

# **PARTICIPATION OF WOMEN IN SHAPING INTERNATIONAL LAW: A MANIFESTATION OF WOMEN CIVIL AND POLITICAL RIGHTS**

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## ***Abstract***

*This article aims at outlining the women participation in making international human rights law which covered international conventions and international court decisions. Additionally, it critically examines whether the existing international instruments are sufficient to embody the equality of women and men in civil and political rights. This study is conducted in doctrinal method by analyzing the international norm using historical and conceptual approach. The discussion determines that After the 2nd World War, women began involving in the formation of international law either through international treaties making or court decisions. However, women's involvement in international law making is still limited due to gender bias in international law-making processes and bound on the male parameter. Male domination in making international law resulted in the emergence of human rights rules that provide rights and equality for women in fulfilling civil and political rights as a mere formality, therefore, it has not significantly contributed to the effective human rights instruments in guaranteeing the fulfillment and equality of civil and political rights for women. The overall arguments in this study provide sufficient reasonings for the transformation toward more-gender responsive international law that featuring reformulation and reinterpretation of international law, involving more women as state delegate in international law-making process, and the parity of women in International Court Bench.*

**Keywords:** *Civil and Political Rights; International Law; Law-Making; Women's Participation*

## **1. Introduction**

Civil and political rights are the first-generation rights covering the basic rights of individuals that emerged as a reaction to the amount of state intervention in personal life. This right originated from the reformist theory in the XVII and XVIII centuries and is closely related to 3 major revolutions i.e. the British, American, and France Revolutions.<sup>1</sup> Civil and political rights were the most important achievements and still exist today from the French Revolution and American Revolution at the end of the XVIII century and other bourgeois revolts in the XIV and XX centuries.<sup>2</sup> Rights in this first generation are synonymous with liberalism traditions; hence these rights are the rights of people who cannot be revoked (inalienable rights) solely due to the

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<sup>1</sup> Oleksandr Oliinyk and Nikolay Nikolaevich Oleynik, "The First Generation of Human Rights Includes. Third Generation of Human Rights," 2021.

<sup>2</sup> Janusz Symonides, Vojin Dimitrijevic, and David Beetham, *Direitos Humanos: Novas Dimensões e Desafios* (Brasilia: UNESCO Brasil, 2000), 69.

reasons of common interests (common good) and state authorities as emphasized by the liberalism movement.<sup>3</sup>

Although this concept has been echoed since the XVII and XVIII centuries, in this period civil and political rights are displayed as male dominance. Magna Charta, which is often referred as an initial document that guarantees freedom of the king's authority, basically only provides guarantees to the nobles, especially men of aristocrats. Freedom for everyone and equality of rights in political life that echoed during the Francis Revolution - also had intentionally or unintentionally nullified women. Therefore, when the rights of men from the common people who initially did not have the same rights as men from the nobles in public and politics began to be recognized, women were still behind. The enlightenment era which culminated in various major thoughts including natural rights that would be the basis of the human rights concept, had succeeded in emphasizing freedom for men, indeed failed to give the same rights for women. Despite all the improvements made during the Enlightenment, the life of women in society did not change.<sup>4</sup> Women are the 2nd class, as deviations from men. Women are not destined as political creatures because they are considered unable to reflect or understand general conceptions as men.<sup>5</sup>

Inequality of women and men in the political field, especially in law making not only incurred in national domain but also in international domain. International law is mainly interpreted as a rule of law governing relations between countries in which the making process is dominated by men. This can be seen in the process of forming international law through international convention, international customary law and doctrine.

