

## Women's September 11th: Rethinking the International Law of Conflict\*

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The configuration of acts and actors of September 11, 2001 is not one that international law, centered on states, has been primarily structured to address.<sup>1</sup> Neither was most of men's violence against women in view when the laws of war, international humanitarian law,<sup>2</sup> and international human rights guarantees were framed.<sup>3</sup> The formal and substantive parallels between the

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1. This obvious observation about international law since at least the Treaty of Westphalia, Oct. 24, 1648, 1 Consol. T.S. 198, is illuminated in the present setting by, among others, Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 993–98 (2001); Robert K. Goldman, *Certain Legal Questions and Issues Raised by the September 11th Attacks*, 9 HUM. RTS. BRIEF 2 (2001), available at <http://www.wcl.american.edu/hrbrief/09/1sept.cfm> (last visited Nov. 17, 2005); and Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002).

2. Of this list, international humanitarian law has the best facial history, long prohibiting some violence against women in wartime in very clear terms. See, e.g., Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (The Lieber Code), U.S. War Dep't General Orders No. 100, § 2, art. 37 (Apr. 24, 1863), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 3 (Dietrich Schindler ed., 2004) ("The United States acknowledge and protect, in hostile countries occupied by them . . . the persons of the inhabitants, especially those of women; and the sacredness of domestic relations."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

3. Attempts to get the drafters of the Universal Declaration of Human Rights to consider women's humanity are analyzed in MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 111–12, 164 (2001). A particularly telling example is the

two—prominently their horizontal legal architecture, large victim numbers, and masculine ideology<sup>4</sup>—make both patterns of violence resemble dispersed armed conflict, but the world’s response to them has been inconsistent.

Since September 11th, the international order has been newly willing to treat nonstate actors like states as a source of violence invoking the law of armed conflict. Much of the international community has mobilized forcefully against terrorism.<sup>5</sup> This same international community that turned on a dime after September 11th has, despite important initiatives,<sup>6</sup> yet even to undertake a comprehensive review of international laws and institutions toward an effective strategic response to violence against women<sup>7</sup> with all levels of re-

absence of express mention of violence against women or sexual aggression in the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 180, at 193, U.N. GAOR, 34th Sess., Supp. No. 45, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW]. The Committee on the Elimination of Discrimination Against Women remedied this in *General Recommendation No. 19* by interpreting the definition of discrimination in CEDAW Article 1 to “include[ ] gender-based violence—that is violence which is directed against a woman because she is a woman or which affects women disproportionately.” CEDAW, *General Recommendation No. 19*, ¶ 7, U.N. Doc. A/47/38 (Feb. 1, 1992). The area of trafficking in women provides an example on another level. Although trafficking in women has long been criminal under the law of nations, not until the Palermo Protocol were some of its real power dynamics directly addressed. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25 (II), at 54, U.N. Doc. A/55/383 (Nov. 2, 2000) (including “the abuse of power or of a position of vulnerability . . . for the purpose of exploitation” as one element in the definition of trafficking).

4. See *infra* notes 9, 12, 13 and accompanying text; discussion *infra* Parts II and III.

5. This international mobilization has been read by some as simply marching to the tune of the United States. See, e.g., Slavoj Žižek, *The Smell of Love, in WELCOME TO THE DESERT OF THE REAL* 135 (2002). This U.S.-centric reading of post-September 11th events, the rest of the world its lackeys, does not explain changes on the international level that the United States does not entirely control, nor does it address the question of why the rest of the world does next to nothing about violence against women, nationally or internationally, with or without U.S. involvement.

6. See, e.g., In-depth Study on All Forms of Violence Against Women, G.A. Res. 185, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/185 (Mar. 18, 2004); The Secretary-General, *Advancement of Women—Violence Against Women, Report of the U.N. Secretary-General*, U.N. Doc. A/59/281 (Aug. 20, 2004); CEDAW, *General Recommendation 19*, *supra* note 3; Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), 33 I.L.M. 1534 (1994) [hereinafter Convention of Belém do Pará]; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, July 11, 2003, arts. 1(j), 3(4), 4(2), 5(d), 11(3), 22(b), 23(b), available at <http://www.africa-union.org> (last visited Nov. 5, 2005) (into force Nov. 26, 2005) [hereinafter African Protocol]; M.C. v. Bulgaria, 646 Eur. Ct. H.R. ¶¶ 166, 185 (2004) (concluding that the European Convention for the Protection of Human Rights and Fundamental Freedoms requires Member States effectively prosecute nonconsensual sex acts, including in the absence of physical resistance by the victim, and holding that Bulgaria did not fulfill its positive obligation to effectively criminalize rape). The U.N. Human Rights Committee’s concluding observations are also at times critical of state parties for inadequate measures against key abuses of women. See, e.g., Human Rights Committee, *Concluding Observations of the Human Rights Committee: Yemen*, ¶ 11, U.N. Doc. CCPR/CO/84/YEM (Aug. 9, 2005); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Kenya*, ¶¶ 10, 11, U.N. Doc. CCPR/CO/83/KEN (Apr. 29, 2005); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Uzbekistan*, ¶¶ 23, 24, U.N. Doc. CCPR/CO/83/UZB (Apr. 26, 2005).

7. “Violence against women” has operational meaning in international investigations. See, e.g., Coomaraswamy, *infra* note 14; *Report of the U.N. Secretary-General*, *supra* note 6. The Convention of Belém do Pará contains one:

Violence against women shall be understood to include physical, sexual and psychological violence: a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse; b. that occurs in the community and is perpetrated by

sponse on the table, even as the “responsibility to protect” from gross and systematic violence is increasingly emerging internationally as an affirmative duty.<sup>8</sup> The post–September 11th paradigm shift, permitting potent response to massive nonstate violence against civilians in some instances, exemplifies if not a model for emulation, a supple adaptation to a parallel challenge. It shows what they can do when they want to. If, in tension with the existing framework, the one problem can be confronted internationally, why not the other?

### I.

Viewed through a gendered lens, September 11th was markedly sex-neutral on the victims' side. Women, along with men—if, one supposes due to sex discrimination in employment, not equal numbers of them—were people that day.<sup>9</sup> At the World Trade Center, women and men together rushed up and up to help, crawled down and down being helped, jumped unbearably, ran covered with fear and ash, became ash. Then, day after day, month after month, there they all were, one at a time on the special memorial pages of *The New York Times*,<sup>10</sup> often smiling, before. In remembrance, they were individuals, did everything, had every prospect. Then on one crushing day, they were vaporized without regard to sex.

On the perpetrators' side, the atrocities were hardly sex- or gender-neutral. Animated by a male-dominant ethos, this one in the guise of religion—a particular fundamentalist extremism that has silenced women, subordinated them in private, and excluded them from public life—these men bound for glory and pleasure, some for virgins in a martyr's paradise,<sup>11</sup> exterminated people

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any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

Convention of Belém do Pará, *supra* note 6, at 1535. So does the African Protocol:

“Violence against women” means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

African Protocol, *supra* note 6, at art. 1(j). This term has the virtue of being concrete but the vice of not addressing violence against comparatively powerless groups who, socially rather than biologically female, are feminized as targets for male violence, including sexual violence. Boys and gay men are the largest of such groups. The term “gender-based violence” solves this problem. *See, e.g., CEDAW, General Recommendation 19, supra* note 3. (However, this recommendation, as an interpretation of CEDAW, applies only to women.)

8. *See* Kofi Annan, Two Concepts of Sovereignty, Address Before the U.N. General Assembly (Sept. 20, 1999), in KOFI ANNAN, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL 37, 39 (1999).

9. The FBI reports 648 women and 2175 men were killed at the World Trade Center on September 11, 2001. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES SPECIAL REPORT: THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001: A COMPILATION OF DATA 302 (2001), available at [http://www.fbi.gov/ucr/cius\\_01/01crime5.pdf](http://www.fbi.gov/ucr/cius_01/01crime5.pdf) (last visited Nov. 11, 2005) [hereinafter UNIFORM CRIME REPORTS]. At all locations together, 739 women and 2303 men died of the atrocities that day. *Id.*

10. *See* NEW YORK TIMES, PORTRAITS: 9/11/01 THE COLLECTED PORTRAITS OF GRIEF (2d ed. 2003), available at <http://www.nytimes.com/pages/national/portraits/index.html> (last visited Nov. 5, 2005).

11. A five-page letter found in the luggage of Mohammed Atta, one of the September 11th hijackers,

by the thousands to make a point. The rest of the world is still trying to figure out exactly what that point was. But this aggression, these atrocities, this propaganda by deed, made September 11th an exemplary day of male violence. Every other day, as well as this one, men as well as women are victimized by men's violence. But it is striking that the number of *people* who died at these men's hands on September 11th, from 2800 to 3000, is almost identical to the number of *women* who die at the hands of men every year in just one country, the same one in which September 11th happened.<sup>12</sup> Women murdered by male intimates alone could have filled one whole World Trade tower of September 11's dead.<sup>13</sup> This part of a war on women in only one country, variously waged in all countries,<sup>14</sup> is far from sex-equal on either side.

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left at Logan International Airport in Boston, stated, in part: "You will be entering paradise. You will be entering the happiest life, everlasting life . . ." *Excerpts from Letter Thought to Be Instructions*, N.Y. TIMES, Sept. 28, 2001, at B4. Another document used by the hijackers the night before the attacks stated: "When the confrontation begins, strike like champions who do not want to go back to this world . . . Know that . . . the women of paradise are waiting[.]" *Notes Found After the Hijackings*, N.Y. TIMES, Sept. 29, 2001, at B3. *See also* Joseph Lelyveld, *All Suicide Bombers Are not Alike*, N.Y. TIMES MAG., Oct. 20, 2001, at 49. Atta's will specified that only "good Muslims" should prepare his body and that his funeral should exclude women: "I don't want any women to go to my grave at all during my funeral or any occasion thereafter." Philip Shenon & David Johnson, *Suspect's Will Suggests a Longtime Plan to Die*, N.Y. TIMES, Oct. 4, 2001, at B5 (quoting Atta).

12. In recent years, the number of women murdered in the United States was 3215 in 2003, 3251 in 2002, 3214 in 2001, 2076 in 2000, and 3085 in 1999. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, <http://www.fbi.gov/ucr/ucr.htm> (follow "2003" hyperlink; then follow "Table 2.3" hyperlink; and follow "2002;" then follow "Table 2.4;" and follow "2001;" then follow "Table 2.4;" and follow "2000;" then follow "Table 2.4;" and follow "1999;" then follow "Table 2.4.") (last visited Nov. 5, 2005). For some years, the sex of murder victims was not known to the data authorities, so the numbers could be larger. *See id.* (follow "2004" hyperlink; then follow "Report Summary" hyperlink). The number of women known to be murdered by men varies each year, but men tend to outnumber women as women's killers by about ten to one. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, <http://www.fbi.gov/ucr/ucr.htm> (follow "2003" hyperlink; then follow "Table 2.7" hyperlink; and follow "2002;" then follow "Table 2.8;" and follow "2001;" then follow "Table 2.8.") (last visited Nov. 5, 2005).

13. One thousand two-hundred forty-seven women were killed by male intimates in 2000. BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE 1993–2001, <http://www.ojp.usdoj.gov/bjs/abstract/ipv01.pdf> (last visited Nov. 5, 2005). At least one-third of murdered women are estimated to have been killed by intimate male partners, with the victim-offender relationship unknown in an additional third. BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S.: INTIMATE HOMICIDE, <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (last visited Nov. 5, 2005). Studies that look more closely at the incidence of men murdering intimate women partners in the United States find that the correct number is closer to fifty percent. *See, e.g.*, THE NEW MEXICO INTIMATE PARTNER VIOLENCE DEATH REVIEW TEAM, GETTING AWAY WITH MURDER III: INTIMATE PARTNER VIOLENCE DEATHS 1999–2000, <http://ndvfri.org/docs/NM99.pdf> (last visited Nov. 11, 2005); LINDA LANGFORD, NANCY E. ISSAC & STACIE KABAT, HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS, 1991–1995 (Peace at Home 1999), *available at* <http://www.peaceathome.org/pdfs/homrepo.pdf> (last visited Nov. 7, 2005) [hereinafter LANGFORD] (finding that forty-three percent of all female homicide victims in the state were killed by current or former intimate partners; that the "current U.S. system of data collection, the Supplementary Homicide Reports (SHR) compiled by the FBI, does not . . . fully document all of the Partner Victims;" and that in Massachusetts from 1991 to 1995, the SHR was found to have missed twenty-nine percent of the partner victims and to have failed to document "Other Victims" as homicides related to intimate partner violence). In addition, the SHR has no categories for victim-offender relationships such as ex-boyfriend or ex-girlfriend. *See* LANGFORD at 6. Intimate male-on-female violence thus tends to be undercounted even when death results.

