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Text

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Introduction

His Eminence Ennio Antonelli's Address to participants of this conference quotes Pope Benedict XVI in stating: "Human rights are increasingly being presented as the common language and the ethical substratum of international relations." ¹ For this very reason, scholars from various disciplines have gathered to study the foundation of human rights, in particular Catholic contributions, with a view to promoting authentic human rights. In this regard, Cardinal Antonelli draws our attention to the 1948 Universal Declaration of Human Rights ("UDHR") emphasizing the fact that, "although the UDHR makes no mention of God, it illustrates a "great convergence between the Declaration and Christian anthropology and ethics' and offers a "meeting' point for dialogue, as well as a necessary reference for integral human development and peace." ² Indeed, the UDHR is essential for a more Catholic-inspired vision of international human rights law, and should especially be included as part of the response [*2] to sorting out current discussions about troublesome terminology. Elsewhere, ³ I have fleshed out how and

¹ H.E. Ennio Card. Antonelli, President of the Pontifical Council for the Family, *Messaggio alla Conferenza "il fondamento dei diritti umani: contributi cattolici,"* [Message to the Conference "The Foundation of Human Rights: Catholic Contributions"] at Ave Maria School of Law (Mar. 3-4, 2011), available at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20110211_mess-dir-umani_it.html (author's translation).

² Id. (author's translation).

why the UDHR embodies a universal and objective notion of the human person and promotes rights as well as duties "based on the natural law inscribed on human hearts and present in different cultures and civilizations." ⁴ Therefore, it is beyond the scope of this Article to revisit this thesis as an answer to the problems I raise for discussion today.

Rather, the purpose of this Article is to explore the controversy surrounding the meaning of the term "gender" within the United Nations ("U.N.") system, with a view toward developing a context for those scholars who may be unfamiliar with how human rights are discussed and debated on the international level. The gender debate is related to ongoing discussions about, on the one hand, "sexual orientation" and "gender identity," ⁵ and on the

³ See generally Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family*, *4 Ave Maria L. Rev.* 343 (2006); Jane Adolphe, *Il Diritto Naturale e La Dichiarazione Universale dei Diritti dell'Uomo*, [Natural Law and the Universal Declaration of Human Rights] in *Riscoprire le radici e i valori comuni della civiltà occidentale. Il concetto di legge in Tommaso d'Aquino* [Discovering the Roots and Common Values of Western Civilization: The Concept of Law in Thomas Aquinas] (F. Di Blasi & C. Wolfe eds., 2006).

⁴ Antonelli, *supra* note 1.

⁵ See Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, *50 Wm. & Mary L. Rev.* 800 (2008).

Probably the most telling demonstration of the international schism on the question of sexual minority human rights is the fate of the joint Brazil/European Union 2003 draft resolution in the U.N. Commission on Human Rights. The resolution, entitled "Human Rights and Sexual Orientation," was the first draft Human Rights Commission resolution to call on "all States to promote and protect the human rights of all persons regardless of their sexual orientation." After a brief but intense debate on the draft, Pakistan, on behalf of the Organization of the Islamic Conference, proposed a motion of no action, which was barely rejected (twenty-two votes in favor, twenty-four against, six abstentions). The Commission then voted on a motion to postpone the resolution until the next (sixtieth) session, which succeeded with a vote of twenty-four to seventeen, with ten abstentions. During this sixtieth session, Brazil refrained from reintroducing the motion due to ongoing negotiations, and the Commission decided by consensus to defer a vote on the resolution until the sixty-first session. Brazil declined to reintroduce the motion at the sixty-first session for lack of support in the Commission.

Id. at 810-11. See also Permanent Rep. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the U.N., Letter dated Dec. 18, 2008 from the Permanent Rep. of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands, and Norway to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 18, 2008); Statement of the Holy See Delegation at the 63rd Session of the General Assembly of the United Nations on the Declaration on Item 64 (b): Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms (Dec. 19, 2008), available at <http://www.holyseemission.org/statements/statement.aspx?id=112>; Piero A. Tozzi, UN General Assembly Receives Dueling Declarations on "Sexual Orientation," LifeSiteNews.com (Dec. 19, 2008), <http://www.lifesitenews.com/news/archive/ldn/1981/21/8121902> (The French-led European Union statement called on member states to include "sexual orientation" and "gender identity" as protected categories of non-discrimination. However, a second statement was presented by member States from sub-Saharan Africa, Oceania, and the Middle East warning against creating "new rights" or "new standards" by "misinterpreting" the non-discrimination clauses of human rights instruments. The Holy See stated in its statement that the French document went well beyond recognition or definition in international law and the intent of the declaration, resulting in legal ambiguity and uncertainty). See also James Tillman, UN General Assembly Eliminates Reference to "Sexual Orientation," Gender Identity, LifeSiteNews.com (Dec. 21, 2009), <http://www.lifesitenews.com/news/archive/ldn/2009/dec/09122102> (reporting that General Comment 20 of the ICESCR treaty body with its adoption of the terms "sexual orientation" and "gender identity" was successfully deleted from a Resolution). See United Nations General Assembly, Extrajudicial, Summary or Arbitrary Resolution, Revised Draft Resolution, U.N. Doc. A/C.3/65/L.29/Rev.1 (Nov. 12, 2010). Members of the Group of African States, Group of Arab States, and Organization of the Islamic Conference co-sponsored this amendment in favor of broader language referencing the prohibition of discrimination for any reasons, thereby deleting the reference to "sexual orientation." It was adopted on November 16, 2010 with seventy-nine votes in favor, seventy against, and seventeen abstentions. See United Nations General Assembly, Recorded Vote on Extrajudicial, Summary or Arbitrary Resolution, U.N. Doc. A/C.3/65/L.65 (Nov. 16, 2010) (providing voting record on aforementioned amendment). In an unprecedented move, the United States insisted on bringing back the resolution for another vote, introducing an amendment to reinsert "sexual orientation." See Lauren Funk & Samantha Singson, U.S. Re-Opens

other hand, "sexuality [*3] education." ⁶ However, due to time constraints, a discussion of these latter terms will be left for another day. In specific regard to gender, [*4] this Article argues that, notwithstanding lobbying efforts to promote a radical understanding of "gender," a historical review of U.N. initiatives for women reveals that the term "gender" is commonly used as a synonym for women and/or male and female. The majority of State Parties, in negotiated documents, have consistently rejected the radical feminist concept of "gender" as a social construct "based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes." ⁷

To flesh out this thesis, this Article will be divided into two Parts. Part I will give a brief historical overview of initiatives for women in the U.N. system and analyze the various attempts to integrate the term "gender" into different U.N. documents. Part II will consider four possible understandings of the concept of gender within the U.N. system: (1) gender as a social construct; (2) gender as a cultural aspect of femininity and masculinity, but based on the biological sexes, male and female; (3) gender as synonymous with women and sex, or women and children; and (4) gender meaning the two sexes, male and female, within the context of society. This last definition

Resolution to Push for "Sexual Orientation," LifeSiteNews.com (Dec. 17, 2010), <http://www.lifesitenews.com/news/us-re-opens-resolution-to-push-for-sexual-orientation>; see also United States Mission to the United Nations, Explanation of Vote by a United States Advisor of Extrajudicial, Summary or Arbitrary Executions Resolution (A/C.3/65/L.29) (Nov. 16, 2010), available at <http://usun.state.gov/briefing/statements/2010/151133.htm> (explaining the reasons for the United States abstention from the original vote on the resolution passed on November 12, 2010). But cf. Human Rights Council Res. 16/L.6, U.N. Doc. A/HRC/16/L.6 (Mar. 18, 2011) (seeming to counter the development of "new rights" such as "sexual orientation" and "gender identity"). This resolution was adopted March 24, 2011, with twenty-four votes in favor, twenty against, and seven abstentions. See also Human Rights Council Res. 17/19, U.N. Doc. A/HRC/17/L.9/Rev.1 (July 14, 2011) which was introduced on behalf of co-sponsors and adopted on June 17, 2011 with twenty-three votes in favor, nineteen against, and three abstentions. The world community should anticipate vigorous debates in the near future about this threshold crossing event.

⁶ See U.N. Special Rapporteur on the Right of Education, Interim Report on the Right to Education, P 23, transmitted to the General Assembly by Note of the Secretary-General, U.N. Doc. A/65/162 (July 23, 2010) (prepared by Vernor Munoz); see also U.N. GAOR, 65th Sess., 29th mtg., U.N. Doc. A/C.3/65/SR.29 (Dec. 13, 2010) (providing a record of States' interventions made on October 25, 2010 in response to the Interim Report). States criticized use of the term "comprehensive sexuality education" and have continually endeavored to protect the well-established rights and duties of parents to educate their children in accordance with their religious and moral beliefs. Cf. Convention on the Rights of the Child, G.A. Res. 44/25, at arts. 3(2), 5, & 14(2), U.N. Doc. A/RES/44/25 (Nov. 20, 1989) ("States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures"; "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention"; "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 18(1), U.N. Doc. A/6316 (Dec. 16, 1966) ("Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching"); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. 26.3, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) ("Parents have a prior right to choose the kind of education that shall be given to their children."). See also UNESCO, International Technical Guidance on Sexuality Education: An Evidence-Informed Approach for Schools, Teachers and Health Educators (Dec. 2009); Lauren Funk, UN Report Calls for Comprehensive Sex Ed for Ten Year Olds as a way to Fight AIDS, Catholic Family and Human Rights Institute, June 9, 2011, <http://www.c-fam.org/fridayfax/volume-14/un-report-calls-for-comprehensive-sex-ed-for-ten-year-olds-as-a-way-to-fight-aids.html>.