International customary law in the classical view, which is also confirmed in the decision of the International Court of Justice in the case of "North Sea Continental Shelf", emphasized the requirement of two elements: states practice and *opinion juris*. State practice is actions taken by state organs. At the beginning of international law, state organs that formed the state practice were male-dominant. Even so with the doctrine as a source of international law, which is dominated by male international law experts. Hugo Grotius, known as the father of international law; Bynkershoek; Hersch Laagenerpacht; Oppenheim; Ludwig Ehrlich; and Manfrech Lachs; are

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<sup>3</sup> Mohammad Reza Sarani, Seyed Hossein Sadeghi, and Hossein Ravandeh, "The Concept of 'Right' and Its Three Generations," *International Journal of Scientific Study* 5, no. 4 (2017): 37-41, [https://www.ijss-sn.com/uploads/2/0/1/5/20153321/ijss-iran\\_jul\\_oa06\\_-\\_2017.pdf](https://www.ijss-sn.com/uploads/2/0/1/5/20153321/ijss-iran_jul_oa06_-_2017.pdf).

<sup>4</sup> Sonali Gupta, "Liberty for All? An Exploration of the Status of Women in Revolutionary France," *Primary Source* 5, no. 1 (2014): 18.

<sup>5</sup> Gupta, "Liberty for All? An Exploration of the Status of Women in Revolutionary France."

international law experts whose great influence on the process of forming international norms and rules as well as its formation as a legal system.<sup>6</sup>

Male domination in international law and international relations is one of the sharpest criticisms from feminists. J Ann Tickner even mentioned that since the birth of the modern state, international relations have had gender. He further described that the basis of international relations is men's experiences and ideas.<sup>7</sup>

Even though international law initially did not specifically provide equality for women, the progress of equality started within international law. The end of The World War 2 became an important point in the positive progress of women's equality in obtaining and enjoying civil and political rights. After World War 2, various international human rights law instruments were constituted, starting from the UDHR, and ICCPR to CEDAW that specifically stipulate women's rights. All of these instruments are based on the principle of non-discrimination including non-discrimination based on gender. States bind themselves to these international instruments, making the state obliged to embody women's equality in enjoying civil and political rights.

Regardless of international law's contribution to the positive progress of equality of civil and political rights of women with men, there is still criticism directed at this subject. One of the criticisms originating from feminists found that international instruments on human rights were developed by men in a male-oriented world. This instrument is not interpreted in a gender-sensitive way that is responsive to justice for women.<sup>8</sup> In addition, as reminded by Catherine O'Rourke that important work following current developments is not only to produce international law norms but also to reflect and evaluate the effectiveness of these developments in international law.<sup>9</sup> This evaluation and reflection are important to measure whether the existing legal norms are sufficient to realize equality for women in enjoying civil and political rights.

This study departs from a number of articles that study the relationship between international law and feminism: first of all, Maher and Hassan, "Feminist Perspective of International Law and Its Effect International Courts and Tribunals". Secondly, Rosa Ehrenreich, "Feminism and

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<sup>6</sup> Agata Wnukiewicz-Kozłowska, "Doctrine as a Source of International Law," 2017, [https://repozytorium.uni.wroc.pl/Content/89558/05\\_A\\_Wnukiewicz-Kozłowska\\_Doctrine\\_as\\_a\\_source\\_of\\_international\\_law.pdf](https://repozytorium.uni.wroc.pl/Content/89558/05_A_Wnukiewicz-Kozłowska_Doctrine_as_a_source_of_international_law.pdf).

<sup>7</sup> Rachel Saloom, "A Feminist Inquiry Into International Law and International Relations," *Roger Williams University Law Review* 12, no. 1 (2006): 159–181, [https://docs.rwu.edu/rwu\\_LR/vol12/iss1/4/](https://docs.rwu.edu/rwu_LR/vol12/iss1/4/).

<sup>8</sup> Ibid.

<sup>9</sup> Catherine O'Rourke, "Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions," *European Journal of International Law* 28, no. 4 (2017): 1019–1045, <https://academic.oup.com/ejil/article/28/4/1019/4866309>.