14. *See* LORI HEISE, MARY ELLSBERG & MEGAN GOTTEMOELLER, POPULATION REPORTS: ENDING VIOLENCE AGAINST WOMEN 5 (1999), *available at* <http://www.inforhealth.org/pr/111/violence.pdf> (last

To call violence against women “a war,” especially in a legal context, is usually dismissed as metaphorical, hyperbolic, and/or rhetorical. Since the U.N. Charter, when war ceased being the definitive legal term, international law speaks of “armed conflict” or “armed attack.” This body of law primarily regulates the use of force between or within states or for control of states.<sup>15</sup> If one side is armed and the other side is not, or if states are not the units or focus of the fighting, the conflict may not qualify. Whether the fighting has reached the point where peacetime law and institutions have broken down is a prime criterion. Violence against women has not looked like a war in this system in part because states are not seen to wage it, nor does it present armies contending within or across or against or for control or for definition of states. It is not about state power in the usual way. Nor do the sexes look like combatant groups are thought to look. Neither sex is considered to be in uniform. The regularities of their social behavior are not seen as organized, so their conflict looks more chaotic than ordered. Women are usually unarmed, many weapons used against women are not regarded as arms, and women do not typically fight back. Even attacks on women by men that employ conventional weapons are not considered “armed attacks” or a “use or threat of force” in the international legal sense.<sup>16</sup> The battle of the sexes simply does not look the way a war is supposed to look.

So, no Geneva Conventions set limits. There are no rules of engagement, no rules of combat, unless domestic criminal laws count—laws so under-

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visited Nov. 11, 2005) (finding by World Health Organization multicountry study that approximately ten to fifty percent of women are physically assaulted by their male partners at some point in their lives); Radhika Coomaraswamy, *Preliminary Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, esp. ¶¶ 120–21, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1995) [hereinafter *Preliminary VAW Report*]; Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, esp. ¶ 62, U.N. Doc. E/CN.4/1996/53 (Feb. 7, 1996) [hereinafter *Second VAW Report*]; Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, esp. ¶¶ 22–23, U.N. Doc. E/CN.4/1997/47 (June 17, 1997) [hereinafter *Third VAW Report*].

15. See 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 668–70, (Bruno Simma et al. eds., Oxford 2002) (discussing scope of “armed attack”). However, international law has increasingly incorporated nonstate acts and actors into its framework, for example, under Protocol II to the Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2 (1987), 1125 U.N.T.S. 609 [hereinafter Protocol II]. Certain *jus cogens* norms, such as against genocide, have always applied to private as well as public actors. But as the Report of the High-level Panel on Threats, Challenges and Change conceded, “The norms governing the use of force by nonstate actors have not kept pace with those pertaining to States.” High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 159, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *High-level Report*].

16. International standards regarding the resort to force have invasion of one state by another principally in mind. For example, “use or threat of force” within Article 2(4) of the U.N. Charter is generally understood to be broader than “armed attack,” meaning it encompasses mere frontier incidents or skirmishes, including ones by irregulars at the borders of states. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at ¶ 195 (June 27) [hereinafter *Nicaragua*]. The Rome Statute of the International Criminal Court (ICC) is still broader, recognizing that armed conflict can take place between two nonstate actors but, if no governmental authorities are involved, it wants to see “protracted armed conflict” between “organized armed groups.” The Rome Statute, art. 8, ¶ 2(f).

enforced it can almost seem as if they are not there.<sup>17</sup> Women get no quarter; surrender means more force. Because so much violence against women takes place in what is called peacetime, its atrocities do not count as war crimes unless a war among men is going on at the same time. Instead of being regarded as war crimes—as beyond the pale, if to some degree inevitable in exceptional contexts—acts of violence against women are regarded not as exceptional but inevitable, even banal, in an unexceptional context, hence beyond no pale. In this “war,” no one is a noncombatant with protected civilian status. These “combatants” cannot be distinguished from civilians who are off-limits to attack, either by their lack of command structure or by their clothing; no dress code here, just socially prescribed attire that targets women by screaming “female” and makes it hard to run. Nor does aggression against women count as crime against the peace, as aggression against states is called, women not being a state. All this makes “All’s fair in love and war” only half true; in war, all is not fair.

Acts of violence against women are legally considered to be everyday crimes, of course, left to national and other local systems. For this reason, and because the actors under the U.N. Charter are states, not people,<sup>18</sup> responsive force by people, including women, has not been considered authorized under the Charter as self-defense.<sup>19</sup> Women’s countermeasures are not usually found justified as self-defense under most national and state systems either.<sup>20</sup> Parallel norms of immediacy and proportionality,<sup>21</sup> created with conflicts between

17. See CATHARINE A. MACKINNON, *SEX EQUALITY* 715–45, 772–87 (2001) (providing extensive sources discussing and documenting the inefficacy of states in the United States in addressing violence against women, including domestic violence and sexual attacks). With cultural variation, similar patterns hold around the world. See *Second VAW Report*, *supra* note 14, ¶¶ 54–114, 117–123, 130.

18. But note that the U.N. Charter begins, “We the Peoples,” not “We the States.” U.N. Charter Preamble.

19. Article 51 of the U.N. Charter provides that “[n]othing shall impair the inherent right of individual and collective self-defense.” This provision might be read to extend to private actors in a genocidal civil war but, in the classic formulation, the right to self-defense applies to states, largely because it is the exception to the U.N. Charter’s Article 2(4) ban, which (at least until post-September 11th) has been read to apply only to states. For the International Court of Justice’s (ICJ) interpretation of collective self-defense generally, including under this regime, see *Nicaragua*, *supra* note 16, ¶¶ 195–200. For states, the right of self-defense is often seen as customary as well, rather than being entirely supplanted by the Charter. See *id.* ¶ 193.

20. See, e.g., B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1 *DUKE J. COMP. & INT’L L.* 169, 172–76 (1991); Sandra K. Lyons & David McCord, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 *AM. CRIM. L. REV.* 97, 107–10 (1992); *Second VAW Report*, *supra* note 14, ¶¶ 8–10, 130 (criticizing the United Arab Emirates for failing to accept self-defense claims such as that of “a 16-year-old Filipina migrant worker, Sarah Balabagan, who was reported to have stabbed her employer to death in self-defense after having been raped at knife-point by him”) (describing the frequent mitigation of men’s crimes for killing women, not extended to women who kill their abusers in self-defense). Perhaps legal standards that preclude women from using force in self-defense might be found to violate the International Covenant on Civil and Political Rights, arts. 6, 26, G.A. Res. 2200A (XXI), at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

21. An International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber has held that paragraph (1)(c) of Article 31 of the Statute of the ICC, providing that self-defense excludes criminal responsibility if the act is in response to “an imminent and unlawful use of force in a manner proportionate to the

men in mind,<sup>22</sup> are enforced against women defendants claiming self-defense in most states in the United States, as if women have the power that states have.<sup>23</sup> Self-defense standards are seldom effectively enforced on nations; their sovereignty is defended by force with relative legal impunity through acts that are sometimes proportionate and sometimes not, and little to nothing is done.<sup>24</sup> But women who defend themselves from male violence with lethal force are likely to wind up convicted of murder and on death row.<sup>25</sup> In no case—except, for example, de facto through jury nullification or, at a stretch, when pardoned—are they treated anything like protected combatants.<sup>26</sup>

This is not to suggest that men's capturing and killing of women should be legal, as it would be if the war on women were legally considered a war. Yet even if it was, rape would still be a war crime. However ignored in practice, rape has long been considered unfair in men's wars<sup>27</sup> and is being adjudicated internationally under increasingly serious rules that recognize a context of force<sup>28</sup> that no domestic rape law yet does. It is to observe that while daily life goes on almost as if violence against women is legal, daily life lacks the legal benefits to noncombatants that a recognized state of war confers. If women in everyday life are not formally considered combatants, with combatants' rights, neither do they effectively receive the benefits the law of war confers

degree of danger" to the person "protected," codifies customary international law. *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, ¶ 451 (Feb. 26, 2001). The Appeals Chamber appeared to approve this view. *See Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgment, ¶ 837 (Dec. 17, 2004).

22. For one judicial recognition of this criticism in the U.S. setting, see *State v. Wanrow*, 588 P.2d 1320 (Wash. 1978), where the so-called Battered Women's Syndrome attempts to address this problem. *See* Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 123–26 (1985) ("The traditional doctrine of self-defense is based on the experiences of men; it neither contemplates nor acknowledges those acts of self-defense by women that are reasonable, but different from men's. . . . The male experience permeates both the elements of the defense and the standards of reasonableness.") .

23. *See* Lyons & McCord, *supra* note 20, at 108; *see also* Byrd, *supra* note 20, at 172.

24. *See Nicaragua*, *supra* note 16, ¶¶ 194, 237. An excellent review is provided by CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 105–08, 111 (2000). *See also* Jost Delbruck, *Proportionality*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1140 (Rudolph Bernhardt ed., 1997).

25. The Second VAW Report finds that:

In one country, for example, women throughout the country are serving lengthy prison sentences for killing their abusers in self-defense. Conversely, men who kill their intimate partners are often excused or their sentences mitigated after the provocation defence or the defence of honor has been raised and accepted by the court.

*Supra* note 14, ¶ 130.

26. A good overview on this subject, as well as of the dichotomy between war and peace, can be found in Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004). Note that protections for civilians in armed conflict are not unlimited. Civilians can lose their protections if they take part in hostilities or, under the doctrine of reasonable collateral damage, if their unintended losses are proportional to a military advantage thereby gained. These doctrines also have echoes between the sexes, for example when women are punished if they fight back or are effectively treated as roadkill in men's conflicts among each other, as in unprosecuted war rapes.

27. *See* Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993); Christine M. Chinkin, *Rape and Sexual Abuse in International Law*, 5 EUR. J. INT'L L. 326 (1994).

28. *See* *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 686–88 (Sept. 2, 1998) [hereinafter *Akayesu*]; Catharine A. MacKinnon, *Defining Rape Internationally: A Commentary on Akayesu*, 44 COLUM. J. TRANSNAT'L L. (forthcoming 2006).

on civilians during combat. Even as the alleged September 11th perpetrators (and those lumped together with them) are inconsistently considered soldiers and criminals under U.S. law, while consistently receiving the benefits of neither the war model nor the crime model,<sup>29</sup> most men who commit violence against women are legally considered neither soldiers nor criminals, yet often receive the effective impunity that is the practical benefit of both.

If violence against women were considered a war inside one country, an armed conflict “not of an international character,” much of what happens to women every day all over the world would be crisply prohibited by the clear language of Common Article 3 of the Geneva Conventions.<sup>30</sup> Its protections for civilians during conflicts that are not among nations are thought to be the least that must be available for acts with a nexus to armed conflict. It prohibits violence to life and the person, especially murder, mutilation, cruel treatment, and torture, and outrages on personal dignity, especially humiliating and degrading treatment.<sup>31</sup> Imagine women’s everyday lives without all that. Common Article 3 even guarantees that people not taking part in hostilities are to be treated without discrimination on the basis of sex. The absence, for women around the world outside what are termed zones of conflict, of such guarantees for noncombatants in war puts women in the practical position of being combatants in daily hostilities, while at the same time generally being unarmed and considered criminals if they fight back. Realized in

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29. All the relevant features of this problem are displayed in the debate over the legality of the military commissions that the United States is advancing to try individuals accused of activities associated with and following September 11th. See, e.g., Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 345–48 (2002) (discussing the contradictions produced by simultaneous application of war and crime models); Harold Hongju Koh, *The Case Against Military Tribunals*, 96 AM. J. INT’L L. 337 (2002); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328 (2002). The larger legal issues raised in this context are being adjudicated in criminal cases involving the detainees. See, e.g., Richard A. Serrano, *Detainee Challenges “Combatant” Status; Lawyers for a Man Held at a Military Jail in South Carolina Plan To Test the President’s Authority To Decide the Legal Standing of Terrorism Suspects*, L.A. TIMES, Sept. 18, 2005, at A22; Mitch Frank, *Terror Goes on Trial*, TIME, Mar. 7, 2005, at 34; Jerry Markson, *U.S. Can Confine Citizens Without Charges, Court Rules*, WASH. POST, Sept. 10, 2005, at A01.

