (2011).

174. *See* Miranda, *supra* note 127127, at 254–65; Meghan Walley, *Exploring Potential Archaeological Expressions of Nonbinary Gender in Pre-Contact Inuit Contexts*, 42 ÉTUDES INUIT STUD. 269, 275–76 (2018).

B. The Impossibility of the International?

So what would international law look like if participants from all over the world had been able to participate in its creation? As I have suggested throughout this article, international law would likely not be structured around the strict gender binary that was imposed by European conquest. Instead of primarily citing Roman history and Christian theology, early international law writers might have approached their task from a multitude of perspectives, traditions, and cosmological worldviews. Additionally, the strict gender hierarchy I described in Part I, in which women are nothing more than victims or property meant to propagate the nation, would collapse in the face of egalitarian or gender-diverse Indigenous perspectives. Feminist activists seeking to gain power would not necessarily be compelled to frame their arguments with references to a hetero-cissexist corpus of texts because other sources and perspectives would be available and acceptable to the wider international law community. In a different kind of international law, women and gender-diverse people could be understood as victims, perpetrators, complicit bystanders, military leaders, peacebuilders, civilians, genocidaires, and more.

It is also worth considering that perhaps the project of "international" law would never work if the perspectives and gendered beliefs of all nations had been given equal weight. Non-European societies did not agree with one another about gender, and sometimes conceived of gender in ways which would have been mutually exclusive if placed side-to-side. How long, then, would a list need to be to include the thousands of different gender labels that have been used by human communities? How could a treaty work if it needed to be updated for every new form of gender expression? And how could the gender fluidity present in many communities ever truly be captured by the inflexible limits of the written word?

Perhaps this impossibility of creating a truly "international" consensus about gender and law is a good thing. For one, it reveals the uncomfortable truth that the Eurocentric vision of universal "international" law is predicated upon the violent and invisible subjugation of non-European customs and societies. Moreover, as many queer scholars have demonstrated, law and legal categories stabilize certain ideas of gender and make it impossible to understand expressions and performances which fall outside of that categorization.[175] Even now, as progressive international law activists attempt to include gender diversity in the discipline, they often get tripped up by the linguistic quagmire of using Western terms like "transgender" to refer to non-Western perspectives and identities.[176] An alternative to legal categories that could move beyond the need to find international consensus on

175. *See* Otto, *supra* note 22, at 319–20.

176. Sandra Duffy, *Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law*, 84 MODERN L. REV. 1041, 1063 (2021).

something as intimate as gender might therefore be worthwhile, potentially allowing for greater personal expression and fluidity.

Additionally, it is worth questioning whether a truly inclusive version of international law would have created the same types of massive institutions to adjudicate and enforce its rules, or whether other decentralized peace processes would have been used instead. As many TWAIL scholars have convincingly shown, the rise of international institutions in the twentieth century largely benefitted the Global North, creating a system whereby colonial powers could maintain their hierarchy over former colonies through financial and political control.[177] In an inclusive version of international law, therefore, it is hard to imagine that political communities outside of Europe would have willingly consented to a binding legal regime centered around institutions which were all physically located in Western Europe or North America.[178] Instead of relying on expensive and solemn courts in The Hague, perhaps an inclusive legal system would have considered other localized methods of dispute resolution to adjudicate gendered issues. Instead of relying upon a European vision of carceral international law, perhaps an equal consideration of non-European peace processes which already existed at the time of colonization could have provided the tools and strategies for resolving gendered violence in situations of armed conflict or peace. And instead of spending tremendous sums of money on one or two high-profile criminal prosecutions,[179] perhaps a non-European perspective would prioritize spending to support victims or rebuild war-ravaged infrastructure.

Of course, these dreams of an alternative legal history are not just speculation, but rather a way to think through the "limits of our current patriarchal, heteronormative and white privileged world."[180] Indeed, queer and decolonial scholars have been at the forefront of critical efforts in international politics, and a number of queer, feminist, and TWAIL scholars do immensely valuable work as Special Rapporteurs, ICC advisors, and academic commentators.[181] This work demonstrates how the process of unsettling the colonial, heteropatriarchal, and cissexist realities of international law is not a simple problem that can be resolved by amending a treaty or deciding a case; instead, the process requires the constant (re)deployment of queer and

177. Mutua, *supra* note 16, at 31, 34–35.

178. *See* James Thuo Gathii, *Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)*, 114 PROCEEDINGS ANNUAL MEETING AM. SOC'Y INT'L L. 165, 166 (2020).