International Law: An Opportunities for Transformation; and finally, the writings of Saloom, "A Feminist Inquiry into International Law and International Relations," *Roger Williams University Law Review*: Vol. 12: Issue. 1, Article 4. These three articles criticized the strong dominance of men in the formation of international law, both through the making of international treaties and through the making of international court decisions, which has effect to the formation of legal norms that cannot fully protect women's civil and political rights. The differentiating point of this study from previous studies is the idea of reformulating international legal norms not merely through the creation of new international agreements but through the interpretation of norms based on substantive understandings related to the social and political conditions of women. This interpretation can be done through making court decisions.

This study aims to examine the role of women in international law-making, particularly in international instruments relating to civil and political rights, and to analyze whether the existing international instruments are sufficient to realize equality of women and men in civil and political rights. Furthermore, the authors will propose idea, steps, and mechanism to make international human rights law more accommodating in embodying women's civil rights. This analysis is an important part of enriching the discourse on the equality of women and men in civil and political rights. This is because the relationship between international law and national law recently closely related and influences one another. Particularly in human rights law, national law generally refers to international law. Therefore, even though realizing women's civil and political rights will considerably depend on the domestic level implementation; international human rights law, which gave the burden in fulfilling human rights as state obligations, might have accommodative implementing norms on the fulfilment of women's civil and political rights.

This study will begin with the role of women in the formation of the Women international instruments, namely the Convention on the Elimination of Discrimination Against Women 1979 (hereafter called CEDAW). Studies have also been carried out on women's role in forming international law through court decisions. Then, international human rights law rules will analyze whether they are sufficient to embody equality of civil and political rights between women and men.

## **2. Method**

This study used normative method by using a historical and conceptual approach. This work analyses *travaux préparatoires* of ICCPR, and critically examines the provisions contained in

various international instruments. The materials used in this study were international instruments that specifically regulate civil and political rights and women's rights, court decisions, and scholars' opinions. These materials were collected through searches of various library materials in the form of international instruments, books, scientific journals, and court decisions.

### **3. Results and Discussion**

#### **3.1. Male Domination in International Law**

Male domination in international law starts from the most basic view of international law, namely the definition of international law. According to the traditionalist scholar, national law governs the relations between individuals within the state, while international law governs the relations between states.<sup>10</sup> Many feminist figures use the state as the starting point for their criticism. The state is often identified as male. Apart from that, state actions have different consequences for men and women. The relationship between the state and men as well as women are also different, where women are considered more dependent on the state than men because of social and economic disparities between men and women.<sup>11</sup>

If international law is based on state action, then it is clear that women have minimal involvement in international law. Women have rarely been heads of state, of course, so this exclusive focus on state relations renders women, for that matter, most other individual humans - more or less invisible from the Olympian perspective of international law.<sup>12</sup> International law in a world dominated by men can also be clearly seen in the low number of female top officers in various international organizational bodies, even in bodies that handle human rights issues. Women will usually be found in divisions related to children's and women's rights. This, as explained by Rosa Ehrenreich Brooks, seems to be caused by civil and political rights being a distinctly lesser concern for most of the world's three billion women, and discussions about humanitarian law are more about the rules of soldiers in armed conflict rather than the impact on the fate of women as a result of armed conflict.<sup>13</sup>

The masculine nature attached to international law causes gender bias in international law. International law areas that are considered to have masculine characteristics, such as international

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<sup>10</sup> Rosa Ehrenreich Brooks, "Feminism and International Law: An Opportunity for Transformation," *Yale Journal of Law and Feminism* 14 (2002): 345.

<sup>11</sup> Saloom, "A Feminist Inquiry Into International Law and International Relations," 164.

<sup>12</sup> Brooks, "Feminism and International Law: An Opportunity for Transformation."

<sup>13</sup> *Ibid.*, 347.

security issues, are areas that are dominated by men. Meanwhile, women's involvement is limited to fields that are considered directly related to women.

The condition of put women in a limited area of international law, also situated in international court. Charlesworth and Chinkin pointed out that international law might link the involvement of women in tribunals to the situations of women.<sup>14</sup> Women rarely sit as judges in the international court that identify as male business, such as WTO and International Tribunal on the Law of the Sea.