30. Common Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

*Supra* note 2.

31. *Id.*



what is called peacetime, Common Article 3 would transform the lives of women everywhere. But you need a war for it to apply.

## II.

The threshold legal barrier to addressing male violence against women internationally has been that both the perpetrators and the victims are private persons, termed nonstate actors. But Osama bin Laden and his Al Qaeda network—assuming they are behind the 9/11 attacks<sup>32</sup>—are also private citizens. Allegations have been made of varying levels of state involvement, linkage, and backup to their plot, but, so far as is known, Al Qaeda was not working for any state. If anything, Osama bin Laden may have hijacked Afghanistan, its illegitimate regime potentially working for him rather than the other way around. An Al Qaeda connection with Saddam Hussein's regime has been officially floated in the United States and is widely believed, but no direct evidence for it has yet surfaced.<sup>33</sup> Under the laws of war, conduct of private persons or entities has required some degree of state control or adoption to be attributable to states.<sup>34</sup> As to September 11th, state action has not only not been proven; it has so far barely been credibly alleged.

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32. This appears quite well-established, but all the sources are press. See *Saturday Early Show: New Videotape from Osama bin Laden* (CBS television broadcast, Oct. 30, 2004) ("On the tape, bin Laden admitted for the first time that he ordered the September 11 attacks."); see also *Weekend Edition: New Osama bin Laden Tape Rears Its Ugly Head* (NPR radio broadcast, Oct. 30, 2004); Transcript of Interview by Tayseer Alouni of Al-Jazeera Television with Osama bin Laden (Oct. 2001), available at <http://archives.cnn.com/2002/WORLD/asiapcf/south/02/05/binladen.transcript/index.html> (last visited Nov. 21, 2005).

33. See Walter Pincus & Dana Milbank, *The Iraq Question: Al Qaeda-Hussein Link Is Dismissed*, WASH. POST, June 17, 2004, at A1 (reporting that Vice President Dick Cheney termed evidence of ties "overwhelming," and that an April 2004 Harris poll showed as many as forty-nine percent of Americans believed that "clear evidence" of a connection had been found). The 9/11 Commission concluded that, although Iraqi officials may have met bin Laden or his aides at some point, "to date, we have seen no evidence that [any contacts between bin Laden and Iraq] ever developed into a collaborative operational relationship. Nor have we seen evidence indicating that Iraq cooperated with al Qaeda in developing or carrying out any attacks against the United States." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9-11 COMMISSION REPORT 66 (2004).

34. See LASSA OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 550 (8th ed. 1955) (explaining that the ultimate issue is one of fact: "whether the individuals concerned were sufficiently closely associated with the state for their acts to be regarded as acts of the state rather than acts of private individuals"); EMMERICH DE VATTEL, THE LAW OF NATIONS 162 (Gaunt 2001) (1834) (stating that acts of private citizens can be attributed to the state if it "approve[d]" or "ratifie[d]" the act, thus becoming "the real author of the injury"). A similar rule pertains in attribution of civil damages. See *Cotesworth and Powell* (Gr. Brit. v. Colom.) (1875), reprinted in JOHN BASSETT MOORE, 2 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAD BEEN A PARTY 2050 (1898) (citing de Vattel for the proposition that "[o]ne nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury.").

Views vary on standards for attribution of nonstate actor behavior to states. See *Nicaragua*, *supra* note 16, ¶¶ 114–116. Expounding a test of "effective control" by states, the ICJ there found that acts by the Contras taken with U.S. support (finance, training, equipment) were not imputable to the United States, while the United States was held responsible for acts that were a direct result of the U.S. military or its paid agents. *Id.* ¶ 115. The core concept is developed in *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 27–35, 42 (May 24), in which the takeover of the U.S. embassy by armed students, subsequently embraced by the government, was attributed to Iran. In *Prosecutor v. Tadić*, Case

On the victim side, the Pentagon would have been a military target in a war (although it cannot legally be hit with civilian aircraft), but the World Trade towers, which Mr. bin Laden apparently regarded as some sort of official target, were private buildings full of mostly private citizens working for private corporations. The twin towers certainly were *in* the United States, symbolized the nation to some, and were a cultural icon of sorts, but for legal purposes, they were not the United States. They were not a military target, for which, in a war, a military response is legal. In a war, they would be a civilian target, a war crime to attack, to be pursued judicially. And before, on, and since September 11th, Al Qaeda's victims have transcended national boundaries, as do the victims of the war on women.

So, on September 11th, nonstate actors committed violence against mostly nonstate (nongovernmental and civilian) actors. It has been basically inconceivable within the Westphalian system that such an act could be so damaging or provide the predicate for the level of response it has occasioned.<sup>35</sup> Yet from that moment forth, in a usage that slides between the legal and the ordinary, the concrete and the rhetorical, the United States has told the world, "We are at war."<sup>36</sup> With no state yet in view behind the aggression, U.N. Secu-

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No. IT-94-1-T, Judgment, ¶¶ 116–144 (July 15, 1999), the ICTY Appeals Chamber, weighing the responsibility of Yugoslavia for acts of Bosnian Serb forces, relaxed the requirement for attributing their unlawful acts to the state to "overall control" over the organized paramilitary groups. That court held that the extent of requisite state control varies such that the question "is whether a *single* private individual or a *group that is not militarily organized* has acted as a *de facto* state organ when performing a specific act." *Id.* ¶ 137; *see also* Prosecutor v. Tadić, Case No. IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, ¶¶ 18–34 (May 7, 1997). The international community appears to be moving toward accepting the *Tadić* majority's understanding of attribution post-Afghanistan:

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.

*Tadić*, Judgment at ¶ 137; *see also* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, art. 8, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) (attribution to the state is appropriate if the nonstate actor "in fact [is] acting on the instructions of, or under the direction or control of, that State in carrying out [the wrongful] conduct."). In one national court, some progress was made toward international accountability for the actions of a rogue entity leader. *See* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996) [hereinafter *Karadzic*].

35. *See* Treaty of Westphalia, *supra* note 1. The 1945 U.N. Charter regime significantly furthered this development. Before the Charter, states responded to nonstate violence through the use of force, for example in raiding the Emir of Tripoli after the Barbary pirates interfered with Mediterranean shipping, and in pursuing Pancho Villa into Mexico.

36. President Bush reportedly told his aides, "We're at war," when he heard of the second plane hitting the second tower. Dan Balz, *A Bond Cemented by Chemistry: Crisis Highlights Links and Differences Between Bush Administrations*, WASH. POST, Sept. 15, 2001, at A3. On September 11th, President Bush stated, "we stand together to win the war against terrorism." Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1100 (Sept. 11, 2001). On September 16, he said, "It is time for us to win the first war of the 21st century decisively, so that our children and our grandchildren can live peacefully into the 21st century." Remarks on Arrival at the White House and an Exchange with Reporters, 2 PUB. PAPERS 1116 (Sept. 16, 2001). On September 20, he stated, "On September 11, enemies of freedom committed an act of war against our country." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140 (Sept. 20, 2001). And on September 25, President Bush stated that, "Two weeks ago there was an act of war declared on

riety Council resolutions concerning September 11th implied that the events of that dreadful day were an “armed attack.”<sup>37</sup> NATO invoked collective defense for the first time in its history.<sup>38</sup> So this becomes a war—complete with war crimes, military tribunals, potentially justified acts of self-defense, and prisoners of war.<sup>39</sup> The fact that the existing structure of international law does not have a conflict like this primarily in mind has not stopped the wartime scale response, complete with military mobilization, finance, ordnance, rhetoric, and alliances. Few have called the time since September 11th peacetime.

This international effort, the “war on terror,” calls the acts of September 11th “terrorism,” a term that has a far less settled international definition than “armed conflict” has.<sup>40</sup> Yet U.N. Security Council resolutions have used it repeatedly in reference to the events of September 11th without definition,<sup>41</sup> over little protest. Clearly, the acts of that day fall within a widely understood meaning of the term. Common elements include premeditation rather

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America. . . [W]e're at war, a war we're going to win.” Remarks to Federal Bureau of Investigation Employees, 2 PUB. PAPERS 1160–62 (Sept. 25, 2001). Bush noted of the Patriot Act that “[t]his Government will enforce this law with all the urgency of a nation at war.” Remarks on Signing the USA PATRIOT ACT of 2001, 2 PUB. PAPERS 1307 (Oct. 26, 2001). See Donald Rumsfeld, Editorial, *A New Kind of War*, N.Y. TIMES, Sept. 27, 2001, at A21 (referring *passim* to the U.S. effort against terrorism as “this war”). In his 2004 State of the Union Address, President Bush appeared to acknowledge the legal issue when he said: “I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. . . . After the chaos and carnage of September the 11, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.” *President's State of the Union Message to Congress and the Nation*, reprinted in N.Y. TIMES, Jan. 21, 2004, at A18. Although a declaration of war is not essential—creating a state of armed conflict is the issue—bin Laden's fatwa of 1998, *infra* note 53, could be read as a declaration of war.

37. Actually, the preamble to Security Council Resolution 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001), does more than this. It notes that the Security Council is “[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter.” See also S.C. Res. 1373, Preamble, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Varying views on the scope and contours of the right of self-defense under the U.N. Charter are ventilated in articles on the legality of the U.S. war against Iraq. See, e.g., William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003) (viewing the attack as lawful as collective self-defense, especially in light of 1990 and 2003 Security Council resolutions); Richard N. Gardner, *Neither Bush Nor the “Jurisprudes,”* 97 AM. J. INT'L L. 585 (2003) (discussing the risks of an enlarged self-defense scope in light of the Cuban Missile Crisis); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628 (2003) (cautioning against a broad preemption doctrine); Jürgen Habermas, *Interpreting the Fall of a Monument*, 4 GER. L.J. 701 (2003) (arguing that although the war in Iraq is incompatible with the U.N. Charter, the war represents not the defeat of international law but the passing of the normative authority of the United States).

38. See Lord Robertson, *North American Treaty Organization (NATO): Statement by NATO Secretary General, Lord Robertson*, 40 I.L.M. 1268 (2001).

39. This is not to take any position on the “unlawful combatant” debate, but it should be noted that armed forces of states are not always automatically entitled to prisoner of war status if the state systematically violates the law of armed conflict.

40. For useful reviews, see Rosalyn Higgins, *The General International Law of Terrorism, in TERRORISM AND INTERNATIONAL LAW* 13 (Rosalyn Higgins & Maurice Flory eds., 1997); 1 INTERNATIONAL CRIMINAL LAW, 776–80 (M. Cherif Bassiouni ed., 2d ed. 1987); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3 (1999). The U.N. General Assembly has not yet concluded a comprehensive convention to fill any gaps between the existing twelve counterterrorism agreements. See Gerhard Hafner, *Certain Issues of the Work of the Sixth Committee at the Fifty-Sixth General Assembly*, 97 AM. J. INT'L L. 147 (2003).