⁷ Fourth World Conference on Women, Beijing, China, Sept. 1-15, 1995, Report of the Fourth World Conference on Women, Reservations and Interpretative Statements on the Beijing Declaration and Platform for Action, at 162, U.N. Doc. A/CONF.177/20/Rev.1 (1996) [hereinafter Report on Beijing Conference] (recording the Holy See's statement of interpretation on the word "gender").

constitutes [*5] the only definition in international law that binds State Parties that have signed and ratified the Statute of the International Criminal Court.⁸

I. An Overview of U.N. Initiatives Regarding Women

A. The Period: 1945 to 1962

The 1945 Charter of the United Nations is considered the first global treaty to call for "equality between women and men."⁹ The Charter reaffirms a "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."¹⁰ The United Nations places "no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."¹¹ The General Assembly, one of the U.N.'s six principal organs, promotes "international co-operation" in various fields in the realization of human rights "for all without distinction as to race, sex, language, or religion."¹² Similar wording is used to describe the obligations of Economic and Social Council ("ECOSOC"), another principal organ of the U.N., which is charged with promoting universal respect for human rights.¹³

From 1945 to 1962, the emphasis was focused on legal or formal equality, or, in other words, non-discrimination on the basis of sex fully enshrined in national and international laws. In this regard, the [*6] work of the Commission on the Status of Women ("CSW")¹⁴ is noteworthy. Established in 1946, and under the authority of ECOSOC, it contributed to the drafting of the 1948 UDHR, the foundational document for the modern human rights movement. CSW also collected data, networked with other U.N. organizations, and promoted the drafting of conventions on various issues (e.g., human trafficking, prostitution, equal work, equal pay, political rights, employment discrimination, and marriage, as regards consent, age, and registration).¹⁵

⁸ See Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002) [hereinafter Rome Statute].

⁹ Press Release, United Nations Department of Public Information, Global Gender Agenda and the United Nations, U.N. Press Release DPI/1890 (Feb. 1997) [hereinafter Global Gender Agenda], available at <http://www.un.org/ecosocdev/geninfo/women/gender.htm>. See also United Nations Division for the Advancement of Women, Short History of the Commission on the Status of Women [hereinafter Short History of CSW], available at www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf (last visited Oct. 6, 2012); Hilka Pietila, The Unfinished Story of Women and the United Nations 21 (Beth Peoc'h ed., 2007); Allison Adams-Alwine, Gender Mainstreaming in the United Nations: A History, Resource Guide, and Agenda for the Future 2 (May 1, 2009) (unpublished M.A. thesis, Georgetown University), available at <http://repository.library.georgetown.edu/bitstream/handle/10822/553260/adamsallison.pdf?sequence=1> (last visited Oct. 6, 2012).

¹⁰ U.N. Charter pmbl., para. 2.

¹¹ Id. at art. 8.

¹² Id. at art. 13(1).

¹³ See id. at arts. 55(c), 62(2), 68.

¹⁴ See Overview, Commission on the Status of Women, <http://www.un.org/womenwatch/daw/csw/> (last visited Feb. 3, 2011); see also E.S.C. Res. 1987/24, U.N. Doc. E/RES/1987/24 (May 26, 1987) (expanding ECOSOC's mandate to include activities which promoted "Equality, Development and Peace," and monitored the implementation of international measures for the advancement of women); Short History of CSW, supra note 9, at 2.

¹⁵ See Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV), U.N. Doc. A/RES/317(IV) (Mar. 21, 1950); Equal Remuneration Convention, Aug. 2, 1951, I.L.O. No. 100 (entered into force May 23, 1953); Convention on the Political Rights of Women, G.A. Res. 640 (VII), U.N. Doc. A/RES/640(VII) (Dec. 20, 1952); Convention on the Nationality of Married Women, G.A. Res. 1040 (XI), U.N. Doc. A/RES/1040(XI) (Jan. 29, 1957); Discrimination (Employment and Occupation) Convention, July 5, 1958, I.L.O. No. 111 (entered into force June 15, 1960);

The phenomenon of decolonization was also important during this period. In 1956, a growing number of States began making a "transition from colonial to authoritarian governance to independent entities with democratic aspirations," and many new States, often referred to as developing nations, were admitted to the United Nations.¹⁶ In turn, international development agencies adopted a "welfare approach" to assist women in developing countries, whereby women were viewed as recipients of aid, and important contributors to economic development as mothers and care givers.¹⁷ The programmes, also referred to as "mother-child initiatives,"¹⁸ targeted nutrition and hygiene for women and children. Then, in the 1960's, when concerns were raised about "rapid population growth," family planning programmes were established to educate "women on contraceptive use," considered at that time the "best way to limit [*7] family size."¹⁹ The population control agenda was and remains a controversial topic to this very day, and is "categorically opposed by many nations," including those strongly influenced by Catholicism and Islam.²⁰

B. The Period: 1963 to 1975

During 1963 to 1975, laws alone were deemed insufficient. The priority moved to substantive equality with a focus on women's active contribution in "national-building and socio-economic development," in cooperation with international development agencies and States.²¹ The international women's rights movement rallied around the issue of development as a common agenda, which it referred to as "Women in Development" ("WID").²² In specific regard to economics and development, the central argument was that women, in particular, as opposed to the family unit per se, were highly productive members of society and should not be ignored.²³ The WID strategy concentrated on "women-only" projects,²⁴ as opposed to those targeting the family as a whole. For example, the General Assembly designated 1975 the "International Women's [*8] Year,"²⁵ and the period from 1976 to 1985

Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 1763 A (XVII), U.N. Doc. A/RES/17/1763A(XVII) (Nov. 7, 1962).

¹⁶ Adams-Alwine, *supra* note 9, at 10.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 7. Cf. G.A. Res. 57 (I), U.N. Doc. A/RES/57(I) (Dec. 11, 1946) (creating an International Children's Emergency Fund).

¹⁹ Adams-Alwine, *supra* note 9, at 7.

²⁰ Pietila, *supra* note 9, at 22-23. See, e.g., The Holy See's Explanation of Position at the 44th Session of the Commission on Population and Development (Apr. 11-15, 2011), <http://www.un.org/esa/population/cpd/cpd2011/countrystatements/agendaitem9/holysee.pdf>. It states:

Unfortunately, as it stands, the general tenor of the present text reflects the false premise that population growth is the cause of poverty, concluding, therefore, that in order to reduce poverty one must eliminate poor people directly or otherwise radically reduce their numbers. In this regard, my delegation reaffirms that population control policies of any kind, be they supported by racial biases, ideological positions or economic profit, have no place in authentic development.

Id. P 3. The Holy See also reaffirmed past reservations with regard to "the terms 'sexual and reproductive health,' 'sexual and reproductive health and reproductive rights,' 'reproductive health,' 'health-care services' and 'services': namely, that we do not consider contraception or abortion or abortion services to be a dimension of such terms." *Id.* P 9. For similar statements, on this last point in particular, see the explanations of position of Benin, Chile, Costa Rica, Egypt, Guatemala, Honduras, Malta, Pakistan, Poland, and St. Lucia at Forty-fourth Session (11-15 April 2011), ECOSOC Population Division, <http://www.un.org/esa/population/cpd/cpd2011/cpd44.htm> (last visited Oct. 15, 2012).

²¹ See Adams-Alwine, *supra* note 9, at 1.

²² *Id.* at 12. See generally Ester Boserup, *Woman's Role in Economic Development* (1970).

²³ Adams-Alwine, *supra* note 9, at 15. See generally Boserup, *supra* note 22.

²⁴ Adams-Alwine, *supra* note 9, at 19.