### **3.2. Women's Role in Forming the International Instrument on The Civil and Political Rights and Women's Equality**

Women's rights have been accommodated and confirmed in the UN Charter 1945 and the Universal Declaration of Human Rights 1948. However, there was little development before the second feminist wave in the 1960-the 70s.<sup>15</sup> Some proofs of the successful feminist movement are the ICCPR 1966 and CEDAW 1979. These successes continue until today since the acceptance of Gender Equality within the Sustainable Development Goals 2030<sup>16</sup> became one of the essential goals to be achieved by the state parties across the globe.

The first international law binding instrument that stipulate women rights is the International Covenant on Civil and Political Rights 1966. This covenant guarantees the equal rights of men and women in enjoy all civil and political rights as enumerated in it, among them , the right to life, freedom from torture, freedom from slavery, the right to liberty and security of the person, rights relating to due process in criminal and legal proceedings, equality before the law, freedom of movement, freedom of thought, conscience and religion, freedom of association, rights relating to family life and children, rights relating to citizenship and political participation, and minority groups' rights to their culture, religion and language.

Women have made contribution to the international human rights conventions that stated women's rights, particularly in CEDAW 1979. A specific convention is needed to protect women's

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<sup>14</sup> Misbah Sabohi, Saghir Maher, and Shafiqul Hassan, "Feminist Perspective of International Law and Its Effect on International Courts and Tribunals," *Journal of Legal, Ethical and Regulatory Issues* 22, no. Special Issue 1 (2019): 8, <https://www.abacademies.org/articles/Feminist-perspective-of-international-law-and-its-effect-on-international-courts-and-tribunals-1544-0044-22-S1-259.pdf>.

<sup>15</sup> Rebecca Adami and Dan Plesch, eds., *Women and the UN: A New History of Women's International Human Rights* (London: Routledge, 2022).

<sup>16</sup> David Tremblay et al., "Sustainable Development Goal Interactions: An Analysis Based on the Five Pillars of the 2030 Agenda," *Sustainable Development* 28, no. 6 (2020): 1584–1596, <https://onlinelibrary.wiley.com/doi/abs/10.1002/sd.2107>.

basic rights. CEDAW is one of the most significant documents produced for the Protection of Human rights.<sup>17</sup> In principle, CEDAW 1975 provided equality without distinction and is a step further by formulating rights specifically for women stemming from the equality principle in the ICCPR 1966.<sup>18</sup> CEDAW has been established to advance the protection of women's rights. To achieve this purpose, women's rights are declared through an international bill of rights for women, and their implementation is supported by an agenda for national action to end discrimination against them.<sup>19</sup>

The birth of CEDAW could not be separated from the role of women. There are several names which were "the midwife" of the Convention on Elimination and Discrimination Against Women before became a legally binding convention, it was known as the Declaration on the Elimination of Discrimination against Women (DEDAW). DEDAW transformed global understanding of the issue of sex discrimination and provide a framework for a binding women's rights treaty.<sup>20</sup> DEDAW itself was drafted by Annie Jiagge, who was Ghanaian which represent her country at the United Nations Commission on the Status of Women (CSW).<sup>21</sup> One of her important contributions on the DEDAW was the UN's first attempt in defining "the women's rights as basic human rights" concept broadly.<sup>22</sup>

After Jiagge, there was a Filipino, Leticia Shahani who played a major role in the acceptance of DEDAW into CEDAW, since the meetings itself were conducted several times, in 1974, 1976, 1977, and 1979. The preparation of CEDAW in the CSW was initially encouraged by International Women's Year, adopted by the World Conference of the International Women's Year held in

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<sup>17</sup> Jennifer L. Ulrich, "Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic within Reach?," *Indiana Journal of Global Legal Studies* 7, no. 2 (2000): 629–654, <https://www.jstor.org/stable/20644746?seq=1>.