41. See, e.g., S.C. Res. 1368, *supra* note 37; S.C. Res. 1373, *supra* note 37.

than spontaneity, ideological and political rather than criminal motive, civilian targets (sometimes termed “innocents”), and sub-national group agents.<sup>42</sup> What about violence against women fails to qualify? Much of it is planned, including many gang rapes and serial murders, much stalking and sexual harassment, a lot of pornography production, and most sex trafficking. Are women somehow not “innocent,” qua women existentially at fault? If the language of war reveals women as de facto conscripts, always non-civilians yet never combatants, the language of terrorism shows that women are seldom innocent enough. And just what about women’s status relative to men is not “political”? If sex is one way power is socially organized, forming a sexual politics, sexual violence is a practice of that politics, misogyny its ideology.<sup>43</sup>

Some definitions of terrorism also require that the violence target a third party (say, civilians) in order to coerce a principal target (for example, a government or an international intergovernmental organization).<sup>44</sup> Despite scant proof of what the United States was supposed to be coerced into doing by the attacks of September 11th<sup>45</sup> (apart from giving up its way of life), the label “terrorism” has not been said *not* to apply to those attacks for this reason. This

42. For discussions of definitional issues, see Jordan J. Paust, *A Definitional Focus*, in *TERRORISM: INTERDISCIPLINARY PERSPECTIVES* 18, 18–25 (Yonah Alexander & Seymour Maxwell Finger eds., 1977); ELIZABETH CHADWICK, *SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT* 2–3 (1996); Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 *ILSA J. INT’L & COMP. L.* 357 (2003). The latter element mentioned in the text would exclude state terrorism, which many people (including me) think should be covered. For an illuminating discussion, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion & Prot. of Human Rights, *Terrorism and Human Rights*, ¶¶ 37–67, U.N. Doc. E/CN.4/Sub.2/2001/31 (June 27, 2001) (prepared by Kalliopi K. Koufa). The *High-level Report* takes an integrative approach to this question. Referring to existing definitions, the report describes terrorism as, in addition to acts covered by existing conventions on the subject, “any action . . . that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.” *High-level Report*, *supra* note 15, ¶ 164(d).

43. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); KATE MILLETT, *SEXUAL POLITICS* (1970).

44. *Compare* International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, Annex, U.N. Doc. A/RES/54/109 (Feb. 25, 2000) (requiring that the threat be directed against a civilian or noncombatant), *with* 8 U.S.C. § 1182(a)(3)(B)(iii)(II) (2005) (lacking this element). Under the Convention, an act is terrorism only if it is intended to coerce action by a government or international organization; under U.S. law, intent to compel action by any third party is enough. The International Convention Against the Taking of Hostages views “all acts of taking of hostages as manifestations of international terrorism.” G.A. Res. 34/146, Preamble, U.N. Doc. A/C.6/34/L.23 (Dec. 17, 1979). It identifies the political objective of a hostage-taker by defining such an offender as a person “who seizes or detains and threatens to kill, to injure or to continue to detain a hostage . . . in order to compel a third party, namely, a State . . . to do or abstain from doing any act as . . . a condition for the release of the hostage.” *Id.* art. 1, ¶ 1; *see* CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* 17–20 (1992) (defining terrorism as violence aimed at innocents or noncombatants to gain an edge over or to coerce a third party); *High-level Report*, *supra* note 15, ¶ 164(d).

45. Perhaps it was for the United States to leave the three holy places. *See* Walter Pincus, *Bin Laden Fatalistic, Gaunt in New Tape*, *WASH. POST*, Dec. 28, 2001, at A1. Or that Americans should feel the fear the Palestinians feel. On both points, *see*, for example, Cam Simpson, *U.S. Fears More Attacks*, *CHI. TRIB.*, May 14, 2003, at A6 (“I swear to God that America will never dream of security or see it before we live it and see it in Palestine, and not before the infidel’s armies leave the land of Muhammad.” (quoting Osama bin Laden)).

definitional element serves to further underline that, as with what makes a war, official entities tend to be what count. When this element is adopted, attacks on people matter only when they are a means of coercing states, something that does matter. And violence against women, except in wars, is usually not engaged in for the purpose of coercing states.

Although in some respects violence against women is much like terrorism, the acts of which can also be acts of armed conflict, it is not as such regarded as an act of war in the *jus ad bellum* sense nor necessarily a war crime.<sup>46</sup> But the attempt to control terrorism, despite not yet being defined by the Rome Statute<sup>47</sup> of the International Criminal Court (ICC), has produced decades of international debate and scores of international conventions.<sup>48</sup> With respect to male violence against women, by contrast, there have not been any special ad hoc tribunals or truth and reconciliation commissions even proposed, much less created, to get out the truth, heal this social division, and restore justice—places where men would come and confess everything they had ever done to a woman, where those women, should there be rooms big enough to hold them, could decide whether to give their abusers amnesty.<sup>49</sup>

The acts of September 11th surely are crimes against humanity under international humanitarian law, as is much violence against women, making both internationally illegal anytime, at least in theory, not only in war (and not as such an act of war).<sup>50</sup> Yet crimes against humanity have been widely legally unimplemented. The ICC, which was not in force on September 11, 2001, might become a place to seek justice for (heaven forbid) any such future atroci-

46. Although, assuming an armed conflict, it could be. See Geneva Convention relative to the Protection of Civilian Persons in Time of War, *supra* note 2, art. 33; Protocol II, *supra* note 15, art. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]. For prescient discussion of this interface, see Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145 (2000).

47. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 to July 17, 1998, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex 1(E), U.N. Doc. A/CONF.183/10 (July 17, 1998); see also COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 98–99 (Otto Triffterer ed., 1999).

48. For an updated list, see U.N. Treaty Collection, <http://untreaty.un.org/English/Terrorism.asp> (last visited Nov. 11, 2005).

49. That this would have been ex-U.S. President Clinton's legacy remains an unrealized fantasy. For a narrower but consonant recommendation that post-conflict Truth and Reconciliation Commissions as presently structured investigate crimes against women, see ELIZABETH REHN & ELLEN JOHNSON SIRLEAF, UNITED NATIONS DEVELOPMENT FUND FOR WOMEN (UNIFEM), WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING 106–07, 140 (2002), available at <http://www.reliefweb.int/rw/lib.nsf/AllDocsByUNID/3f71081ff391653dc1256c69003170e9> (last visited Nov. 16, 2005).

50. In the Rome Statute, crimes against humanity lost their formerly required nexus to a state of war, although an act, to qualify, still must have been committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." See The Rome Statute, art. 12, ¶ 3. Note in this connection that the two ad hoc tribunals, the ICTY and the International Criminal Tribunal for Rwanda (ICTR), have addressed violence against women as crimes against humanity in the reality context of armed conflict and genocide.

ties, even potentially for non-ratifying states (like the United States).<sup>51</sup> For violence against women, not even the ICC, an improvement in so many ways,<sup>52</sup> fully solves the problem. Apart from crimes against humanity, the acts of September 11th most closely fit a legal category that is interestingly almost never invoked for them: genocide, “the intentional killing of members of a national group . . . in part, with intent to destroy the group as such.”<sup>53</sup> One evocative definition of terrorism is “bit by bit genocide.”<sup>54</sup> If women were seen to be a group, capable of destruction as such, the term genocide would be apt for violence against women as well.<sup>55</sup> But that is a big if.

In light of this analysis, it is the “war on terror” that is the metaphor—legally a mixed one at that—although its pursuit has been anything but, and violence against women that qualifies as a *casus belli* and a form of terrorism every bit as much as the events of September 11th do.

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51. Most thinking about the status of nonparty states under the Rome Statute has revolved around whether their nationals could be prosecuted, not whether nonparty states could have access to remedies. For one discussion of the “third party” treaty debate in the ICC context, see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. & CONTEMP. PROBS. 13 (2001).

52. The Rome Statute, art. 7, ¶ 1(g), defines acts of sexual violence as crimes against humanity when committed as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.

53. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1949, 78 U.N.T.S. 277, art. 2. Although considering September 11th as genocide minimizes the multinational identities of the victim group, a similar mix is often present in genocides, which are defined by intent. *See id.* Potential examples of genocidal intent reported in connection with the September 11th attacks include: On February 23, 1998, Shaykh Osama bin Muhammad bin Laden issued his Jihad Against Jews and Crusaders charging that:

[T]he ruling to kill the Americans and their allies—civilian and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it. . . . We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill the Americans and plunder their money wherever and whenever they find it.

*A Wealthy, Shadowy Mastermind*, ATLANTA J. CONST., Aug. 21, 1998, at C2. A text of a videotaped statement by bin Laden broadcast on Al-Jazeera television stated “God has blessed a group of vanguard Muslims, the forefront of Islam, to destroy America.” *Bin Laden’s Statement: “The Sword Fell,”* N.Y. TIMES, Oct. 8, 2001, at B7. Al-Jazeera also aired a videotape featuring September 11th hijacker Ahmed Alhaznawi stating: “It is time to kill the Americans in their own homeland, among their sons, and near their forces and intelligence.” Tim Golden, *Videotape Links Al Qaeda with Sept. 11 Hijackers*, N.Y. TIMES, Apr. 16, 2002, at A5. On May 21, 2003, Al-Jazeera aired an audio tape from Ayman Al-Zawahiri, senior aide to Osama bin Laden, exhorting Muslims to “[c]arry out attacks against the embassies, companies, interests and officials of the U.S., Britain, Australia and Norway. Burn the ground under their feet. . . . The crusaders and the Jews only understand the language of murder, bloodshed . . . and of the burning towers.” *New Al-Qaeda Tape Calls for Attacks*, AL JAZEERA, May 21, 2003, <http://english.aljazeera.net/NR/exeres/293D19D4-CBB9-4296-B158-D54246F6259E.htm> (last visited Nov. 5, 2005).

54. Joseph J. Lador Lederer, *A Legal Approach to International Terrorism*, 9 ISRAEL L. REV. 194, 211 (1974).

55. This analysis is discussed in Catharine A. MacKinnon, *Genocide’s Sexuality*, in POLITICAL EXCLUSION AND DOMINATION (Stephen Macedo & Melissa S. Williams eds., 2005) [hereinafter *Genocide’s Sexuality*]. The trial decision in the *Akayesu* case does face the role of sexual atrocities in genocide defined on existing grounds. *See Akayesu*, *supra* note 28, ¶ 731.

## III.

Those who contend that men's daily violence against women ought to be a recognized violation of international law—as some of us who work on these issues have been arguing under various rubrics for years<sup>56</sup>—have long been told, in essence, that we do not know what we are talking about. International law, including human rights law, it is said, is designed mainly to control official acts; hence, it applies primarily to official entities, either state-to-state or individual-to-state. Exceptions are mainly for genocide and crimes against humanity, which are widely thought to have to occur on a scale that usually requires some official backing or at least official condonation. The international law of war may address internal armed conflicts—that is, conflicts internal to states, as in civil wars, contest by guerrilla forces of state power, or wars of national liberation—but not what are routinely termed individual acts of violence by some people in civil society against other people, acts seen to be sporadic and isolated, called “private.” Even when violence against women takes place in armed conflicts of men against other men such that the laws of war apply, it has taken years of work to begin to get a serious legal response. Although rape in war has long been illegal, sexual atrocities were ignored at Nuremberg, were raised only in part in the Tokyo Trials,<sup>57</sup> are beginning to be addressed by the Yugoslav Tribunal,<sup>58</sup> are being addressed by the Rwanda Tribunal,<sup>59</sup> and have been codified in war by the statute of the ICC.<sup>60</sup>

But even with this progress, international law still fails to grasp the reality that members of one half of society are dominating members of the other half in often violent ways all of the time, in a constant civil war within each civil society on a global scale—a real world war going on for millennia. It little imagines a war, or crimes of war, or crimes against the peace taking place in which states as such are neither the source nor the name of the power being violently exercised, nor the object sought, nor the violated party. It does not

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56. See, e.g., Catharine A. MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 21 (Kathleen Mahoney & Paul Mahoney eds., 1992); Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 234–35 (2000).

57. See United Nations War Crimes Commission, *4 Law Reports of Trials of War Criminals* 1–2 (1948) (successfully prosecuting Japanese General Tomoyuki Yamashita for rape, murder, and mass executions carried out in the Philippines during World War II).

58. See, e.g., Prosecutor v. Kunarac, Kovac, & Vukovic (*Foča*), Case Nos. IT-96-23-T & IT-96-23/1-1-T, Judgment, ¶¶ 515–43, 651 (Feb. 22, 2001) (holding that serial rape in a brothel-like setting constitutes slavery); Prosecutor v. Milošević, Case No. IT-99-37-I, Indictment, ¶ 36 (Nov. 22, 2001) (indicting for rape as act of genocide).

59. See, e.g., *Akayesu*, *supra* note 28. The U.N. Special Court for Sierra Leone is also addressing issues of sexual abuse, including forced marriage, in the context of that conflict. For an example, see the case of Augustine Gbao (or Gao), whose indictments can be found at <http://www.sc-sl.org/Documents/SCSL-04-15-PT-122-6181-6191.pdf> and <http://www.sc-sl.org/Documents/SCSL-04-15-PT-12-6192-6202.pdf>, together with a summary of the case at <http://www.sc-sl.org/RUFcasesummary.html> (last visited Nov. 16, 2005).