179. *See* Jon Silverman, *Ten Years, $900m, One Verdict: Does the ICC Cost Too Much?*, BBC, Mar. 14, 2012, htttp://www.bbc.com/news/magazine-17351946.

180. Sandberg, *supra* note 122, at 6.

181. *See e.g.*, International Criminal Court, *ICC Prosecutor Mr Karim A.A. Khan QC appoints Seventeen Special Advisers* (Sept. 17, 2021), http://www.icc-cpi.int/Pages/item.aspx?name=pr1611. *See also* ANAYA, *supra* note 93, at 45–58 (discussing how Indigenous advocates have entered international legal spaces to advocate for their own interests).

decolonial political will in order to address the ever-changing field of international politics.[182] In other words,

> [T]here is much that will always remain unknown and unimaginable, something that we actually need to cherish. Queer theory is unstable, and it is disturbing and destabilizing. But it is this kind of instability that might, in fact, be needed. . . . [W]e might have to accept, as queer theory suggests, that [law] can never be truly inclusive and that there is simply no perfect model. Indeed, one of the implications of thinking about peace processes and about the role of international law in this context consists in a commitment to consider both as that: as processes. There can be no predetermined state of peace, only relative peaces, and ongoing peace processes, and law must continuously reconsider and reinvent itself in order to assume a constructive and emancipatory role.[183]

III. CONCLUSION

This article has sought to question how gender has been deployed in international law by deconstructing its origins. I examined how generations of white male European thinkers (re)produced legal categories which understood gender as both binary and hierarchical, with cisgender women resigned to a perpetually weak position and gender-diverse people erased entirely. I then turned to non-European perspectives on gender and war to further demonstrate the narrow and regional scope of the European gender binary/hierarchy in international law.

My goal in challenging the "absolute despot duality that says we are able to be only one or the other" has been to find the discursive space for moving beyond (cis)sexism and the racist/colonial realities of public international law.[184] Colonization has not ended, and Indigenous communities continue to contest the imposition of patriarchal European gender norms that perpetuate violence and disenfranchisement.[185] While the "stable" Eurocentric system of binary gender may feel comfortable and commonplace

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182. *See* Philipp Kastner & Elisabeth Roy Trudel, *Unsettling International Law and Peace-Making: An Encounter with Queer Theory*, 33 LEIDEN J. INT'L L. 911, 912 (2020).

183. *Id.* at 930.

184. GLORIA ANZALDUA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA 76 (1987); *see also* Alyosxa Tudor, *Decolonizing Trans/Gender Studies?*, 8 TRANSGENDER STUD. Q. 238, 251 (2021). ("Moreover, trans-gender calls for trans-nation—for fiercely anti-nationalist, anticolonial politics and knowledge productions. Both the endeavors of countering anti-gender attacks and decolonizing trans/gender studies require ongoing deconstructions of the category of gender and analyses that see trans/gender as defined through racialization, post /colonial geopolitics, transnational movements, and translation.")

185. Betasamosake Simpson, *supra* note 146, at 316–17.

to many international lawyers today,[186] such a perspective fails even the most basic scrutiny when transgender, intersex, gender-diverse, and other individuals are considered.[187] This larger perspective also highlights the shortcomings of the liberal feminist beliefs which dominate many gender-based discussions in international law today, obscuring other currents of feminist thought which incorporate economic, racial, decolonial, and disability-based concerns into their critiques.[188]

Distancing the international justice project from its European origins has the potential to move international law toward a more liberatory agenda. For example, practitioners should question how and why five hundred years of genocidal European conquest has completely escaped the sight of international criminal law, whereas the prosecution of African men remains central to the discipline.[189] Legal historians and academics should also continue to contest the uncritical reliance on European sources of international law by acknowledging the horrific gendered violence which was facilitated by the work of writers like Vitoria or Grotius.[190] In other words,

> The Eurocentric story of international law has proven wrong because it is incomplete. Not only does it generally ignore the violence, ruthlessness, and arrogance which accompanied the dissemination of Western rules, and the destruction of other legal cultures in which that dissemination resulted. Like most other histories, this

186. Duffy, *supra* note 176, at 1044. For an excellent discussion of these so-called "stable" gender classifications, see generally Paisley Currah & Lisa Jean Moore, *"We Won't Know Who You Are:" Contesting Sex Designations in New York City Birth Certificates*, *in* THE TRANSGENDER STUDIES READER 2, at 607 (Susan Stryker & Aren Z. Aizura eds., 2013) (examining how New York City bureaucrats disagreed with transgender activists about what constituted a legitimate sex change).