²⁵ G.A. Res. 3010 (XXVII), P 1, U.N. Doc. A/RES/3010(XXVII) (Dec. 18, 1972).

as the "International Decade for Women."²⁶ In addition, the first World Conference on Women was convened in Mexico to coincide with the 1975 International Women's Year.²⁷ It reminded the global community about the continuing problem of discrimination against women on the basis of sex.²⁸ The Conference adopted a World Plan of Action with guidelines for the Implementation of the Objectives of the International Women's Year and mandated the drafting of a Convention on the Elimination of Discrimination Against Women ("CEDAW").²⁹

C. The Period: 1976 to 1985

The period from 1976 to 1985 was devoted to the "UN Decade for Women: Equality, Development and Peace,"³⁰ and marked a new era in promoting women. During this period, women's full and equal participation was promoted as essential for development itself, and for "the well-being of everyone."³¹ Women were being promoted as full and equal partners with men, having equal rights to opportunities and resources:³² the mantra became "development is not only good for women and society, but impossible without them." In 1979 CEDAW was adopted by the General Assembly, and entered into force in 1981.³³ It was promoted as a significant development in the human rights arena because it prohibited "sex" discrimination on the basis of "equality of men and women."³⁴ Moreover, it obliged State Parties to take all appropriate measures "to ensure the full development and advancement of women," in order to guarantee **["9"]** their human rights "on a basis of equality with men."³⁵ It also pointed "to specific prejudices, customary practices, and stereotyped roles of men and women as things to be eliminated by state parties."³⁶ In addition, a Committee was established to monitor implementation at the national level, and make (non-binding) recommendations to State Parties.³⁷ Both the Convention and the work of the Committee have been the subjects of much criticism.³⁸

²⁶ G.A. Res. 3520 (XXX), U.N. Doc. A/RES/3520(XXX) (Dec. 15, 1975). See also World Conference of the International Women's Year, Mexico City, Mex., June 19-July 2, 1975, World Plan of Action for the Implementation of the Objectives of the International Women's Year, at 35, U.N. Doc. A/CONF.66/34 (1976) [hereinafter International Women's Year Plan of Action].

²⁷ See G.A. Res. 3520 (XXX), *supra* note 26.

²⁸ *Id.*

²⁹ See International Women's Year Plan of Action, *supra* note 26, at 120.

³⁰ See G.A. Res. 35/136, U.N. Doc. A/RES/35/136 (Dec. 11, 1980); G.A. Res. 36/126, P 1, U.N. Doc. A/RES/36/126 (Dec. 14, 1981); G.A. Res. 37/58, U.N. Doc. A/RES/37/58 (Dec. 3, 1982).

³¹ See Global Gender Agenda, *supra* note 9.

³² See Adams-Alwine, *supra* note 9, at 12.

³³ See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

³⁴ *Id.* at art. 1.

³⁵ *Id.* at art. 3.

³⁶ Adams-Alwine, *supra* note 9, at 16.

³⁷ See CEDAW, *supra* note 33, at art. 21(1).

³⁸ See Janice Shaw Crouse & Wendy Wright, CEDAW Harms Families, Concerned Women for America, <http://www.cwfa.org/articledisplay.asp?id=18900&department=BLI&categoryid=family&subcategoryid=blifem> (last visited Aug. 13, 2012) (arguing that CEDAW undermines the traditional family, is a tool for radical feminists to impose their views upon all of society, undercuts the role of parents in child rearing, globalizes abortion policy, encourages decriminalizing prostitution, and negatively affects national sovereignty); see also Janice Shaw Crouse & Wendy Wright, U.N. Treaty's Agenda is Hidden Behind Skirt of Women's Issues, *Insight on the News*, July 1, 2002, at 45 (arguing that the CEDAW committee has lamented the celebration of Mother's Day, has advocated for the legalization of prostitution, criticized the "lack of access to easy and swift abortion," promoted reconceptualization of lesbianism into "sexual orientation," offered a redefinition of the family, and views government as having prior right to parents to educate children). See also Family Watch International, *The Relentless Push to Create an "International Right" to Abortion* (2009), available at

In 1980, another global conference on women was held at Copenhagen, where States gathered for a mid-decade review of the "UN Decade on Women: Equality, Development and Peace."³⁹ Five years later in Nairobi,⁴⁰ the Conference reviewed and appraised the [*10] U.N. Decade for Women as a whole, and established a blueprint for future strategies outlining guidelines for implementing women's equality, with reference to "gender."⁴¹ The women's movement credits the Conference at Nairobi for having translated new "theoretical underpinnings ... into a concrete plan of action."⁴² According to gender or radical feminists, it launched the term gender as referring to social construct under the umbrella approach "Gender and Development" ("GAD").⁴³ However, this assertion relating to the definition of gender as a social construct is highly debatable: the term "gender" appears in the outcome document only sixteen times, and is not defined.⁴⁴

D. The Period: 1986 to 1995

From 1986 to 1995, efforts were directed towards exposing violence against women, which culminated in a number of activities: the 1993 Declaration for the Elimination of Violence Against Women ("DEVAW");⁴⁵ the appointment of a Special Rapporteur on Violence Against Women;⁴⁶ the establishment of the Criminal Tribunals for the Former Yugoslavia ("ICTY")⁴⁷ and for Rwanda ("ICTR").⁴⁸ In addition, research and study began with a view toward

http://www.familywatchinternational.org/fwi/documents/fwiPolicyBriefonAbortionandHumanRights_FinalforPublication.pdf ("Many UN Member States then and now oppose the legalization of abortion. And even though abortion is not to be promoted as a method of family planning per the ICPD and Beijing outcome documents, the CEDAW Committee has pressured 66 nations to legalize, remove penalties for, or increase access to abortion. In other words, the UN CEDAW Committee is attempting to invent a 'right' to abortion by deliberately misinterpreting the treaty they are tasked with monitoring, and it has instructed countries to liberalize their abortion laws under threat that if they don't do that, they will be out of step with the Committee's misguided interpretation of CEDAW.") (footnote omitted); Maria Sophia Aguirre & Ann Wolfram, Human Rights and the Family within United Nation's Policy, 34 *Veritas* 1 (2001) ("In particular, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) shifted the focus from the development of the multi-faceted character of women to focusing on controlling [their] fertility. Reproductive control was seen as a means for females to overcome their discriminated status and gain equality with men.").

³⁹ G.A. Res. 33/185, U.N. Doc. A/RES/33/185 (Jan. 29, 1979) (directing attention to three main themes: employment, health, and education); see also World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, Den., July 14-30, 1980, Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, U.N. Doc. A/CONF.94/35 (Sept. 19, 1980).

⁴⁰ See World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, Kenya, July 15-26, 1985, U.N. Doc. A/CONF.116/28/Rev.1 (1986) [hereinafter 1985 U.N. Report].

⁴¹ G.A. Res. 37/60, U.N. Doc. A/RES/37/60 (Dec. 3, 1982); see also Adams-Alwine, *supra* note 9, at 20. See generally Boserup, *supra* note 22.

⁴² Adams-Alwine, *supra* note 9, at 19.

⁴³ *Id.* at 17-19.

⁴⁴ See 1985 U.N. Report, *supra* note 40.

⁴⁵ See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (including two references to gender, and clearly referring to women in arts. 1 & 4(f)).

⁴⁶ See U.N. Comm'n on Human Rights, Report of the Second International Workshop on National Institutions for the Promotion and Protection of Human Rights, at 21, U.N. Doc. E/CN.4/1994/45 (Dec. 23, 1993) (creating the position of Special Rapporteur and requesting governments to cooperate with and assist the Special Rapporteur in the performance of the tasks and duties mandated and to furnish all information requested).

⁴⁷ See S.C. Res. 827, at 2, U.N. Doc. S/RES/827 (May 25, 1993).

⁴⁸ See S.C. Res. 955, at 2, U.N. Doc. S/RES/955 (Nov. 8, 1994).

eventually introducing an individual right to petition the CEDAW Committee through the vehicle of an Optional Protocol to the Convention.⁴⁹ Moreover, the United Nations promoted "an integrated global agenda of development" through a series of conferences on international **["*11"]** development: environment and development at Rio de Janeiro (1992);⁵⁰ human rights at Vienna (1993);⁵¹ population and development at Cairo (1994);⁵² social development at Copenhagen (1995);⁵³ human settlements at Istanbul (1996);⁵⁴ and food security at Rome (1996).⁵⁵

During this period, the term gender was increasingly being introduced. Indeed, of the aforementioned non-binding documents negotiated between State Parties, it was inserted into DEVAW, as well as the outcome documents of the aforementioned conferences held at Vienna, Cairo, and Rome.⁵⁶ However, the term was never defined, and since the word itself was "not an easily transmissible technical concept,"⁵⁷ it was understood as a synonym for women and/or sex. In this way, "women's equality," not "gender equality" became a "cross cutting theme" in international policy-making related to the topics addressed at the aforementioned conferences.⁵⁸

The decade culminated in the last of the global conferences on women: Beijing (1995). This Fourth World Conference on Women, sponsored by the United Nations,⁵⁹ has been described as one of the "greatest achievements" of the CSW.⁶⁰ The final document, the **["*12"]** Beijing Declaration and Platform for Action, focused on twelve critical areas of concern, and used the term "gender" 233 times.⁶¹ Gender feminist scholars argue that the GAD approach, inclusive of the term gender as a social construct, was firmly entrenched at Beijing.⁶² In response, this assertion is patently false. State Parties never agreed to define "gender" as a social construct. As

⁴⁹ See Short History of CSW, supra note 9, at 14.

⁵⁰ See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (Aug. 12, 1992).

⁵¹ See World Conference on Human Rights, Vienna, Austria, June 14-25, 1993, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (July 12, 1993). The term gender appears five times, and clearly refers to girls and/or women. Id. at arts. 18, 38, 42.

⁵² See International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13/Rev.1, Annex I (1995). Chapter IV of the Report is devoted to "Gender Equality, Equity and Empowerment of Women." Id.

⁵³ See World Summit on Social Development, Copenhagen, Den., Mar. 6-12, 1995, Report of the World Summit for Social Development, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995).