60. See The Rome Statute, art. 7(g) (in or out of war), 8(b)(xxii), 8(e)(vi).

envision conflicts in which it is not the boundaries of nations or the sovereignty of states that are attacked or defended, but the boundaries of the person as a member of a group that are transgressed, and the sovereignty of members of a group of people to live life every single day that is infringed—all the while being regarded as life as normal. Nothing imagines a conflagration with one side armed and trained, the other side taught to lie down and enjoy it, cry, and not wield kitchen knives. Why international law cannot address gender conflict is not specified. It is said that it cannot for historical reasons—meaning it cannot because it has not.

Women have no state, are no state, seek no state—this being the Virginia-Woolf-meets-September-11th moment in this discussion.<sup>61</sup> Since this history never seems to get around to including us, and genocide does not cover women on the basis of sex,<sup>62</sup> and crimes against humanity were implemented nowhere until the ICC (which still prioritizes state enforcement), what are women violated by men to do? Internationally, what we *have* done is labor to get states on the hook by meeting, expanding, or weakening the legal requirements for official action, essentially the same move under international law as state action requirements under U.S. constitutional law.<sup>63</sup> The effort is to triangulate the connection between the so-called individual man, the woman, and the state in order to secure state accountability for what he does to her.

But states that do what exactly? What precisely do they do to make men's impunity for violence against women so close to total? Sometimes state actors commit the crimes in their official capacities; sometimes they affirmatively cover them up. But this is a drop in the ocean quantitatively. How to address so many laws seemingly useless by design, full of traps for the violated called "doctrine," entrenched before women were even allowed to vote, now enshrined as precedent? How to make that kind of connection into the affirmative, hopefully conscious and intentional, preferably facial even conspiratorial link that the law (which women also did not write) wants to see before anything can be done (and one is also called paranoid for claiming)? How to get at the endless doing of nothing that enables something—a pattern we are frequently told is inaction, not action? Letting die can be killing, bystanders to international atroci-

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61. See VIRGINIA WOOLF, *THREE GUINEAS* 13 (1st Harbinger ed. 1963) (1938).

62. This thought leads one to wonder if women as a group are already so destroyed that our destruction as such is unimaginable, an analysis explored in *Genocide's Sexuality*, *supra* note 55. When women are assaulted as women members of their ethnic communities, they are covered at least technically in some jurisdictions. See *Karadžić*, *supra* note 34.

63. Charles Black observed that the U.S. constitutional concept of state action in the law of race is protean:

[I]f and where it works, it immunizes racist practices from constitutional control. Those who desire to practice racism are therefore motivated, even driven, to test it through total possibility . . . and its potential variety is simply the variety of all possible action by that complex entity that is called the state. [Commitment] to a single and exclusive theory of state action . . . would be altogether unprincipled, in terms of the most vital principle of all—the reality principle.

Charles L. Black, Jr., *Foreword: State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 90 (1967). The same could be said of issues of sex raised by sexual violence under constitutional and international law.



ties half a world away are said to be complicit, but letting men abuse women at home is seldom acknowledged as abusing women, and watching them do it, as in pornography, is a constitutional right in some countries and simply allowed in most.<sup>64</sup> How to capture the larger reality of men getting away with violence against women and knowing they can—a force that operates between the sexes like gravity? How to include the pervasive support for men being men (grown-up boys being boys) in countless guises that we are endlessly told is social and cultural, not political much less criminal, hence a form of freedom (men's), not coercion (women's)? When men are violated, particularly certain men, eventually it will be seen to form a politics, on the way to having human rights. When women are violated, it is still called culture, the latest cover for standing by.

Then, late on September 11th, out of the mouth of President Bush came an answer of sorts: “We will make no distinction between the terrorists who committed these acts, and those who harbor them.”<sup>65</sup> The state harbors them. The notion of harboring has not had quite this prominence until now in this area of law, although human rights conventions often by their terms hold states accountable for violations on their territory that they do not stop,<sup>66</sup> and regional jurisdictions have been expanding the net of official responsibility for human rights violations in this direction for some time.<sup>67</sup> Since September 11th, though, the international motion in this direction in the security arena has been precipitous. On the level of institutional practice, the U.N. Security Council rushed to embrace the formerly radical notions that non-state acts can be attributed to states that harbor terrorists, and that self-defense and a threat to the peace under the U.N. Charter can be triggered by harboring and even by the mere continuing threat of terrorist acts.<sup>68</sup> The Security

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64. For discussion in the context of the United States, where making, sale, and use of pornography attracts rights of constitutional dimension, see CATHARINE A. MACKINNON, *ONLY WORDS* (1993). Although the dynamics are distinct in significant respects, it is instructive (and sustains the parallel) to observe that, since September 11th, proposals in England, the Netherlands, and Italy would forbid propaganda that “glorifies” terrorism. See <http://www.statewatch.org/news/2005/aug/italy-new-terror-laws.pdf> (last visited Nov. 16, 2005); <http://www.edri.org/edriagram/number3.16/terrorism> (last visited Nov. 16, 2005).

65. George W. Bush, Address to the Nation on the Terrorist Attacks (September 11, 2001), 37 *Weekly Comp. Pres. Doc.* 1301, 1301 (Sept. 17, 2001).

66. Among international instruments that prohibit failures to act are: ICCPR, *supra* note 20, art. 15, ¶ 2 (articles 1(3), 2, and 3 impose affirmative duties to act, and article 41 discusses the competence of the Committee to receive complaints regarding the failure of a country to fulfill its obligations); CEDAW, *supra* note 3, at 194; International Convention on the Protection of All Migrant Workers and Members of Their Families, G.A. Res. 45/148, at 261, U.N. GAOR, 45th Sess., U.N. Doc. A/45/49 (May 2, 1991).

67. This principle has been developed in the Inter-American regional system in cases involving violence against women by irregular forces putatively linked to states. See *Velásquez-Rodríguez Case*, 4 Inter-Am. Ct. H.R. (ser. C) at 31 (1988). “Harboring” is not unique to the war context. It is used in the context of trafficking in women in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 3, Annex II, art. 3; see also *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829, 839 (Perm. Ct. Arb. 1928); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, at 121, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/5217 (Oct. 24, 1970).

68. See José Alvarez, *The U.N.'s “War” on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 243 (2003).

Council in 2004 used its Chapter VII powers to require states to adopt and enforce effective laws against “any nonstate actor” proliferating and delivering nuclear, chemical, and biological weapons “in particular for terrorist purposes.”<sup>69</sup> This, they can manage. On the level of state practice, had the Taliban not existed, the United States would almost have had to invent Afghanistan’s relation to Al Qaeda in order to have a state to bomb and invade, to turn what would otherwise be crimes against humanity responding to crimes against humanity, state terrorism retaliating for nonstate terrorism, male violence against male violence, into this thing called war. Having demolished one state sanctuary (and parts of already-damaged Afghanistan with it), the United States has moved to pursue Al Qaeda worldwide, a network of potential harboring so far said to extend to up to sixty countries.<sup>70</sup>

The fact that Al Qaeda is not organized into a nation with armies and territory did not stop this international response before it started. No one argued that the bigger Al Qaeda is, the less can be done about it. Yet the fact that male dominance is not organized as a state, but like Al Qaeda is literally transnational and pervades the world, is used to keep male violence against women largely unopposed in the international system. That men are not a state (never mind that they run most every state) even seems to get them treated as if they have no power over women at all. Whether any state entity is as central to Al Qaeda’s terrorist network as it is to giving a target the look and feel and thus potential justification of a war remains to be seen. And whether violent men whose targets are women, who operate with essential impunity worldwide, will be seen as “harbored” by the states that effectively permit, hence condone and support, their acts, or whether male violence against women will ever be regarded as urgent enough to ignore—or preferably restructure—international law to address it, remains to be seen as well.

Compare the response to September 11th with excuses for doing nothing about violence against women. As the roots of September 11th are uncovered deep in social and economic life around the world, in belief and identity, its acts as expressive as they are masculine, will the war on terror grind to a halt? Will it be said that some individuals are just violent, so nothing can be done? Will terrorism be seen as cultural, hence protected? Will the United States throw up its hands when it learns that Al Qaeda, like some pornographers and other sex-traffickers (sex their religion as well as their business) is organized in (what for men are) unconventional ways? Violence against women is

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69. See S.C. Res. 1540, ¶ 2, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

70. Those who have used this number include U.S. Secretary of Defense Donald Rumsfeld (CNN television broadcast Sept. 19, 2001); White House Press Secretary Ari Fleischer, Ari Fleischer Holds White House Briefing, *FDCH Political Transcripts* (Sept. 21, 2001) (“I just remind you that the Al Qaeda organization is present in some sixty countries, and those who harbor and support terrorists are the targets of the president’s action to protect our country.”); William Walker, *Widening His Sights*, *TORONTO STAR*, Mar. 10, 2002 at B1, (“Bush says terrorists are being harboured by sixty countries and trained at camps in several of them, including Somalia, Sudan, Syria and Lebanon.”); Richard Norton-Taylor, *This Marks the Death of Deterrence*, *GUARDIAN*, Oct. 9, 2002, at 18 (“Vice President Dick Cheney has suggested this includes no fewer than 60 states . . .”).

imagined to be nonstate, culturally specific, expressive acts of bad apple individuals all over the world that is so hard to stop. Terrorism, which is all of these, is said to be so serious, there is no choice but to stop it, while seriously addressing threats to women's security is apparently nothing but a choice, since it has barely begun.

Here is the question: What will it take for violence against women, this daily war, this terrorism against women as women that goes on every day worldwide, this everyday, group-based, systematic threat to and crime against the peace, to receive a response in the structure and practice of international law anything approximate to the level of focus and determination inspired by the September 11th attacks? Assuming that women are a group, a collectivity though not a state, to ask this is not simply to contend that because violence against women is systemic and systematic (although it is), it should be addressed at this level of urgency. A lot of socially built-in death and mayhem is legally ignored. This parallel is closer than, for example, that with the death of the thousands of children who die from preventable diseases daily.<sup>71</sup> And the point is not a moral one: that this is bad and should be stopped. It is legal: Both September 11th and most violence against women are acts by formally nonstate actors against nonstate targets. It is analytical: Both are gender-based violence. And it is empirical: The body count is comparable in just one country in just one year.<sup>72</sup>

This is not to argue that the only effective response to a war is a war. It is to ask, when will the international order stop regarding this very condition as peace and move all at once, with will, to do whatever is necessary to stop it, shaping the imperatives of the response to the imperatives of the problem? It is to ask why one matters, the other not. Why does the international order mobilize into a concerted force to face down the one, while to address the other squarely and urgently seems unthinkable? That the configuration of parties on September 11th failed to fit the prior structure and assumptions of the international legal order did not deter the response one whit. That actions like those taken since September 11th produce the structure and assumptions that become international law—customary international law in the making<sup>73</sup>—is, for better and worse, closer to the truth. At this point, it is

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71. See U.N. Dev. Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World*, at 11 (2002), available at <http://hdr.undp.org/reports/global/2002/en/pdf/complete.pdf> (last visited Nov. 16, 2005); Mary Robinson, *Making Human Rights Matter: Eleanor Roosevelt's Time Has Come*, 16 HARV. HUM. RTS. J. 1, 8 (2003).

72. See UNIFORM CRIME REPORTS, *supra* note 9, and additional FBI statistics, *supra* note 12.

73. On the operation of this process, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986). For analysis, see MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* (1999); ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 1–15 (1991); STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (Int'l Law Ass'n, Comm. on the Formation of Customary (General) Int'l Law, London Conference, 2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> (last visited Nov. 16, 2005).

hard to avoid noticing that terrorism threatens the power of states, while male violence against women does not; state power might be said to be one organized form of it.