<sup>18</sup> Johanna Buerkert, Michaël Schut, and Lili Szuhai, "All About That Face (No Trouble?) An Analysis of the Dutch Ban on Face-Covering Garments in Light of the ECHR, ICCPR and CEDAW, Together with Feminist Theory," *Utrecht Journal of International and European Law* 36, no. 1 (2021): 33–51, <https://utrechtjournal.org/articles/10.5334/ujiel.533>.

<sup>19</sup> United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979*, 1979.

<sup>20</sup> Deborah Atobrah and Albert Awedoba, "A Trail-Blazer, An Outstanding International Jurist, A Humanitarian, An Ecumenical Christian and More: The Life of Justice Annie Jiagge (Nee Baeta)," in *Building the New Nation: Seven Notable Ghanians*, ed. M. Akrofi-Ansah and E. Sutherland-Addy (DigiBooks Ghana Ltd, 2019).

<sup>21</sup> Cornelia Weiss, "Creating UNSCR 1325: Women Who Served as Initiators, Drafters, and Strategists," in *Women and the UN: A New History of Women's International Human Rights*, ed. Rebecca Adami and Dan Plesch (London: Routledge, 2022).

<sup>22</sup> United Nations, *The United Nations and the Advancement of Women, 1945-1996* (New York: Department of Public Information, United Nations, 1996).

Mexico in 1975.<sup>23</sup> At the conference held in Mexico, it was encouraged the establishment of a convention on the elimination of discrimination against women, with effective procedures for its application can be implemented universally. And finally, the formal adoption of the Convention by consensus in December of 1979, and the signing ceremony was conducted at the Second World Conference on Women, 1980 in Copenhagen.<sup>24</sup>

### **3.3. Women Participation in Making International Court Decision**

Court decisions are thought processes that rely on the knowledge and findings of a judge who can produce decisions that influence legal developments and even setbacks in the law itself so each resulted decision is closely dependent on how each individual; as in these terms are judges; understands and interprets the law.<sup>25</sup>

In this situation the development of international law is the same as experiencing in the national law which both depart from the context of men's thinking so that most decisions produced in the international justice system are still biased towards gender which affects the legal system and administration of international law. As expressed by two female jurists: Hillary Charlesworth and Christine Chinkin; who said that the dominance of men in the formation of international law affects not only the policies produced in international norms but also the implementing organs and the form of the justice system international.<sup>26</sup>

One of the international tribunals that have major influence in international development is International Court of Justice (ICJ), a dispute settlement body under the UN. Even though the ICJ decision does not use *stare decisis* principle, previous ICJ decisions are often used as references by subsequent decisions. In addition, ICJ decisions are also often used as a basis for identifying customary international law. In the international justice system, the ICJ has a special role which is represented by 15 judges who serve for 9 years and represent the principles of the world legal system and civilization, whose job is to handle the toughest cases in the world's issues ranging from the use of nuclear weapons to terrorism. The results of their decisions have a definitive and

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<sup>23</sup> Patrick J. Hillery, "United Nations World Conference of the International Women's Year. Summary of Speaking Notes of Dr. P.J. Hillery, Vice-President of the Commission of the European Communities. Mexico City, 19 June - 2 July 1975," 1975.

<sup>24</sup> Lars Adam Rehof, "Introduction to the Genesis of the Convention," in *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, n.d., 6-12.

<sup>25</sup> Manfred Lachs, "Some Reflections on the Contribution of the International Court of Justice to the Development of International Law," *Syracuse Journal of International Law and Commerce* 10, no. 2 (1983): 239-278, <https://core.ac.uk/download/pdf/215696267.pdf>.