⁵⁴ See G.A. Res. 51/177, U.N. Doc. A/RES/51/177 (Feb. 11, 1997).

⁵⁵ See World Food Summit, Rome, Italy, Nov. 13-17, 1996, Rome Declaration on World Food Security and World Food Summit Plan of Action. The word gender appears one time in the Declaration, eight times in the Plan of Action, and the majority of the latter references are clearly to women. Id. pmb. P 6, arts. 16(a)-(b), 16(d)-(f), 34(a), 35(f), 59(c).

⁵⁶ See supra notes 48-49, 52 and accompanying text.

⁵⁷ Hilary Charlesworth, Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations, [18 Harv. Hum. Rts. J. 1, 12 \(2005\)](#) [hereinafter Charlesworth, Gender Mainstreaming].

⁵⁸ Short History of CSW, supra note 9, at 14. In the United States, it is noteworthy that one of the earliest references to gender appears in a 1984 publication for the United States Agency for International Development ("USAID"). See Catherine Overholt et al., Harvard Inst. for Int'l Dev., Instructors Manual to Gender Roles in Development Projects (1984).

⁵⁹ See Report on Beijing Conference, supra note 7, at 232(a).

⁶⁰ Short History of CSW, supra note 9, at 14.

⁶¹ See Report on Beijing Conference, supra note 7.

⁶² See Adams-Alwine, supra note 9, at 24.

discussed *infra* in Part II, the working group set up during the Beijing conference decided to revert to its common usage, which had always been understood by State Parties to refer to either women, or women and men, or the two sexes.

In terms of organizational support, by 1995 the advancement of women was "the primary responsibility" of six main agencies or bodies: CSW; ⁶³ Division for the Advancement of Women ("DAW"); ⁶⁴ International Research and Training Institute for the Advancement of Women ("INSTRAW"); ⁶⁵ United Nations Development Fund for Women ("UNIFEM"); ⁶⁶ the Inter-Agency Network on Women and Gender Equality ("IANWGE"); ⁶⁷ and Office of the Special Adviser on Gender Issues and Advancement of Women ("OSAGI"). ⁶⁸ The definition of gender as a social construct distinct from biology is found in the documents issued by these various U.N. agencies, but in documents negotiated by State Parties, the term is left undefined or merely used by other U.N. institutions as a tool to generate statistics on women-men ratios (e.g., holding of political offices). ⁶⁹

[*13]

E. The Period: 1996 to 2006

During 1996 to 2006, CSW, the preparatory committee for Beijing 1995, and now the primary monitoring body of the Beijing Platform for Action, ⁷⁰ established a schedule of events for the purpose of reviewing the Platform for Action. The first of many appraisals, namely Beijing+5, was carried out in a special session of the General Assembly ("Women 2000: Gender Equality, Development and Peace for the Twenty-First Century"). ⁷¹ Then, in 1997, ECOSOC in its non-binding Agreed Conclusions took "note with appreciation" of the report of the Secretary-General on the coordination of the United Nations System activities for "mainstreaming a gender perspective into all policies and programmes in the United Nations system." ⁷² In 2000, the United Nations Millennium Development

⁶³ See *supra* note 14.

⁶⁴ See Division for the Advancement of Women, <http://www.un.org/womenwatch/daw/vaw/indexnew.htm> (last visited Oct. 7, 2011).

⁶⁵ See G.A. Res. 39/249, U.N. Doc. A/RES/39/249 (Apr. 9, 1985).

⁶⁶ See G.A. Res. 39/125, U.N. Doc. A/RES/39/125 (Dec. 14, 1984); G.A. Res. 31/133, U.N. Doc. A/RES/31/133 (Dec. 16, 1976); G.A. Res. 36/129, U.N. Doc. A/RES/36/129 (Dec. 14, 1981).

⁶⁷ See Inter-Agency Network on Women and Gender Equality, <http://www.un.org/womenwatch/ianwge/index.html> (last visited Oct. 7, 2011). The Inter-agency Network on Women and Gender Equality ("IANWGE") is described as a "network of Gender Focal Points in United Nations offices, specialized agencies, funds and programmes [that] is chaired by UN Women," which also serves as its Secretariat. *Id.* It consists of "approximately 60 members representing 25 entities of the United Nations system." *Id.*

⁶⁸ See Office of the Special Adviser on Gender Issues and Advancement of Women, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Oct. 7, 2012). The Office of the Special Adviser on Gender Issues and Advancement of Women was established after the Beijing conference for coordination of gender policies within the United Nations and is specifically concerned with gender mainstreaming. See also Global Gender Agenda, *supra* note 9.

⁶⁹ See, e.g., Charlesworth, Gender Mainstreaming, *supra* note 57; Fernanda de Abreu Prazeres, Gabriel Semerene Costa & Izadora Xavier do Monte, Gender Trouble in the UN-Shortcomings of United Nations Peacekeeping in Mainstreaming a Gender Perspective, Paper Presented at the Annual Meeting of the ISA-ABRI at Pontifical Catholic University (July 22, 2009) (transcript available at http://www.allacademic.com/meta/p381365_index.html); Mona Lena Krook & Jacqui True, Global Strategies for Gender Equality: The United Nations Before and After Beijing, Paper Presented at the Annual Convention of the International Studies Association (Mar. 26-29, 2008) (transcript available at http://krook.wustl.edu/pdf/Krook_True_ISA_2008.pdf).

⁷⁰ See E.S.C. Res. 1996/6, U.N. Doc. E/RES/1996/6 (1996).

⁷¹ See E.S.C. Res. 2001/4, U.N. Doc. E/RES/2001/4 (July 24, 2001).

Goals (MDGs) used the term "gender equality" as one of the eight targets that, when achieved, will end extreme poverty worldwide by 2015.⁷³ In 2005, CSW organized the tenth year review session, Beijing+10, within its own framework during its 49th session.⁷⁴ In addition, the Optional Protocol under CEDAW that establishes the competence of the CEDAW Committee to receive a petition from victims of discrimination was drafted and eventually entered into force in 2000.⁷⁵ The Rome Statute of the International Criminal Court was [*14] established in 1996, entered into force in 2002, and contains the only legally binding definition of gender: both sexes, male and female, within the context of society.⁷⁶

F. The Period: 2006 to the Present

From 2006 to the present, many initiatives have taken place. In 2006, the General Assembly replaced the Commission of Human Rights with the establishment of the Human Rights Council. The purpose of the Human Rights Council is to address violations of human rights through recommendations for action.⁷⁷ It conducts a universal periodic review which must "fully integrate a gender perspective."⁷⁸ In addition, selection and appointment of mandate-holders must take due consideration of "gender balance."⁷⁹ However, it is noteworthy that the term "women" is presently only used in relation to Special Rapporteurs, whose titles had pre-existed the new body, and therefore have remained unchanged (e.g., "Special Rapporteur on trafficking in persons, especially in women and children").⁸⁰

In 2010, CSW organized the review process referred to as Beijing +15, and pursuant to U.N. practice, produced a non-binding document.⁸¹ Later the same year, the U.N. General Assembly established the mega-agency called the United Nations Entity for Gender Equality and the Empowerment of Women, also known as U.N. Women.⁸² It brings together resources by merging the DAW, INSTRAW, OSAGI, and UNIFEM; it provides substantive support to CSW facilitating participation of NGO's in CSW's annual session, and services as secretariat of IANWGE.⁸³ The guiding documents of the new Women's agency are said to be the following: CEDAW, Beijing Platform for Action

⁷² See E.S.C. Res. 2010/29, U.N. ESCOR, 65th Sess., 46th mtg., U.N. Doc. E/2010/SR.46 (July 23, 2010); E.S.C. Res. 2004/04, U.N. ESCOR, 59th Sess., 27th mtg., U.N. Doc. E/2004/4 (July 7, 2004); U.N. GAOR, 57th Sess., Supp. No. 3, U.N. Doc. A/57/3/Rev.1 (1997). See also Krook & True, *supra* note 69.

⁷³ See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) [hereinafter U.N. Millennium Declaration]; see also United Nations General Assembly, *Keeping the Promise: United to Achieve the Millennium Development Goals*, U.N. Doc. A/65/L/1 (Sept. 17, 2010).

⁷⁴ See Short History of CSW, *supra* note 9.

⁷⁵ U.N. Secretary-General, *Review of the implementation of the Beijing Platform for Action and the outcome documents of the special session of the General Assembly entitled "Women 2000: gender equality, development and peace for the twenty-first century,"* P 24, U.N. Doc. E/CN.6/2005/2 (Dec. 6, 2004).

⁷⁶ See Rome Statute, *supra* note 8.

⁷⁷ See G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

⁷⁸ U.N. GAOR, 62d Sess., Supp. No. 53, P 3(k), U.N. Doc. A/62/53 (June 18, 2007).

⁷⁹ *Id.* PP 40, 91.

⁸⁰ *Id.* at app. II (emphasis added).

⁸¹ See U.N. ESCOR, 54th Sess., U.N. Doc. E/2010/27-E/CN.6/2010/11, Supp. No. 7 (2010).