Asked another way: Why did the condition of Afghan women, imprisoned in their clothes and homes for years, whipped if an ankle emerged, prohibited education or employment or political office or medical care on the basis of sex,<sup>74</sup> and subjected to who yet knows what other male violence, not rank with terrorism or rise on the international agenda to the level of a threatening conflict? Why were those who sounded the alarm about their treatment ignored? Why, with all the violations of international law and repeated Security Council resolutions, was their treatment alone not an act of war or a reason to intervene (including, yes, militarily) on any day up to September 10, 2001? To the suggestion that Afghan women should instead complain through international mechanisms, imagine the reaction to the suggestion that the United States, instead of responding with force to the acts of September 11th, should remove its reservation to Article 41 of the International Covenant on Civil and Political Rights (ICCPR) and enter a declaration against Afghanistan.<sup>75</sup>

Except to pacifists, some things justify armed intervention. How governments treat their own people, including women, has traditionally not been one of them. In the approach taken throughout the 1930s, for example, so long as Hitler confined his extermination of Jews to Germany, only Germany was generally regarded as properly concerned. It was after other *countries* were attacked that the rest of the world became involved. Is the approach to women's treatment still stuck back then, so that men inside each country are allowed to do to women what men cannot do to women of other countries? The record supports something close to that as an operative rule.

Women are incinerated in dowry killings in India or living in fear that they could be any day.<sup>76</sup> They are stoned to death for sex outside marriage in some parts of South Asia and Africa. They are dead of botched abortions in some parts of Latin America and of genital mutilations in many parts of the world. Girls killed at birth or starved at an early age, or aborted as fetuses because they are female, are documented to number in the millions across Asia.<sup>77</sup> If

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74. For some of the well-known information on Afghan women's situation prior to the invasion, see S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1214, ¶ 12, U.N. Doc. S/RES/1214 (Dec. 8, 1998); S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998); S.C. Res. 1076, ¶ 11, U.N. Doc. S/RES/1076 (Oct. 22, 1996); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion & Protection of Hum. Rts., The Secretary-General, *Report of the Secretary-General on the situation of women and girls in Afghanistan, submitted in accordance with Sub-Commission resolution 1999/14*, U.N. Doc. E/CN.4/Sub.2/2000/18 (July 21, 2000).

75. Article 41 of the ICCPR recognizes the jurisdictional competence of the Human Rights Committee to receive communications for noncompliance. ICCPR, *supra* note 20, art. 41, ¶ 1. The declaration of the United States on this article can be found at 138 CONG. REC. 8068, Decl. III(3) (1992). The United States might also consider whether ratifying the 1966 Optional Protocol to the ICCPR, Dec. 19, 1966, 999 U.N.T.S. 302, would help victims such as those of September 11th.

76. For documentation of the examples cited in this paragraph, and more, see *Preliminary VAW Report*, *supra* note 14, and *Second VAW Report*, *supra* note 14.

77. See Amartya Sen, *More Than 100 Million Women Are Missing*, 37 N.Y. REV. BOOKS 20, Dec. 20,

foreign men did all this inside one country, would that create a state of war? (Come to think of it, what does that make sex tourism in Thailand?)<sup>78</sup> The nationality of the perpetrators has little to do with the injury to the women. While some of this is finally beginning to be seen as a violation of human rights, at least in theory,<sup>79</sup> none of it is thought to constitute a use of force in the legal sense. On its own, it has yet to create what is perceived as a humanitarian emergency or to justify military intervention. Peacetime laws and institutions, for their part, far from breaking down and failing to operate from time to time in this context as the law of armed conflict envisions, simply never have worked for women on a large scale anywhere. But instead of these unredressed atrocities being recognized as armed conflict for this reason, because the events happen with relative impunity all the time instead of just sometimes, or perhaps because they do not happen in front of television cameras all on one day, they raise little international concern.

What does being done by domestic men inside each country make these acts in international terms? What do we call the conservatively counted one-in-four women raped, one-in-three sexually abused in childhood, one-in-four battered in their homes (including being crushed and burned), the uncounted prostituted women, systematically raped and thrown away, women of color and indigenous women the most victimized and the least responded to: the record of women living in non-metaphorical terror in the United States who have no effective relief at home?<sup>80</sup> Although it has been documented and analyzed by survivors and social scientists since 1970,<sup>81</sup> chronicled by international observers in the United States and elsewhere,<sup>82</sup> women's pervasive fear of violence has not even been noticed in the literature on terrorism,<sup>83</sup> far less

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1990, at 61, 66.

78. An instructive thought experiment is to ask how the world would have responded if all 648 women in the World Trade Center had been raped by foreign men, and whether that response would change if, say, the same number of mostly American women were raped there by mostly American men on a single day.

79. See, e.g., sources cited *supra* note 6.

80. These facts, although many readers remain inexplicably startled by them, have been robustly established with solid empirical methodology for over twenty years. Myriad such empirical documentation is collected in CATHARINE A. MACKINNON, *SEX EQUALITY* 715–897 (2001). See also DIANA E. H. RUSSELL & REBECCA M. BOLEN, *THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES* (2000); STAFF OF S. COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., *VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA* (Comm. Print 1992); MARY P. KOSS ET AL., *NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY* (1994).

81. See, e.g., ANDREA DWORKIN, *A Battered Wife Survives*, in *LETTERS FROM A WAR ZONE: WRITINGS 1976–1989* 100, 100–06 (1988); MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* (1989); see also *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. on Labor and Human Resources*, 101st Cong. (1990).

82. See *Second VAW Report*, *supra* note 14, ¶ 57 (“The mere existence of violence against women in general and domestic violence in particular spreads fear among women, often restricting the way in which they lead their lives.”); see also *id.* ¶ 27 (“[A]cts or threats of violence, whether occurring in private or in public life, instill fear and insecurity in women’s lives and are obstacles to the achievement of equality, development and peace, resulting in high social, health and economic costs to the individual[.]”).

83. For some literature ignored, see SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 229 (1975) (observing that “men who commit rape have served in effect as front-line masculine shock troops, terrorist guerillas in the longest sustained battle the world has ever known”); ROBIN MOR-

produced an organized uprising by the international community or spurred rethinking of the structure, content, and priorities of international organizations brought to a crossroads, as September 11th has.<sup>84</sup> Comprehensive international strategies for world peace and security have never included sustained inquiry into violence itself as a gendered phenomenon.<sup>85</sup>

Acts of violence against women are mass atrocities, mass human rights violations, widespread and systematic attacks on the basis of sex, crimes against humanity pervasively unaddressed. But are they not also violent, organized conflict? Do these women not count as casualties in some war? Will the Marines never land for them? A kind of war is being fought unrecognized in a conflict that one suspects would be seen as such if men were not the aggressors and women the victims.<sup>86</sup> Why does no international model—not war, not criminal law, not yet even human rights—intervene effectively in this anywhere? Why does finding effective modes of intervention raise no international sense of urgency? In the American war against the Taliban, for a brief moment women had a foreign policy, or briefly became part of a pretext for one.<sup>87</sup> But when men subordinate women within one country (and where do they not?), that apparently makes it non-international, no one else's business, more off-limits to international intervention than even civil wars have been, including in places where women have no effective recourse at home (and where do they?). If nothing else, September 11th showed that the bounded view of sovereignty is an illusion that failed to protect people across national lines. It does not protect women within them either.

The war in Iraq has taken these questions to a whole new level. Apart from enforcement of U.N. Security Council resolutions,<sup>88</sup> the primary U.S. rationale

GAN, *THE DEMON LOVER: ON THE SEXUALITY OF TERRORISM* (1990) (analyzing terrorism in feminist terms). Andrea Dworkin in 1977 titled her first speech exclusively on pornography, *Pornography: The New Terrorism*. DWORKIN, *supra* note 81, at 197–202. For some legally focused analysis in similar vein, see Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997).

84. See, e.g., Kofi Annan, Address to the General Assembly (Sept. 23, 2003), available at <http://www.un.org/apps/sg/sgstats.asp?nid=517> (last visited Nov. 16, 2005) (referring to September 11th as having brought the international system to a “fork in the road”).

85. The *High-level Report*, *supra* note 15, ¶ 148(b), which mentions gender in passing as an ideological rather than a material factor, is no exception. Causes and facilitators of terrorism are said to include poverty (although more women than men are poor without resorting to terrorism), lack of social and political rights (although women are more deprived of them than men are), and political grievances, organized crime, and collapse of states (all of which affect both sexes without making women violent to the degree men are).

86. This analysis pushes one step further the logic of Meron on the national/international distinction in the war context:

Why protect civilians from belligerent violence, or ban rape . . . and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign state? If international law . . . must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 261 (2000).

87. On this point and other gendered dimensions of September 11th and its aftermath, see Hilary Charlesworth & Christine Chinkin, *Sex, Gender, and September 11th*, 96 AM. J. INT'L L. 600 (2002).

88. Enforcement of Resolutions 687 and 1441 was the primary rationale offered in formal settings, although Zelikow's white paper offered a general theory of pre-emptive self-defense. S.C. Res. 687, U.N.

for invasion was preemptive self-defense, meaning because we are scared of you, we can kill you. Apart from not being firmly established as a legal ground of self-defense,<sup>89</sup> and factually yet to be supported in this instance, imagine what the principle of fear justifying aggression in advance would permit women to do to men, with centuries of facts behind it. Moreover, the United States did not invade Iraq to stop what Saddam Hussein's regime did to the Kurds in 1988, or to the Shiites after 1991, or to the Marsh Arabs throughout—all genocidal atrocities analytically similar to the domestic treatment of women worldwide, and also not recognized as justifying resort to force under the U.N. Charter absent Security Council authorization. The United States and Britain did institute no-fly zones in part on such a rationale, and the Security Council let it happen,<sup>90</sup> a level and intensity of response never made for women anywhere. As the invasion of Iraq progressed, and weapons of mass destruction were not found, and the U.S. government made more of Saddam Hussein's atrocities to his own people (if little of their legal description), self-defense was trumpeted and twisted less, the liberation of the Iraqi people (who certainly needed it) more.<sup>91</sup> This shift occurred against the backdrop of the U.N. Charter, which on conventional reading allows use of force only in self-defense in response to armed attack,<sup>92</sup> although “perfect charity” has

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Doc. S/RES/687 (Apr. 3, 1991); S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002); Philip Zelikow, *The Transformation of National Security: Five Redefinitions*, NAT'L INT., Spring 2003, at 17. For discussion from a perspective supportive of the invasion of Iraq, see Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003).

89. This is not to say that preemptive self-defense is unknown internationally. Classical writers such as Brierly argued against a narrow reading of Article 51. See J.L. BRIERLY, *THE LAW OF NATIONS* 416–21 (6th ed. 1963). Elihu Root argued:

[T]he exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the state exercising it . . . [and a sovereign state may] protect itself by preventing a condition of affairs in which it will be too late to protect itself.

Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427, 432 (1914); see also Wedgwood, *supra* note 88. But pre-Charter legal views should be weighed cautiously here. And since states often use self-defense to justify aggressing, Article 51 of the U.N. Charter has conventionally been read to require an actual armed attack before force can be used in self-defense. See Gardner, *supra* note 37, at 585–87; Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1523 (2003); Patrick McLain, *Note, Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 278 (2003).

90. See S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990). The question whether the Security Council resolutions constitute authorization for the no-fly zones they did not repudiate is debated. See Scott L. Silliman, *The Iraqi Quagmire: Enforcing the No-Fly Zones*, 36 NEW ENG. L. REV. 767 (2002) (arguing that the resolutions do not constitute authorization).

91. That Iraqi women have yet to be liberated through this incursion, as is typical when some men replace other men through war, remains apparent. For two indications, see Kathryn Westcott, *Where Are Iraq's Women?*, BBC NEWS, May 8, 2003, available at [http://news.bbc.co.uk/2/hi/middle\\_east/3007381.stm](http://news.bbc.co.uk/2/hi/middle_east/3007381.stm) (last visited Nov. 5, 2005), and HUMAN RIGHTS WATCH, *CLIMATE OF FEAR: SEXUAL VIOLENCE AND ABDUCTION OF WOMEN AND GIRLS IN BAGHDAD* (July 2003), available at <http://hrw.org/reports/2003/iraq0703/iraq0703.pdf> (last visited Nov. 11, 2005). This information also serves to underline the point that war often has sex-specific negative consequences for women, both during and after.

92. “[N]othing in the Charter shall impair the inherent right of self-defense if an armed attack occurs.” U.N. Charter art. 51.

been a potential justification for war at least since Grotius<sup>93</sup> and, under the rubric of humanitarian intervention's defense of others, has been growing as a rationale for forceful response to mass attacks.<sup>94</sup> But never yet for women as such.