187. *See, e.g.,* David Eichert, *Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary*, 25 U.C.L.A. J. INT'L L. & FOREIGN AFF. 157, 178–81 (2021).

188. BROOKE A. ACKERLY, POLITICAL THEORY AND FEMINIST SOCIAL CRITICISM 57–60 (2000); Halley, *supra* note 116116, at 3–4.

189. *See* Ba, *supra* note 36 at 382–85. Similar critiques have focused on how a strong focus on individual criminal responsibility allows international law actors to obscure the racial, colonial, and structural oppression implicit to international law. Souheir Edelbi, *Making Race Speakable in International Criminal Law: Review of Lingaas' The Concept of Race in International Criminal Law*, TWAIL: REFLECTIONS (2020), http://twailr.com/making-race-speakable-in-international-criminal-law-review-of-lingaas-the-concept-of-race-in-international-criminal-law-%E2%80%A8.

190. *See* Frédéric Mégret & Immi Tallgren, *Introduction*, *in* THE DAWN OF A DISCIPLINE: INTERNATIONAL CRIMINAL JUSTICE AND ITS EARLY EXPONENTS 1–5 (Frédéric Mégret & Immi Tallgren eds., 2020).

> history of international law was a history of conquerors and victors, not of the victims.[191]

It is also worth reiterating that my goal here has not been to weaken protections for cisgender women in international law or to discount the very real horrors they experience during conflict. Nor am I calling for the simple neoliberal "inclusion" or "representation" of queer identities in the discipline.[192] Instead, my hope is that this article will contribute to a more holistic view of sexual and gendered victimhood which understands the interconnected natures of oppression, colonialism, and hetero-cissexism.[193] In the words of Professor Kathryn McNeilly,

> What queer understandings of sex/gender and their challenge to ideas of the sex binary and asymmetry direct feminists towards is a more expansive politics of international human rights and gender, and enhanced links between the two which include, although are not limited to, the naturalised restrictions, discrimination and oppression experienced by women. When sex and gender are understood as both socially constructed, and not restricted to the determinants of "male" and "female" alone, then the term "gender" ceases to equate exclusively to "women." It is then possible to begin to view the oppression that women face within a wider context of heteronormative power, as well as to promote more expansive possibilities for experiencing and expressing sex/gender.[194]

In other words, instead of mindlessly (re)producing the gender binary and its associated colonial influences that have been passed down for centu-

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191. Bardo Fassbender & Anne Peters, *Introduction: Towards a Global History of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1 (Bardo Fassbender & Anne Peters eds., 2012).

192. *See* C. Riley Snorton & Jin Haritaworn, *Trans Necropolitics: A Transnational Reflection on Violence, Death, and the Trans of Color Afterlife*, *in* THE TRANSGENDER STUDIES READER 2 66, 67–68 (Susan Stryker & Aren Z. Aizura eds., 2013); *see also* Laura Sjoberg, *Toward Trans-gendering International Relations?*, 6 INT'L POL. SOC. 337, 343–47 (2012) (discussing how queer and trans individuals interact with the politics of hyper/invisibility, and why some gender-diverse people might choose to stay invisible).

193. *See* James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE, L. & DEV. 26, 40 (2011) ("This acknowledgement of the messiness of law – that it has both transformative as well as regressive potential is a hallmark of third world approaches to international law. Contemporary TWAIL approaches have therefore sought to expand or open up new conceptual spaces for international legal scholarship and praxis not by debunking certain contemporary international law norms for a newer, purer, truthful post-imperial international law, but rather a kind of international legal scholarship that takes international legal history seriously particularly in terms of the relations between formerly colonial countries and their colonial overlords. Such a process is a necessarily 'subversive and messy task' that simultaneously inhabits both its imperial legacy of colonialism and its post-imperial guarantees of sovereign equality and self-determination.").