⁸² G.A. Res. 64/289, U.N. Doc. A/RES/64/289 (July 21, 2010).

⁸³ See e.g., Joint Statement of DAW, INSTRAW, OSAGI and UNIFEM on the Occasion of the Establishment, by the General Assembly, of the United Nations Entity for Gender Equality and the Empowerment of Women, available at <http://www.unwomen.org/2010/07/joint-statement-by-daw-instraw-osagi-and-unifem/>. See also the U.N. webpage devoted to global issues and women, which gives a brief overview of the new entity. Women, United Nations Global Issues, <http://www.un.org/en/globalissues/women/> (last visited Sept. 23, 2012).

(and subsequent review documents), U.N. [*15] Security Council Resolution 1325 (and subsequent resolutions), and the MDGs. ⁸⁴ It is noteworthy that the WomenWatch website contains a directory of U.N. resources on "Gender and Women's Issues" not "Gender Equality and Women's Issues"; this slight change might be an indicator that the entity intends to move to gender as a social construct by separating gender from sex, or women. ⁸⁵

II. Beijing and Beyond

A. From Gender as a "Social Construct" to Gender as "Ordinarily Used"

As previously mentioned, the 1995 Beijing Conference produced a final document employing the term "gender" 233 times. ⁸⁶ The Conference Secretary-General, Gertrude Mongella, a Tanzanian Politician, called for a complete revolution to "make equal people who have never been equal ... to transfer a fair share of resources into the hands of women who have been denied for generation upon generation and to make women leaders and decision-makers...." ⁸⁷ As delegates soon discovered, the term "gender" became the core concept of this revolution, and the main point of controversy during negotiations.

Leading up to the Conference, Martha Lorena de Casco, the Official Delegate of Honduras to the Beijing Conference, lamented that the word "gender" constituted the "very backbone" of the draft outcome document. ⁸⁸ She pointed to the copious references to gender: "gender analysis," "gender factors," "gender equality," "gender sensitivity," "gender skills," and so on. ⁸⁹ However, no definition was provided in the text. Notwithstanding assurances from United Nations Officials that "'gender' did not have a definition and did not need one," ⁹⁰ Ms. De Casco sought clarification. She was ultimately directed to Judith Butler's 1990 book, *Gender Trouble: [*16] Feminism and the Subversion of Identity*. ⁹¹ Here, Butler explained the distinction between sex and gender. She stated: "gender is neither the causal result to sex nor as seemingly fixed as sex." ⁹² Gender itself is a "constructed status ... radically independent of sex ... [it is] a free floating artifice, with the consequence that man and masculine might just as easily signify a female body as a male one, and a woman and feminine a male body as easily as a female one." ⁹³ And if gender is socially constructed, Butler argued, so is sex. ⁹⁴

Disturbed, De Casco, along with others, published *Empowering Women: Critical Views on the Beijing Conference* prior to the final Conference. ⁹⁵ She argued that the term "gender" encapsulated the very essence of radical feminism, which was evident in the new, vague, and ambiguous terminology: "safe motherhood," "sexual rights," "reproductive rights," "maternal health," "the right to confidentiality," "safe sex," and "women's rights." ⁹⁶ She

⁸⁴ See CEDAW, *supra* note 33; Report on the Beijing Conference, *supra* note 7; U.N. Millennium Declaration, *supra* note 73.

⁸⁵ Directory of UN Resources on Gender and Women's Issues, WomenWatch, http://www.un.org/womenwatch/directory/ianwqe_10496.htm (last visited Sept. 23, 2012).

⁸⁶ See Report on Beijing Conference, *supra* note 7.

⁸⁷ Michael Cook, Not a Motherhood Statement: A UN Master Plan for Women, in *Empowering Women: Critical Views on the Beijing Conference* 19, 19 (1995).

⁸⁸ Martha Lorena de Casco, The Battle at Beijing, in *Empowering Women: Critical Views on the Beijing Conference*, *supra* note 87, at 13, 15.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990).

⁹² De Casco, *supra* note 88, at 16 (emphasis added); cf. Butler, *supra* note 91, at 6.

⁹³ De Casco, *supra* note 88, at 16 (emphasis added); cf. Butler, *supra* note 91, at 6.

⁹⁴ See De Casco, *supra* note 88, at 16; cf. Butler, *supra* note 91, at 6.

⁹⁵ See De Casco, *supra* note 88, at 17.

concluded that such language seriously threatened life, the dignity of the human person, and national sovereignty.⁹⁷ Upon reading the draft outcome document, which De Casco described as being founded on "gender feminism" or "radical feminism," she stated the following:

The specific objectives ... range from the legalization of abortion ("a women's right"), the elimination of the biological family and ... marriage, to the stark rejection of all our assumptions about what it means to be human (that men and women are not defined by their sex, but by culturally imposed norms). They culminate in a utopian vision of a new and sexless world in which lesbianism and homosexuality are on equal footing with marriage.⁹⁸

Similarly, author Dale O'Leary weighed into the discussion with her comments on the draft document. Realizing that the word "gender" was not generating enough concern from other delegates, she argued that "gender does not mean male and female - it is not a [*17] synonym for sex."⁹⁹ Since the term had not been defined, O'Leary feared that people equated the term with women and/or sex, male and female. Having studied the radical feminist literature, O'Leary warned: "According to gender feminists everything that we think of as human nature is actually only socially constructed roles that can be changed," like "Manhood and Womanhood; Masculinity and Femininity; Heterosexuality, Homosexuality and Bisexuality; Motherhood and Fatherhood."¹⁰⁰ O'Leary challenged women to "read through [the draft outcome document] line by line and try to find any place that isn't bracketed where there is unqualified support for motherhood as a woman's primary vocation."¹⁰¹ Then, following the conference, she fleshed out the full significance of "gender as a social construct" in her book *The Gender Agenda*.¹⁰²

At the 1995 Beijing conference, gender feminist Bella Abzug, former Congresswomen for the United States, argued that: "The meaning of the term 'gender' has evolved, and has differentiated itself from the term 'sex' in order to express the reality of the fact that the situation of the roles of women and men are social constructs subject to change."¹⁰³ The fact that she used the term "evolved" arguably was a veiled reference to the term "gender" which had been inserted into [*18] negotiated documents prior to Beijing. From a review of these documents, mentioned above in Part I of this Article, it is obvious that the term gender was being used as a synonym for women or sex, male and female.

⁹⁶ Id. at 14-15.

⁹⁷ See id. at 14.

⁹⁸ Id. at 14-15.

⁹⁹ Dale O'Leary, *Communication on the Draft Platform for Action for the Fourth World Conference on Women*, The Catholic Resource Network (1995), <http://www.ewtn.com/library/ISSUES/GENDER.TXT> (last visited Sept. 23, 2012).

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² See generally Dale O'Leary, *The Gender Agenda: Redefining Equality* (1997). O'Leary argues that gender concerns translate into the argument that sex is a natural fact, but irrelevant, and that what is of prime importance is the realization that socially constructed gender roles exist that are arbitrary, irrational, and ought to be challenged. Id. at 25-135. Coupled with this idea is the understanding that, to reach full empowerment (e.g., economic wealth, political power, prestige) in the public sector, women must compete on the same playing field as men. Id. To this end, women must control their ability to have a child, so the argument goes, because this is what keeps them from the empowering environment of the paid work force and ultimately, positions of influence and prestige. Id. at 135-40. O'Leary concludes that gender ideology, in practical terms, leads to a devaluation of marriage, family, motherhood, and human life. Id. at 21-25.

¹⁰³ Oscar Alzamora Revoredo, *An Ideology of Gender: Dangers and Scope*, in Pontifical Council for the Family, *Lexicon: Ambiguous and Debatable Terms Regarding Family Life and Ethical Questions* 467 (2006); cf. O'Leary, *supra* note 102, at 68-71 (discussing a report on a regional conference held in Mar de Plata, Argentina in preparation for the Fourth World Conference on Women in Beijing). The report, prepared by Cristina Delgado, quotes "gender feminists" as stating that man/woman and masculine/feminine are cultural constructs. Id. Further, one feminist at the conference asserted, "the non-existence of a feminine or masculine essence allows us to exclude the supposed superiority of one sex over the other and also even to question if there is a 'natural' form of human sexuality." Id. at 71.