The point here is that the invasion of Iraq was not sought to be legally justified by past and continuing acts of genocide and crimes against humanity, no doubt in part because those violations have not, absent Security Council authorization, yet made armed intervention legal.<sup>95</sup> Should the U.N. Charter

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93. "War is no proper *Employment*, nay, it is so monstrous and horrid, that nothing but mere *Necessity*, or perfect *Charity*, can make it *lawful* . . . . *To bear Arms is*, in *St. Austin's Judgment*, *no Crime*, but *to bear Arms on the account of Booty is Wickedness with a Witness*." HUGO GROTIUS, 2 OF THE RIGHTS OF WAR AND PEACE, IN THREE VOLUMES 635 (Gaunt 2001) (1715). Collective security has grown broader in practice under Chapter VII's rationale of defense of peace, as illustrated by the response to the Kosova bombing. See, e.g., INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2001), available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (last visited Nov. 11, 2005) (concluding that the intervention was not compatible with U.N. Charter norms but was still "legitimate."). By this, the Commission seemingly meant that the precedent was too narrow to undermine the Charter, but international action to prevent gross and sustained violations of human rights as there nonetheless justified international action. See Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 625 n.13 (2003).

94. See, e.g., NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY (2000); Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm*, 10 USAFA J. LEGAL STUD. 27, 32 (2000) (defending anticipatory humanitarian intervention with limits); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 27 (1999) (submitting "under certain strict conditions resort to armed force may gradually become justified, even absent any authorization by the Security Council"). The International Commission on Intervention and State Sovereignty justified military intervention for human protection purposes in order:

to halt or avert: large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 32 (2001), available at <http://www.iciss.ca/pdfCommission-Report.pdf> (last visited Nov. 11, 2005) [hereinafter RESPONSIBILITY TO PROTECT REPORT]; DANISH INSTITUTE OF INTERNATIONAL AFFAIRS, HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS 106–07 (1999), available at <http://www.dupi.dk/www.dupi.dk/hdocs/en11240.ssi> (last visited Nov. 11, 2005); KEN ROTH, HUMAN RIGHTS WATCH, WORLD REPORT 2004 17 (2004), available at <http://www.hrw.org/wr2k4/index.htm> (last visited Nov. 11, 2005) ("War often carries enormous human costs, but we recognize that the imperative of stopping or preventing genocide or other systematic slaughter can sometimes justify the use of military force."). But see SIMON CHESTERMAN, JUST WAR OR JUST PEACE? (2002) (concluding that humanitarian intervention without Security Council authorization is unlawful). Note that the *Responsibility to Protect Report* recognizes rape as potentially justifying resort to forcible intervention, but only when part of an "ethnic cleansing," that is, not when women only are the victims of the onslaught. RESPONSIBILITY TO PROTECT REPORT XII, *supra*, at 32–33. The *High-level Report* endorsed the "responsibility to protect" approach, "authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent," although not without Security Council authorization. *High-level Report*, *supra* note 15, ¶ 203.

95. Article 1 of the Genocide Convention obligates the signatories to act against genocide: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, art. 1, 78 U.N.T.S. 277, available at [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm) (last visited Nov. 11, 2005). This provision—which focuses on acts before (when they can be prevented) and after (when they are punished) genocide takes place—is gener-



be revised so that what have been humanitarian crimes of *jus in bello* or human rights violations can also be *jus ad bellum* triggers? If this question is being increasingly asked, it is so far never suggested that brutal systematic violence against women, even with official impunity or participation, could legally justify resort to force unless it occurs as part of a conflagration in which men are also attacking other men.

The larger connection between men's treatment of women and men's treatment of other men is lost on the international system. When the photographs of American soldiers sexually humiliating Iraqi detainees at Abu Ghraib prison surfaced,<sup>96</sup> the fact that identical acts are routinely committed against women (and some men) in pornography was typically mentioned, if at all, to excuse the crimes, not to indict the pornography.<sup>97</sup> The connection was not lost on one Iraqi man who was abused by Americans in prison. "They wanted us to feel as though we were women," he said, "the way women feel, and this is the worst insult, to feel like a woman."<sup>98</sup> The photos, mild by pornography's standards, were routinely referred to as pictures of torture,<sup>99</sup> yet calling pornography pictures of torture is usually derided as an extremism comparable to calling violence against women a war. Even when an American newspaper was duped into publishing pornography as wartime atrocities,<sup>100</sup> the public penny did not drop. People were upset by what they saw—concerned about the woman shown being raped in the picture—*until* they found out it was pornography. Then the hoodwinked newspaper apologized for poor journalism in not investigating how the pictures were made.<sup>101</sup> As the world recoiled and realigned in

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ally thought to refer to actions short of force. It does not precisely specify what is to happen *during* a genocide. It does not say that the parties undertake to *stop* genocide, which signally may require resort to force, although perhaps that is what prevention has to mean.

96. See U.S. DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (Oct. 19, 2004) (prepared by Major Gen. Antonio M. Taguba), <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> (last visited Nov. 11, 2005) [hereinafter TAGUBA REPORT].

97. See, e.g., Frank Rich, *Saving Private England*, N.Y. TIMES, May 16, 2004, at B1 (quoting Rush Limbaugh, Rich writes: "The photos of the abuses at Abu Ghraib 'look like standard good old American pornography,' [Limbaugh] said as the story spread, as if he might grandfather wartime atrocities into an entertainment industry that, however deplorable to Islam, has more fans in our Christian country than Major League Baseball.").

98. Scheherezade Faramarzi, *Former Iraqi Prisoner Turns Against His American Jailers for Humiliating Him as Allegations of U.S. Torture Are Investigated*, A.P., May 2, 2004 (quoting Dhia al-Shweiri).

99. See, e.g., THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); see also, Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42; ABC World News Tonight with Peter Jennings: *Patterns of Abuse, Who Knew?* (ABC television broadcast May 10, 2004) (discussing the pictures of detainees being tortured and other evidence of torture provided in the International Red Cross Report); *All Things Considered: American Torture of Iraqi Detainees* (NPR radio broadcast May 3, 2004). While the TAGUBA REPORT included only a single explicit finding using the word "torture," it came to the general conclusion that "[s]everal U.S. Army Soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq." TAGUBA REPORT, *supra* note 96, at 15, 50.

100. See *Globe Caught with Pants Down: Paper Duped into Running Porn Photos*, BOSTON HERALD, May 13, 2004, at A6.

101. "[A]t no time did the photograph meet Globe standards. Images contained in the photograph were overly graphic, and the purported abuse portrayed had not been authenticated. The Globe apolo-

response to the photographs of Arab men sexually abused by Americans, as heads roll and trials proliferate, pornographers continue to traffic women being sexually violated, tortured, and humiliated worldwide in plain sight. Inquiry into the making of that pornography is on no public agenda—journalistic or legislative, domestic or international.<sup>102</sup>

#### IV.

All this makes one want to look again at the smiling faces of the women on the special pages of *The New York Times* after September 11th and wonder: Who hurt her before? If she had died from male violence on some other day, at the hands of men close to her at home, would the *Times* have noticed? Would her dying have had the dignity of politics? Would her nation have responded? Or was she more equal on the basis of sex on that day than on any day in her life? If she had lived, would she have been as full a citizen of the United States as she has been dead? Indeed, with her death benefits computed on male income tables,<sup>103</sup> is she more economically equal dead than she ever would have been alive? Given the record of law enforcement on violence against women in the United States, what would have been her tribunal?

Particularly hard to take is the systematic slaughter built into everyday life in quiet, ignored crises of normality that are effectively permitted by most authorities, national and transnational, while crises *from* normality—the exceptional counter-hierarchical acts like September 11th—mobilize much of the world with outrage and determination to walk straight through legal walls. In this, the situation of women is far from alone.<sup>104</sup> As Walter Benjamin once put it, “The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule.”<sup>105</sup>

In this view, neither September 11th nor violence against women are “tragedies,” like dying from an erupting volcano or a lightning strike, nor blank su-

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gizes for publishing the photo.” *For the Record*, BOSTON GLOBE, May 13, 2004, at A2. The *Herald* described the pictures as “graphic photos of alleged sexual abuse of Iraqi women by U.S. soldiers [that] turned out to be staged shots from a hardcore porn Web site.” *Globe Caught with Pants Down*, *supra* note 100. The photos in Abu Ghraib were obviously “staged,” as well, but were nonetheless seen as documenting real abuse.

102. Some perceptive observers have seen a connection. See, e.g., Susan J. Brison, *Torture, or “Good Old American Pornography,”* CHRON. HIGHER EDUC., June 4, 2004, at B10 (“As commercial porn was being mistaken for photos of real torture, the photos of actual torture at Abu Ghraib were being equated with porn.”). This could happen because there is commonly little or no significant difference between the two. The presumed distinction that conventional pornography, unlike torture, is made under conditions of consent or freedom or desire is just that: presumed.

103. See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,238 (Mar. 13, 2002) (Statement by the Special Master).

104. Mahfoud Bennoune notes another ignored crisis of normality: “In Algeria, every year since 1993, we had the equivalent of the victims of September 11 . . . that is, victims of the fundamentalists.” Interview by Karima Bennoune with Mahfoud Bennoune, “A Disease Masquerading as a Cure”: Women and Fundamentalism in Algeria, in NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR 75, 86 (Betsy Reed ed., 2002).

105. Walter Benjamin, *Theses on the Philosophy of History*, in ILLUMINATIONS 255, 259 (Hannah Arendt ed., Harry Zohn trans., Harcourt, Brace and World 1968) (1955).

pernatural “evil,” the term favored by those more comfortable condemning events than explaining them. Both phenomena are more social and political in origin, more under human control, more contingent—hence changeable—than either term evokes. The connection between the treatment of women by men and the events of September 11th is not ultimately the moralistic one: The way women are treated tells us how civilized we all are. Nor is it quite the opportunistic, if also accurate, one: Ignoring how these men treated women endangered everyone. It is this: What these men do to women every day is what they did to both women and men on that day. Men’s behavior in their roles and status as men is the real context of September 11th. Metaphysically put, who they are to women is who they are. It is hard to avoid the impression that what is called war is what men make against each other, and what they do to women is called everyday life. So wars are fratricidally fought, and then are fraternally over, while everyday life never ends.

That day, being a man was no protection, hence the world’s response. The losses of September 11th were real to power in a way women’s losses never have been. Playing out the same dynamic on the domestic level in the United States, equal protection of the laws suddenly became real to power when some men’s access to something real to them—the presidency—was at stake. It was not real to the same people just a few months earlier when women’s equal access to justice for men’s violence against them was at issue. Just as international legal barriers to action suddenly dissolved on September 11th, the federalism (i.e., state’s rights) that was found to preclude women’s access to equal protection of state criminal laws against rape and battering—found in *United States v. Morrison* to require the invalidation of the civil sex equality remedy in the federal Violence Against Women Act<sup>106</sup>—simply dissolved when some men’s access to equal protection of state election laws was at stake, and the U.S. Supreme Court’s decision in *Bush v. Gore* put President Bush into office.<sup>107</sup>

By the same token, policing the world, multilateralism, regime change, nation-building, new federal departments, federalization of formerly private labor forces, and sweeping executive authority—all formerly opposed, ridiculed, by their current American proponents—became no problem, necessary, urgent, even legal, after September 11th. On that day, for some, “everything changed,” eventuating so far in an invasion and occupation of Iraq that legally is at worst aggression, at best preemptive self-defense combined with unauthorized enforcement of U.N. Security Council resolutions under unprecedented circumstances.<sup>108</sup> On the domestic side, U.S. law enforcement in na-

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106. *United States v. Morrison*, 529 U.S. 598 (2000), held the civil remedies provision of the federal Violence Against Women Act, which provided a federal cause of action for sex discrimination in instances of gender-motivated violence, unconstitutional for exceeding Congressional power in an area traditionally regulated by states, rather than being a remedy permitted under Section 5 of the Equal Protection Clause or the Commerce Clause.

107. *Bush v. Gore*, 531 U.S. 98 (2000), found an Equal Protection Clause violation in the standards used for recounting votes in the U.S. presidential election of 2000 in the state of Florida.