<sup>26</sup> Sabohi, Maher, and Hassan, "Feminist Perspective of International Law and Its Effect on International Courts and Tribunals," 1.



authoritative impact on legal developments. In the law-making process, from 15 judges in the ICJ justice system, women's representation has so far only reached 20 percent. It's been 76 years since the ICJ's establishment, in the previous decade women's representation only reached 3.7 percent. This invites controversy regarding the commitment of the UN system to accommodate the principle of equality in international law.<sup>27</sup>

Today, inequality among men and women remains exists in the ICJ justice system, of the 15 judges who serve for a period of 9 years, only 20 percent of women are represented, namely 4 of the 15 total judges. It can be said that since 1946, Rosalyn Higgins was the first forerunner of women's representation since 1995-2009, currently women's representation in ICJ is represented by Joan E. Donoghue who has served since September 9, 2010 who has also served as ICJ President since February 8 2021, besides that there are also other female judges namely Xue Hanqin from China, Julia Sebutinde from Uganda, and Hillary Charlesworth from Australia.<sup>28</sup>

The absence of female judges may jeopardize women's rights by making decisions that are not impartial to women. One example is the failure of the Nuremberg tribunal to prosecute rape as part of an international crime. Although there was ample of evidence which supported that sexual violence occurred during the World War II. Views of gender-bias had made sexual crimes invisible during the Nuremberg trials. Oftentimes sexual violence that occurs in war is only considered an unfortunate situation and an unavoidable impact of the male role in the war. There is a misconception about the assessment of rape which is only considered a crime in the personal sphere even though the facts say otherwise.

The influence of the female judge's in taking sides with the protection of women's rights and interests can be seen in the success of international courts in including and determining sexual crimes as international crimes. ICTR and ICTY have showed that presence of feminist view held by court resources generated positive impact in the law enforcement process for sexual crimes. Some evidence showed that feminist-oriented judge in the international court or tribunal had been success in produce important decision in the development of sexual crimes as international crime.<sup>29</sup> Women judges – such as Navanethem Pillay in the ICTR; Elizabeth Odio Benito and Florence

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<sup>27</sup> Heather Barr, "The International Court of Justice Should Have More Women Judges: Just Four Out of 109 Judges Have Been Female," *Human Rights Watch*, last modified 2021, <https://www.hrw.org/news/2021/10/28/international-court-justice-should-have-more-women-judges>.

<sup>28</sup> International Court of Justice, "Current Members," *International Court of Justice*, accessed February 25, 2023, <https://www.icj-cij.org/current-members>.

<sup>29</sup> Zunnuraeni Zunnuraeni et al., "Feminism and the Birth of Sexual Crime as International Crime and the Challenge of Its Implementation in the Future," *Indonesian Journal of International Law* 19, no. 4 (2022): 539–566, <https://scholarhub.ui.ac.id/ijil/vol19/iss4/3/>.

Mumba in the ICTY - were the one whom made a breakthrough in international law by determine sexual crimes as an international crime.<sup>30</sup>

### **3.4. Human Rights Norm Under Male Perspective**

Even though gender equality is embodied in all international human rights treaties, scholars responded to this matter sceptically. This equality is considered merely formality. Hence human rights are constructed without women's substantial participation and based on patriarchal values and norms.<sup>31</sup>

One of the problems in the embodiment of women's rights in civil and political rights is situated by the limited understanding of the human rights core principle, namely the equality principle, and non-discrimination. Sandra Freedman unequivocally stated that the principle is tied to a male norm, therefore it is not dictating substantive outcomes, but it is essentially a comparative concept.<sup>32</sup> The gender neutrality by considering women get the same treatment to men is problematic hence the norm is emphatically male.<sup>33</sup>

The non-discrimination principle is the core of international human rights law hence it become the basis of most international human rights laws. It is part of equal rights. This right is recognized in article 2 UDHR and confirmed in almost all international human rights instruments, among them are: Articles 2 and 26 ICCPR, Article 2(2) ICESCR, Article 2 CRC, Article 7 CMW, and Article 5 CRPD.