At the conference, "fear and confusion intensified" ¹⁰⁴ when readings and texts used by gender feminists in American colleges and universities were distributed by one of the participants. The definitions of new terminology that had been used as part of the compulsory course readings for "Re-Imagining Gender" offered at one American college were particularly enlightening: hegemony, ¹⁰⁵ deconstruction, ¹⁰⁶ patriarchy, ¹⁰⁷ sexually polymorphous, ¹⁰⁸ mandatory heterosexuality, ¹⁰⁹ sexual preference or orientation, ¹¹⁰ and homophobia. ¹¹¹ Gender feminist Hilary Charlesworth later described the overall debate during the conference in the following manner: while radical feminists feared that the imprecise use of the word would allow gender to be associated with "women" and "sex," delegates from several States, including Honduras and the Holy See, were "concerned that [gender] might be understood as including homosexuality and even bestiality." ¹¹²

To resolve the issue, representatives of some sixty States gathered to establish a working definition of the term. They debated its usage in an informal contact group to seek agreement on the commonly understood meaning of gender in the context of the Platform for Action. ¹¹³ During the debate, CSW even conceded that the use of the word gender was consistent with the way the term had been used in **[*19]** other documents, ¹¹⁴ namely as a synonym for women and/or sex. The result of these discussions, set out in Annex IV to the Report of the Fourth World Conference on Women, was the concluding statement that gender is "to be interpreted and understood as it was in ordinary, generally accepted usage." ¹¹⁵ The statement in full reads:

Having considered the issue thoroughly, the contact group noted that: (1) the word "gender" had been commonly used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action. Accordingly, the contact group reaffirmed that the word "gender" as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage. ¹¹⁶

B. Gender as Distinct from but Dependent upon Biological Sex

¹⁰⁴ Revoredo, supra note 103.

¹⁰⁵ Id. ("Hegemony or hegemonic: Ideas or concepts universally accepted as natural, but which are in reality social constructs.").

¹⁰⁶ Id. ("Deconstruction: The task of denouncing the hegemonic ideas and language, (that is, those universally accepted as natural), in view of persuading the people to believe that their perceptions of reality are social constructs.").

¹⁰⁷ Id. ("Patriarchy, patriarchal: The institutionalization of the masculine control over women, children and society, perpetuating the subordinate position of women.").

¹⁰⁸ Id. ("Polimorphous perversity, sexually polimorphous: Men and women do not feel any attraction to persons of the opposite sex naturally, but due to societal conditioning. Therefore sexual desire may be directed to anyone.").

¹⁰⁹ Id. at 468 ("Mandatory heterosexuality: People are forced to think that the world is divided into two sexes sexually attracted to one another.").

¹¹⁰ Id. ("Sexual preference or orientation: Different forms of sexuality exist - including homosexual, lesbian, bisexual, transsexual, and transvestite - that are equivalent to heterosexuality.").

¹¹¹ Id. ("Homophobia: Fear of relations with persons of the same sex; people with prejudices against homosexuals. (The term is based on the notion that the prejudice against homosexuals has its roots in the exaltation of heterosexual tendencies.").

¹¹² Charlesworth, Gender Mainstreaming, supra note 57, at 16.

¹¹³ See id. at 16; see also Report on Beijing Conference, supra note 7, Annex IV, P 1, at 218.

¹¹⁴ Adams-Alwine, supra note 9, at 26.

¹¹⁵ See Report on Beijing Conference, supra note 7, Annex IV, P 3, at 218.

¹¹⁶ Id. Annex IV, PP 2-3, at 218 (emphasis added).

Following the Beijing Conference, a question raised concerned the meaning of the phrase "ordinary, generally accepted usage" of the term gender. In response, the most compelling argument is that gender had been used in non-binding negotiated documents amongst States as a synonym for women or sex - a point even conceded by gender feminists like Charlesworth.¹¹⁷ The Holy See had never been satisfied with the non-definitional approach adopted in the concluding statement at the Beijing conference, and consequently, entered reservations and included a statement and a very nuanced interpretation of the term "gender." The Holy See stated the following:

In accepting that the word "gender" in this document is to be understood according to ordinary usage in the United Nations context, the Holy See associates itself with the common meaning of that word, in languages where it exists. The term "gender" is understood by the Holy See as grounded in biological sexual identity, male or female. Furthermore, the Platform for Action itself clearly uses the term "Both genders." The Holy See thus excludes dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different [*20] purposes. It also dissociates itself from the biological determinist notion that all the roles and relations of the two sexes are fixed in a single, static pattern.¹¹⁸

Then the statement discussed the thought of Pope John Paul II. In this regard, the Holy See stated:

Pope John Paul insists on the distinctiveness and complementarity of women and men. At the same time, he has applauded the assumption of new roles by women, stressed the degree to which cultural conditioning has been an obstacle to women's progress, and exhorted men to assist in the "the great process of women's liberation". In his recent "Letter to Women", the Pope explained the Church's nuanced view in the following way: "One can also appreciate that the presence of a certain diversity of roles is in no way prejudicial to women, provided that this diversity is not the result of an arbitrary imposition, but is rather an expression of what is specific to being male and female."¹¹⁹

In summary, the Holy See understood, and maintains today, that the term "gender," pursuant to its common usage, is grounded in biological, sexual differences between males and females. This means that such differences are relevant (e.g., motherhood and fatherhood), but not all roles and relations are fixed in a static pattern (e.g., being born female does not mean that a woman is inferior, cannot drive, be educated, hold a job, etc.). The Holy See's definition of gender sought then, and cited today, offers an authentic alternative to the radical definition of gender that minimizes the physical difference of sex and overemphasizes the purely cultural element of gender in a way that obscures the differences and complementarity of the sexes.¹²⁰

The Holy See continues to distance itself from the promotion of women as tied to their liberation from biological constraints. It maintained then, and contends now, that such a conception of women's liberation has inspired ideologies that call into question the natural family based on marriage between one woman and one man, and has made "homosexuality and heterosexuality virtually equivalent in a [*21] new model of polymorphous sexuality."

¹²¹ According to such ideologies, there is no universal human nature with characteristics knowable through right reason. Rather, all persons can and ought to constitute themselves according to their own preferences in a way that

¹¹⁷ See Charlesworth, *Gender Mainstreaming*, supra note 57, at 14.

¹¹⁸ Report on Beijing Conference, supra note 7, at 162 (detailing the Holy See's position).

¹¹⁹ Id. (citation omitted).

¹²⁰ See Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* P 2 (2004), in 34 *Origins* 169, 171 (2004) [hereinafter *On the Collaboration of Men and Women*].

¹²¹ Id. The Holy See has not delineated the different ideologies in this letter. For a discussion on these various ideologies see, O'Leary, supra note 102, at 22 ("Support for the Gender Agenda comes from activist groups, all somewhat interrelated or overlapping in interest, but nevertheless distinguishable: 1) population controllers; 2) sexual libertarians; 3) gay rights activists; 4) multiculturalists/promoters of political correctness; 5) environmental extremists; 6) neo-Marxists/progressives; 7) postmodernists/deconstructionists.").

recognizes their total freedom from "every predetermination linked to their essential constitution." ¹²² The Holy See also has rejected ideologies that have pitted women against men, and initiatives that have promoted women's power in the face of the abuse of power to the point of rejecting the complementarity of the sexes or their need for collaboration. ¹²³

C. Gender as a Synonym for Women and Sex, or Women and Children

In 2005, ten years after Beijing, gender feminist scholar Hilary Charlesworth admitted that gender is "not an easily transmissible technical concept," ¹²⁴ while her colleague Valerie Oosterveld lamented in the same year that the "basic content of "gender" admits of no agreement within the feminist community. ¹²⁵ At that time, and arguably still valid today, Charlesworth has rightly noted that the definition among international lawyers has been "typically understood" by them as a synonym for "'women' and 'sex'." ¹²⁶ So convinced of her position, she finds it ironic that "the term "gender" remains keenly contested internationally." ¹²⁷ She contends that within the U.N. system, the term gender is "an insipid and bland [*22] concept ... that has little cutting edge," ¹²⁸ because it has not been distinguished from the term sex and assumes that gender is a synonym for women. ¹²⁹ At its narrowest, and consequently its worst, according to Charlesworth, the term "gender" means "women and children" (or mothers). ¹³⁰

She gives several reasons for this development, some of which support the thesis of this Article. First, gender has been studied "almost exclusively in the context of sex discrimination" thanks to CEDAW, which is considered the "flagship" of international norms that prohibit sex discrimination. ¹³¹ Second, sexual equality between men and women has become identified with equal treatment of the same, inclusive of affirmative action programmes promoted as temporary solutions "to allow women eventually to perform exactly like men." ¹³² Third, the term "gender" is "mainly used as a synonym for "women' and 'sex' in the [1995 Beijing] Platform of Action." ¹³³

¹²² On the Collaboration of Men and Women, *supra* note 120, P 3.

¹²³ See *id.* PP 2-4.

¹²⁴ Charlesworth, Gender Mainstreaming, *supra* note 57.

¹²⁵ Valerie Oosterveld, The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?, *18 Harv. Hum. Rts. J. 55, 83 (2005)*.

¹²⁶ Hilary Charlesworth, Gender and Governance in International Law, 51 Dev. Bulletin 10-12 (2000), available at <http://devnet.anu.edu.au/online%20versions%20pdfs/51/2charlesworth51.pdf> (last visited March 1, 2011) [hereinafter Charlesworth, Gender and Governance]. See also Charlesworth, Gender Mainstreaming, *supra* note 57, at 17; Carol Cohn, War, Wimps, and Women: Talking Gender and Thinking War, in *Gendering War Talk* (Cooke & Woolcott eds., 1993).

¹²⁷ Charlesworth, Gender Mainstreaming, *supra* note 57, at 16.

¹²⁸ *Id.* at 14.