108. For a range of views, see Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community*

tional security areas now focuses on prevention, an approach to domestic security that American women have been urging for thirty years. During this time, countless women have instead received endless variations of what Linda “Lovelace” was told by police when she phoned them from a hotel room after escaping her violent pimp: “You say he’s coming after you with an AK47? Lady, call us back when he’s in the room.”<sup>109</sup> This is not to argue that the war on terror is the right model for opposing violence against women. It is rather to expose, against the template of one reality of what men getting serious looks like, the commonalities between the problems they address and those they ignore, as well as what unites the solutions they implement and the problems they continue to fail to solve.

For whom did everything change on September 11th, 2001?<sup>110</sup> Once men, many of them white middle-class nationals of the United States, in the midst of their daily lives, became victims along with women and men of all colors and nations and classes, on a respected target ground, the fact that the violence was nonstate—the same issue under international law as U.S. constitutional equality law—was not seen to reduce September 11th to mass murder, merely a local crime. Nor did it produce an international police action leading to criminal trials of foreign men under national auspices, like the Eichmann trial, or in

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*Objectives in the Framework of U.N. Peace Maintenance*, 11 EUR. J. INT’L L. 361 (2000) (criticizing the view that member states have implied authority to unilaterally defend collective goals that Security Council resolutions affirm when the veto paralyzes the Council itself); Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33 (observing that most international lawyers probably find use of force against Iraq illegal under the U.N. Charter, but contending rules may need “to evolve, so that what is legitimate is also legal”); W. Michael Reisman, *Assessing Claims to Revise the Laus of War*, 97 AM. J. INT’L L. 82 (2003) (arguing that preemptive self-defense is not novel because it can contribute to order). Peacekeepers preventively deployed, depending on their mandate, can converge with preemptive defense. See Richard A. Falk, *What Future for the U.N. Charter System of War Prevention?*, 97 AM. J. INT’L L. 590 (2003) (discussing the tension between the invasion of Iraq and the U.N. Charter rules). One could also argue that September 11th was one act in the middle of a war that began with the Khobar Towers bombing, continued with the bombings of the U.S. embassies in Africa, the U.S.S. Cole, and the Bali nightclub, and proceeded to the bombings in Morocco, Saudi Arabia, Spain, and forward. This chronology does not purport to address the roots of the conflict. Of course, there is a tension between seeing September 11th as a unique one-off event and seeing it as part of a war.

109. Linda Boreman often described that call this way. One published account is:

I learned that Chuck was searching for me with both his pistol and his automatic rifle by his side. . . . I called the police. They knew who I was and they listened to my story about my husband coming after me with a gun. I gave up forever on police help when I was told, “Lady, we can’t get involved in domestic affairs.”

LINDA LOVELACE & MIKE MCGRADY, *ORDEAL* 225–26 (1980). Domestic indeed. The German Constitutional Court’s well-developed concept of “mittelbare Drittwirkung” of basic substantive rights—literally meaning indirect third-party effect—such that the highest values of the Constitution have a “radiating effect” throughout all areas of law, including in private law governing horizontal relationships between individuals—converges instructively here with the emerging international notions on nonstate actors. See Bundesverfassungsgericht [BverGE] [Federal Constitutional Court] Jan. 15, 1958, 7 BverGE 198 (F.R.G.) (Lüth Case); BASIL S. MARKESINIS, 2 ALWAYS ON THE SAME PATH: ESSAYS ON FOREIGN LAW AND COMPARATIVE METHODOLOGY 26–73, 132–218 (2001); Ralf Brinktrine, *The Horizontal Effect of Human Rights in German Constitutional Law: the British Debate on Horizontality and the Possible Rolemodel of the German Doctrine of “Mittelbare Drittwirkung der Grundrechte,”* 4 EUR. HUM. RTS. L. REV. 421 (2001).

110. See Noëlle Quenivet, *The World After September 11: Has It Really Changed?*, 16 EUR. J. INT’L L. 561 (2005) (arguing that less has changed than some think).

a third country, as the Lockerbie bombings did.<sup>111</sup> The U.S. government did not instruct citizens to wait to call law enforcement from our cell phones when we saw a terrorist on an airplane and to collect data in the meantime. In the rush and determination to respond as quickly and effectively as conceivable, the unofficial status of the parties was barely noticed. What changed was this: the danger was real because certain men were afraid. They knew they were targeted because of who they are. As further evidence of its realness, no one has yet made September 11th into sex. No one speaks of its victims and injuries in scare quotes. (Where have those postmodernists gone?) There is no talk yet of closure. Where people count, any means thought necessary are energetically pursued, no matter if against nonstate actors attacking unofficial targets, unimpeded by law and institutional constraints.<sup>112</sup> The structure of international institutions is reshaped to create an approach that fits the shape and scale of the problem.<sup>113</sup> The legal framework is urgently interrogated in light of the reality, not the other way around.

By converging civil human rights law with criminal humanitarian law, consideration of the treatment and status of women could be injected into all levels of discussion of humanitarian intervention, including U.N. Charter revision. A new humanitarian protocol to the Geneva Conventions to address the gaps on violence against women could be proposed, defining some widespread and grave forms of it as violent conflict under the law of war. Discussion of the subject of gender-based violence could become part of debates and diplomacy on definitions of terrorism. The Security Council could consider resolutions under Chapter VII against violence against women with impunity by the worst state offenders as threats to international peace and security, perhaps beginning with situations that are international in the more conventional sense. An international restructuring effort might move toward an international convention on violence against women that recognizes its transnational existence, complete with implementation and an affirmative duty to protect from sexual violence with clear standards, which, when breached, could ultimately trigger corrective intervention by transnational forces.<sup>114</sup> Once the issue is reframed, other deeper restructuring possibilities will doubtless emerge.

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111. See *Att'y Gen. of Isr. v. Eichmann* (Isr. Sup. Ct. 1962), reprinted in 36 I.L.R. 277; Agreement Between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning a Scottish Trial in the Netherlands, Neth.-U.K.-N. Ir., Sept. 18, 1998, 38 I.L.M. 926 (treaty under which Lockerbie bombing was adjudicated); see also Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004) (arguing that the United States should have addressed the Taliban and al Qaeda as a police matter, rather than going to war).

112. See, e.g., President George W. Bush, Address to the Nation (Sept. 7, 2003), reprinted in *In The Struggle for Iraq: In Bush's Words: "We Will Do What Is Necessary" in the Fight Against Terror*, N.Y. TIMES, Sept. 8, 2003, at A10.

113. See *High-level Report*, *supra* note 15. Whether any approach is succeeding is another question. In many respects, the approach to September 11th by the United States in particular can be observed to be inapt, even counterproductive.

114. Meantime, intensified conventional efforts that require little if any change should not be neglected. Efforts of the CEDAW Committee and the Human Rights Committee should continue, joined by the Torture Committee and others pushing for national enforcement of existing obligations and legis-

In the process, real difficulties will have to be faced. That prostitution and sex trafficking increase with international policing and military involvement, while being common in domestic policing and military forces, reveals the police and the military to be a site of this problem as well as a potential part of its solution. Maybe all the blue helmets on such missions should be women. Post-conflict micro-policing and law enforcement against domestic violence are avoided for some of the same reasons: the dangers of house-to-house engagement accompanied by a sense of futility. But the fact that anyone with a choice prefers pitched armed combat on an official battlefield to intervening in the places where women and children live out their days hardly recommends the status quo. Stopping thousands of actors is concededly more complex than bringing down a big leader or a symbolic entity, but so is counterinsurgency. Maybe, on some level, men have organized their conflicts the way they have in order to keep them simple and to confine the contenders to those who already wield their comfortable forms of power. Perhaps September 11th is emblematic of other men having broken that code and that agreement. In any case, the fact that male violence against women makes conventional war look safe and simple and easy and doable by comparison does not support abandoning women to their attackers.

Those who oppose international policing in this context might be asked whether they also oppose domestic policing. Those who question, apart from ineffectual domestic mechanisms, why violence against women should be addressed internationally might ask why the events of September 11th are being addressed internationally. The attackers were foreign, but they did not cross international boundaries to do the deed that day, and it was not seen as an attack by Saudi Arabia, the country of which most of the attackers were nationals. Both forms of violence transcend national borders; state boundaries are irrelevant to both, if differently so.<sup>115</sup> And if states' hegemony is threat-

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lative reform where needed, including implementing the many proposals from the Beijing Platform for Action that address violence against women to which nations are already committed. See World Conference on Women, Beijing, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONE.177/23/Add.1 (Oct. 27, 1995). Violence against women with impunity might be expressly recognized in some circumstances as “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” under ECOSOC Resolution 1503, giving rise to complaints to the Human Rights Committee’s communications procedure. U.N. Econ. & Soc. Council [ECOSOC], *Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/RES/7(XXVI) (May 27, 1970), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/1970.1503.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument) (last visited Nov. 11, 2005). The Secretary General could exert further leadership, and restructuring ideas could be injected into Head-of-State Summit reform proposals. The mandate of Security Council Resolution 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000), could be strengthened and extended. Going forward, the Genocide Convention and the definition of genocide in the Rome Statute could be amended to add “sex” as a ground and sexual atrocities expressly as acts, or otherwise reconsidered in light of acts that aim at the destruction of women as such and of information on the place of sexual atrocities in genocide as currently defined. A new special rapporteur on violence against women could be given a mandate to investigate and recommend comprehensive overhaul and consolidating and restructuring of international efforts against violence against women in the post-September 11th era.

115. For an argument that women are an international group, and states a masculine entity, see Catharine A. MacKinnon, *Introduction: Women’s Status, Men’s States*, in *ARE WOMEN HUMAN? AND OTHER*

ened by terrorists, but male states have an investment in male dominance, the argument for independent international intervention may be stronger for violence against women than it is for terrorism, even as domestic police forces need to be involved and transformed to address either effectively. Presumably, once they knew intervention was a real possibility, states would take steps to avoid it by moving to correct the problem. Protectionism, well understood by women around the world, would have to be confronted to keep intervention from becoming yet another way the violated are violated more. The point is to stop the abuse in a way that empowers the unequal rather than adds to the power of the already powerful.

In the absence of such initiatives, as the unfolding aftermath of September 11th flexibly reconfigures international rules, norms, and structures for response to force, including with force, women remain unreal and expendable to the systems we live under. And the male dominance common to both problems, and to the norms and institutional structures of the existing systems for responding to them, continues to be ignored. Among the best of existing responses, the so-called post-conflict peace-building strategies<sup>116</sup> presume an operative model of peace that is the other side of the masculine coin of armed conflict. If conflict is an episodic eruption of men fighting other men, something that begins and ends, then peace becomes periods in which this is not happening. Male violence against women is tolerated in both, perhaps more in the latter than in the former. How will male violence ever end when the very idea of peace presumes and permits it? Opposing violence against women teaches that peace-building is an active social process, not a mere lack of overt fighting, far less a document-signing ritual of contract or an arm-twisting exercise to get the parties in bed together in the silence of power having prevailed.

Resort to arms inflicts disproportionate casualties on women and children,<sup>117</sup> but so does the present peace. Who is counting its risks? After a century of increasing convergence in status and numbers between the civilian casualties of wars and the noncombatant casualties of peace,<sup>118</sup> it is time to ask: What will be done for the women all over the world whose own September 11th can come any day?

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INTERNATIONAL DIALOGUES 1 (forthcoming 2006).

116. For a fine collection of these strategies, see *POST-CONFLICT JUSTICE* (Cherif Bassiouni ed., 2002).

117. See Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002) (arguing that the United States used disproportionate force in Afghanistan, otherwise arguably a lawful exercise of self-defense, killing far too many civilians).

118. See REHN & SIRLEAF, *supra* note 49, at 3 (stating that while civilian fatalities accounted for five percent of all war deaths at the start of the twentieth century, they now account for over seventy-five percent of all fatalities); see also The Secretary-General, *Report of the Secretary-General to the Security Council on the protection of civilians in armed conflicts*, ¶ 3, U.N. Doc. S/2001/331 (Mar. 30, 2001) (“[A]s internal armed conflicts proliferate, civilians have become the principal victims. It is now conventional to say that, in recent decades, the proportion of war victims who are civilians has leaped dramatically, to an estimated 75 percent, and in some cases even more.”).