194. McNeilly, *supra* note 20, at 434–35.

ries,[195] international law practitioners and theorists should work toward deconstructing those ideas and being aware of the political motivations behind existing legal interpretations.[196] This process would, for example, challenge stereotypes which silence queer victims, ignore the agency of female combatants, or reinforce patriarchal hierarchies. And this process requires constant effort, as Professor Emily Haslam explains:

> Writing more inclusive histories is dependent upon continuous negotiation and renegotiation, requiring alertness to, and critically an open articulation of, the terms, politics, and conditions of inscription and exclusion at both micro and macro levels. Writing more inclusive histories also requires an engagement with the politics of memory. All this renders international criminal legal history less linear, more messy and complex than an institutional progress narrative. However, at a time when international criminal law is coming under challenge for its Western bias, such histories can form a critical starting point for the discipline to come to terms with its multiple pasts and grapple with its potential futures. Herein lies their emancipatory potential.[197]

Finally, although this article (and the discipline of legal history in general) is keenly concerned with rediscovering and reinterpreting origins,[198] it is important to remember that gender-diverse people do not exist only in the past. Rather, queer people often take active roles in military and peace processes, are victimized by sexual violence and other war crimes, and (yes) also have the capacity to commit those very same war crimes.[199] It is there-

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195. *See* Sjoberg, *supra* note 192, at 337–38.

196. *See* ORFORD, *supra* note 27, at 285 ("There are no historical methods that can save us from the political character of international legal interpretation.").

197. Emily Haslam, *Writing More Inclusive Histories of International Criminal Law: Lessons from the Slave Trade and Slavery*, *in* THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS 130, 144 (Immi Tallgren & Thomas Skouteris eds., 2019).

198. Frédéric Mégret, *International Criminal Justice History Writing as Anachronism: The Past that Did Not Lead to the Present*, *in* THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS 72, 87–88 (Immi Tallgren & Thomas Skouteris eds., 2019); *see also* TZOUVALA, *supra* note 49, at 7 ("We conduct such readings through the extensive usage of quotations (a paradigmatic case of reading aloud for our audience), footnotes, the retrieval of previously unread texts that purportedly support our case and condemn that of our opponents, and so on. International law's constant search for authority also makes ours a discipline particularly enamoured with textual authorities: new 'fathers' and origins are constantly retrieved, cases and treaties quoted, and diplomatic correspondences called forth in this seemingly endless process of reading.").

199. *See* Towle & Morgan, *supra* note 124, at 491 ("Transgender and transsexual activists need not invoke mythical gender warriors to support the idea that individuals should be free to express and embody themselves as they see fit or to justify their existence. (If warriors are sought, they are here.) Nor do they need to look elsewhere for acceptance. (Acceptance comes through understanding and mutual respect.) The potential that trans bodies and trans lives have to shed light on normative gender relations is immense.").

fore essential to consider how these marginalized communities and individuals engage with ongoing international law processes, notably by asking how international law and politics can address the often widespread economic and social disenfranchisement faced by these people.[200] Rather than continually (re)imposing Eurocentric gender ideas onto the subjects of international law, practitioners and commentators must do more to decenter their own gendered positionalities and challenge the commonplace assumptions which are taught in law school classrooms and international courts. Instead of seeing gender-diverse people as anomalies or footnotes to the project of gender equality, international law should instead reconsider the violent and reductive European gender binary and try to imagine a more liberated world beyond it.

200. *See* Gathii, *supra* note 193193, at 45. This paradox, between abolishing gender as a legal category and providing for the material needs of gender minorities, is one that trans legal theory continues to grapple with, and many trans theorists assert that both goals can and must be pursued in order to achieve liberatory goals. Paisley Currah, *The Transgender Rights Imaginary*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 245, 245–53 (Martha Albertson Fineman, Jack E. Jackson, & Adam P. Romero eds., 2009); Natalie Wynn, *Gender Critical*, YOUTUBE, from 10:23 to 11:48 (Mar. 31, 2019), http://www.youtube.com/watch?v=1pTPuoGjQsI.