¹²⁹ *Id.*

¹³⁰ See *id.* at 16; cf. The Secretary-General, Women and Peace and Security, delivered to the Security Council, U.N. Doc. S/2004/814 (2004) (demonstrating how the United Nations Security Council uses the term "gender" to refer to women and children as well).

¹³¹ Charlesworth, Gender and Governance, *supra* note 126, at 17.

¹³² *Id.* at 18. See also Charlesworth, Gender Mainstreaming, *supra* note 57, at 13 ("It does not address the complex way in which gender is created and sustained by social and power relations.").

¹³³ Charlesworth, Gender Mainstreaming, *supra* note 57, at 17.

She also argues that the Holy See's interpretative statement regarding the meaning of gender clarified - for the world community - that the term gender as described in the Annex IV to the Report of the Fourth World Conference on Women was "designed to eliminate the possibility that gender might refer to socially constructed feminine and masculine roles."¹³⁴ In response, Charlesworth's claim regarding the Holy See's statement and its effect on State Parties is somewhat exaggerated since such a statement has no binding effect on State Parties in international law. Moreover, Charlesworth fails to appreciate the Holy See's nuanced statement. The Holy See would concede that some have attributed to women things that have nothing to do with what it means to be a woman or a feminine person. For example, as previously mentioned, it rejects the claim that a woman because she is a woman cannot study, work, or drive a car, and so forth.

[*23] Charlesworth also maintains that the strategy of "gender mainstreaming" itself is seriously flawed because it rests on a narrow definition of gender.¹³⁵ Generally speaking, the term "gender mainstreaming" refers to protecting women's rights through general norms in central institutional activities as opposed to promoting women's rights through specific norms and special institutions applicable only to women.¹³⁶ In a non-binding document of 1997, ECOSOC defined "gender mainstreaming" in the following manner:

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.¹³⁷

According to Charlesworth, the ECOSOC definition is "too narrow"¹³⁸ because it is "animated by the conception of equality as equal treatment of women and men, assuming symmetry of position between women and men. It does not address the complex way in which gender is created and sustained by social and power relations."¹³⁹ She continues, and makes a statement with which the Holy See might agree: "Treating women and men as though they face similar obstacles will only perpetuate existing disparities between them; and treating women and men as if their interests are always in sharp confrontation offers an impoverished account of relations between the sexes."¹⁴⁰

She reviews the work of treaty-monitoring bodies and argues that "gender mainstreaming" is haphazard, resisted, misunderstood, and applied only as regards to the gathering of data and statistics on women, for example, the number of women in public life, or the **[*24]** number of women affected by a given situation.¹⁴¹ Charlesworth laments that "there is no attempt to understand the way in which stereotypes about sex and gender roles can affect the human right in question. Violations of women's human rights are typically presented as an aspect of women's inherent vulnerability, as if this attribute were a biological fact."¹⁴² She also contends that the melding of sex/gender causes a number of problems, for example, (1) "links gender with biology, implying that gender is a fixed, objective fact about a person"; and (2) "reaffirms the 'naturalness' of female/male identities and bypasses the

¹³⁴ See id.

¹³⁵ See id. at 2.

¹³⁶ See id. at 1.

¹³⁷ Id. at 4 (emphasis added); see also U.N. E.S.C., Report of the Economic and Social Council for 1997, at 27, U.N. Doc. A/52/3/Rev.1; GAOR, 52d Sess., Supp. No. 3 (Sept. 18, 1997).

¹³⁸ Charlesworth, Gender Mainstreaming, supra note 57, at 13.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ See id. at 7-10.

¹⁴² See id. at 10-11.

performative aspects of gender." ¹⁴³ Charlesworth ultimately concludes that the "technique of gender mainstreaming has stripped the feminist concept of "gender" of any radical or political potential." In other words: "gender has been defanged." ¹⁴⁴

D. Gender is Defined as the "Two Sexes, Male and Female, in the Context of Society"

In 1998, the term "gender" became the center of serious debate during negotiations of the Rome Statute of the International Criminal Court (ICC Statute). ¹⁴⁵ It was ultimately adopted after a six-week-long conference held in Rome, Italy, and about a fifty-year-long push for a permanent court to prosecute international crimes. ¹⁴⁶ The court, **[*25]** which functions in a complementary way to national criminal jurisdictions, will have to eventually interpret the term "gender" as defined, ¹⁴⁷ when such nations are "unwilling or unable" to act. ¹⁴⁸ Prepared by the International Law Commission, earlier drafts of the ICC Statute contained no reference to gender, but the final text contains nine references thanks to the "strong lobbying efforts" of the coalition known as Women's Caucus for Gender Justice. ¹⁴⁹ The notion of gender is relevant to the following issues: crimes against humanity, ¹⁵⁰ applicable law, ¹⁵¹ the Office of Prosecutor, ¹⁵² the investigative duties and powers of the Prosecutor, ¹⁵³ the protection of witnesses and victims, and their participation in proceedings. ¹⁵⁴

The fact that "gender" was ultimately defined in the ICC Statute is largely due to the lobbying efforts of the opposing coalition, which included the Holy See, countries with large Catholic populations, and Arab States. ¹⁵⁵ For this group, the Beijing "non-definition" solution to the term gender was too vague an approach, and inappropriate for the certainty required in criminal prosecutions. ¹⁵⁶ Later, gender feminist scholar Valerie Oosterveld described the

¹⁴³ Id. at 15.

It does not capture the ways in which gender is constructed in a particular society so as to make some actions seem natural and others controversial Reading gender to be essentially about women does not capture the relational nature of gender, the role of power relations, and the way that structures of subordination are reproduced. Such a narrow conception allows problems facing women to be understood as the product of particular cultures, lack of participation in public arenas, or lack of information skills, and obscures the way gender shapes our understanding of the world. It requires women to change, but not men. Most significantly, the association of the term "gender" primarily with women leaves both the roles of men and male gender identities unexamined, as though they were somehow natural and immutable.

Id.

¹⁴⁴ Id.

¹⁴⁵ See Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 Mich. St. UDCL J. Int'l L. 151 (1999) (calling the definition of gender as arising out of one of the "most bitter disputes" during treaty negotiations).

¹⁴⁶ See id.

¹⁴⁷ Oosterveld, *supra* note 125, at 58-66.

¹⁴⁸ See Rome Statute, *supra* note 8, at arts. 1, 17(1)(a).

¹⁴⁹ Oosterveld, *supra* note 125, at 58 n.21.

¹⁵⁰ Rome Statute, *supra* note 8, at art. 7(1)(h).

¹⁵¹ See id. at art. 21(3).

¹⁵² See id. at art. 42(9).

¹⁵³ See id. at art. 54(1)(b).

¹⁵⁴ See id. at art. 68(1).

¹⁵⁵ See Oosterveld, *supra* note 125, at 64-66.

¹⁵⁶ Id. at 64.

debate as "polarized," involving "many countries expressing their support for, or opposition to, retaining the term "gender.'" ¹⁵⁷ Members of the opposition maintained that "the term "gender' could imply rights more expansive than those currently recognized in many states, with the main concern being that the term might sanction rights based on sexual orientation." ¹⁵⁸ Others added that the term did not exist in some languages and therefore, could not be "adequately translated into all six official U.N. languages." ¹⁵⁹ States supporting inclusion of [*26] the term maintained that gender meant socially constructed roles or understandings of what it meant to be male and female. ¹⁶⁰

Today, the only binding definition of gender in international treaty law is that which obliges State Parties through their ratification of the ICC Statute. The definition reads: "For the purpose of this Statute, it is understood that the term "gender' refers to the two sexes, male and female, within the context of society. The term "gender' does not indicate any meaning different from the above." ¹⁶¹

The fight to re-define "gender," however, continues. Many gender feminists have been very critical of the definition. Oosterveld sums up the various opinions as follows:

[*27]

Some describe it as stunningly narrow, a failure, puzzling and bizarre, peculiar, restraining, and having limited transformative edge. Others claim that it wrongfully elides the notions of gender and sex, making gender mean the same as biological sex and therefore not recognizing that gender is a constructed and contingent set of assumptions about female and male roles. One ... describes the definition as preventing the approaches that rely on the social construction of gender. ¹⁶²

¹⁵⁷ Id. at 63.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id. at 64; cf. Special Rapporteur on Violence Against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/2001/73 (Jan. 23, 2001) (by Radhika Coomaraswamy); Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 335 (2000); Hilary Charlesworth, Feminist Methods in International Law, [93 Am. J. Int'l L. 379, 394 \(1999\)](#) (explaining that "international lawyers require a much richer understanding of gender than the definition provided in the ICC statute"); Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law, 46 McGill L.J. 217, 236 (2000) (describing the definition as "peculiar and circular," albeit from a more positive point of view); Brenda Cossman, Gender Performance, Sexual Subjects and International Law, 15 Can. J.L. & Juris. 281, 281 (2002) (arguing that "gender is not something one has, but something one does"); Stephanie Farrior, The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?, [12 Colum. J. Gender & L. 587, 589 \(2003\)](#) (similarly describing the definition of gender as "limiting"); Dorean M. Koenig & Kelly D. Askin, International Criminal Law and the International Criminal Court Statute: Crimes Against Women, in 2 Women & Int'l Hum. Rts. L. 3, 20 n.73 (Kelly D. Askin & Dorean M. Koenig eds., 2000) (Askin notes that at a roundtable discussion, Professor Theo van Boven described the definition as "the most puzzling and bizarre language ever included in an international treaty."); Rana Lehr-Lehnardt, One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court, [16 BYU J. Pub. L. 317, 340 \(2002\)](#) (describing the definition as "restraining"); Brook Sari Moshan, Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity, [22 Fordham Int'l L.J. 154, 178 \(1998\)](#) (explaining that women's activists are concerned that the qualification of the term gender "will complicate the prosecution of gender-based crimes"); Ruth B. Phillips, Too Close to Home? International Criminal Law, War Crimes and Family Violence, [24 T. Jefferson L. Rev. 229, 233 n.14 \(2002\)](#) (describing the approach to gender as "regressive" and reflecting "a fear among delegations that gender equality will be interpreted to favor lesbian and gay rights").

¹⁶¹ Rome Statute, supra note 8, art. 7(3). It is noteworthy that the definition of gender contained in the Rome Statute was adopted, thereafter, in a non-binding conference document on the topic of racism. See World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31-Sept. 8, 2001, Report of World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, at 75 n.1, U.N. Doc. A/CONF. 189/12 (2002).

¹⁶² Oosterveld, supra note 125, at 55-56 (citations omitted)(quotations omitted).

Other gender feminists, Oosterveld among them, are more optimistic. According to this group, the real issue is how the ICC will interpret the definition. On this question, they argue that it should understand the "context of society" as equivalent to "socially constructed," and in this sense should not "defer to a misogynist or homophobic context."¹⁶³ In support of their position, they look to the plain reading of the ICC statute, and the negotiation history, which one might argue does not necessarily assist them.¹⁶⁴ Their key argument is that international scholars should begin developing an international gender theory in reference to non-binding conference documents and statements by U.N. agencies, which will serve as an important point of reference for the ICC to embrace an understanding of gender as a social construct, inclusive of the ideas that sexual orientation and gender identity are prohibited grounds of discrimination.¹⁶⁵ To this end, back in 2005, Oosterveld urged States "supportive of a sensitive and forward-looking use of the term 'gender' ... to plan ahead, work together during negotiations, and act as a cohesive bloc."¹⁶⁶

In 2006, Oosterveld put the new strategy into action with her law review article, wherein she contended that there is a "close link between the development of international refugee law and international criminal law with respect to gendered aspects of persecution."¹⁶⁷ She claimed this link was helpful because refugee law had explored "gender-related persecution" that remained [*28] untouched in international criminal law.¹⁶⁸ Despite the differences between the two areas of law, in particular, the reality that "gender" is not a discrete ground of persecution in the Refugee Convention,¹⁶⁹ which binds State Parties, she urged judges of the ICC to "examine [the non-binding] principles or rules found within refugee law," and the feminist academic analysis of the same.¹⁷⁰ Of central place in her article were references to non-binding guidelines, especially the 2002 "Guidelines on International Protection: Gender-Related Persecution" of the United Nations High Commissioner for Refugees.¹⁷¹ She urged the ICC to adopt the definition of gender as a social construct,¹⁷² contained in these Guidelines, as well as to take into consideration, as it does, "sexual orientation,"¹⁷³ gender identities,¹⁷⁴ and the claims of "homosexuals, transsexuals or transvestites."¹⁷⁵

Also in 2006, some U.N. committee members, Special Rapporteurs, and NGO members gathered to draft the so-called "Yogyakarta Principles" a set of guidelines on the "application of international human rights law in relation to

¹⁶³ Id. at 82.

¹⁶⁴ See id.

¹⁶⁵ See id.

¹⁶⁶ Id. at 83.

¹⁶⁷ Valerie Oosterveld, Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution, [17 Duke J. Comp. & Int'l. L. 49, 51 \(2006\)](#).

¹⁶⁸ Id.

¹⁶⁹ See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, U.N.T.S. 2545; Protocol Relating to the Status of Refugees, Jan. 31, 1967, [19 U.S.T. 6223](#), U.N.T.S. 8791.

¹⁷⁰ Id. at 77, 82.

¹⁷¹ United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Guidelines].

¹⁷² See Oosterveld, supra note 167, at 77; cf. UNHCR Guidelines, supra note 171, at 3.

¹⁷³ Oosterveld, supra note 167, at 65-69, 73 (also referring to similar types of guidelines in Canada, United States, Sweden, and the United Kingdom).

¹⁷⁴ Oosterveld, supra note 167, at 77, 82.

¹⁷⁵ Id. at 79; cf. UNHCR Guidelines, supra note 171, P 16.

sexual orientation and gender identity,"¹⁷⁶ which has no binding force in international law. Unsurprisingly, the same individuals have been promoting these Principles within the United Nations system. Most notably, one drafter of the Principles, who is also a U.N. Special Rapporteur, cited them in the controversial 2009 "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism."¹⁷⁷ He argued that "gender [*29] is not synonymous with women but rather encompasses the social constructions that underlie how women's and men's roles, functions and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood."¹⁷⁸ The Report later stated that "governments should remedy the gender inequality that makes women and lesbian, gay, bisexual, transgender and intersex individuals the targets of terrorism."¹⁷⁹

The Report was met with fierce criticism by State Parties for promoting a new and radical definition of gender, inclusive of sexual orientation and gender identity, lesbian, gay, bisexual, transgender, and intersex (e.g., The African Group, The Organization of the Islamic Conference, The Arab Group, The Holy See, St. Lucia, and India).¹⁸⁰ In response, he merely acknowledged that the "report exceeded many expectations by taking the issue [of gender] beyond the human rights of women."¹⁸¹

Finally, in 2011, during the 55th Session of the CSW, the European Union attempted to re-introduce a radical definition of gender in the CSW's "Agreed Conclusions" through the vehicle of "gender studies."¹⁸² During negotiations, when the Holy See sought clarification of the term "gender studies," the European Union defined the notion as a field of interdisciplinary study based on the views of Simone de Beauvoir and Judith Butler.¹⁸³ As previously [*30] mentioned, Judith Butler has challenged the universal nature of the human person, male and female, arguing that gender, based on the social construction theory, is malleable, and biological sex is fluid. The term "gender studies" was eventually dropped from the document and "many delegations reaffirmed the use of 'gender' as referring to 'women and men' or male and female," according to its ordinary agreed usage "before,

¹⁷⁶ See The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Mar. 2007), available at http://www.yogyakartaprinciples.org/principles_en.htm (last visited Oct. 1, 2012).

¹⁷⁷ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, transmitted by Note of the Secretary-General, U.N. Doc. A/64/211 (Aug. 3, 2009) (by Martin Scheinin).

¹⁷⁸ Id. P 20.

¹⁷⁹ Id. P 33.

¹⁸⁰ See General Assembly Department of Public Information, Political Affairs Head Says UN Efforts to Assist Elections in "High Demand" as Third Committee's Debate on Promotion of Human Rights Continues, U.N. Doc. GA/SHC/3959 (Oct. 26, 2009) (detailing the discussion of the State Parties during the question period following presentation of the report).

¹⁸¹ Id.

¹⁸² See Statement of the Holy See in Explanation of Position on the Agreed Conclusions (E.CN.6/2011/L.6) at the 55th Session of the Commission on the Status of Women of the United Nations Economic and Social Council (Mar. 14, 2011), available at <http://www.holyseemission.org/statements/statement.aspx?id=73> [hereinafter Explanation of Position on the Agreed Conclusions]. See also UN Women's Commission Reveals Gender Divide, Catholic Family and Human Rights Institute (Mar. 17, 2011), <http://www.c-fam.org/fridayfax/volume-14/un-women-s-commission-reveals-gender-divide.html>.

¹⁸³ The author of this Article was a member of the Holy See delegation, and present during these negotiations. It is no coincidence that within weeks of the CSW negotiations, forty-seven members of the Council of Europe finalized a document that defined gender as "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men." Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, art. 3(c), Apr. 12, 2011, C.E.T.S. No. 210.

during and after" negotiation at Beijing. ¹⁸⁴ In addition, "a new preambular paragraph was adopted with a view to eliminating doubts about the promotion of a new definition of "gender." ¹⁸⁵

Conclusion

This Article has explored the meaning of the term "gender" within the context of the United Nations System, and has considered four understandings of the concept of gender: as a social construct; as having a cultural aspect but based on the biological sexes, male and female; as synonymous with women and sex or women and children; and as meaning male and female, within the context of society. The concept in the ICC constitutes the only binding definition in international law, which binds State Parties that have signed and ratified the Statute of the ICC. The current fight is among scholars and gay activists to work to ensure that this definition of gender is interpreted in ways that will fill it with the radical content gender feminist theorists hoped for many years ago.

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¹⁸⁴ Explanation of Position on the Agreed Conclusions, *supra* note 182.

¹⁸⁵ *Id.* See also U.N. ESCOR, 55th Sess., Supp. No. 7, P 14, U.N. Doc. E/CN.6/2011/12 (Mar. 12, 2010).