In CEDAW, this principle is confirmed by imposing the state's obligation to take in all fields, in particular in the political, social, economic, and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women's rights, to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

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<sup>30</sup> Rosemary Grey, Kcasey McLoughlin, and Louise Chappell, "Gender and Judging at the International Criminal Court: Lessons from 'Feminist Judgment Projects,'" *Leiden Journal of International Law* 34, no. 1 (2021): 247–264, <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/gender-and-judging-at-the-international-criminal-court-lessons-from-feminist-judgment-projects/3EEC0909D4F60045B7734DB125C42F0D>.

<sup>31</sup> Lara Santos Zangerolame Taroco and Ana Cecília Sabbá Colares, "Women's Rights under Universal Protection and International Human Rights Treaties: Dialogues between Global and Local," *Revista Videre* 10, no. 20 (2018): 48–60, <https://ojs.ufgd.edu.br/index.php/videre/article/view/7380/4879>.

<sup>32</sup> Sandra Fredman, "Less Equal Than Others – Equality and Women Rights," in *Understanding Human Rights*, ed. Conor Gearty and Adam Tomkins (London: Mansell Publishing Limited, 1996).

<sup>33</sup> Ibid.

However, as an equality principle, this principle could be problematic when it applies by strictly compared to males. The statutory norm which governs non-discrimination using male norm expression stated that “a woman may not less favourably be treated than a man would have been”, precisely detrimental for women. Sandra Freedman correctly highlights pregnancy as an example in which direct discrimination terms in statutory<sup>34</sup> have an impact on discrimination against women. In this pregnancy case example, the formal interpretation of non-discrimination treated pregnant women the same as the male comparator, namely an ill man.<sup>35</sup>

The formal interpretation of equality and non-discrimination as mentioned above left women in a detrimental position. Formal equality did not address the substantive content of the law but focuses on treating alike in terms of burden and privilege.<sup>36</sup> Sandra Fredman stated this conditions as “transcends equal treatment, recognizing that treating people alike despite pre-existing disadvantage or discrimination can simply perpetuate inequality”.<sup>37</sup> Therefore, these principles shall define in a substantive interpretation, which determines what differences are relevant and warrant equal or different treatment.<sup>38</sup> Hence men and women have differences in various aspects, starting from natural things such as their biological conditions, as well as difference produce by human. The social cultural value that gives priority for men to involved in public sphere including political affairs, and delineated women as a weak person who cannot capable in social and political affairs<sup>39</sup> are some of the conditions attached to women. These conditions cannot overlook in construct the concept of non-discrimination or equality principles. Therefore, the substantive equality and non-discrimination mean giving different treatment to women in several ways.

Further, when we particularly discuss the social and political rights of women, we shall bear in mind that women have different conditions compared to men. As women inalienable have a nurturing characteristic and enhance by social norms, oftentimes women face constraints in enjoying civil and political rights. Hence this condition, women will be struggling in choosing between enjoying civil and political rights with satisfying social and economic rights. In this situation, civil and political rights have often seemed like distinctly lower priorities for women.<sup>40</sup>

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<sup>34</sup> Ibid., 209.

<sup>35</sup> Fredman, “Less Equal Than Others – Equality and Women Rights.”

<sup>36</sup> Li-ann Thio, *Equality and Non-Discrimination in International Human Rights Law*, 2020, <https://www.heritage.org/sites/default/files/2020-12/SR240.pdf>.

<sup>37</sup> Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, 2006, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=923936](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=923936).

<sup>38</sup> Thio, *Equality and Non-Discrimination in International Human Rights Law*.

<sup>39</sup> Tanto Lailam and Nita Andrianti, “The Constitutional Interpretation of Women’s Political Rights,” *Diponegoro Law Review* 7, no. 2 (2022): 173–191, <https://ejournal.undip.ac.id/index.php/dlr/article/view/42132>.

<sup>40</sup> Brooks, “Feminism and International Law: An Opportunity for Transformation,” 345.

Unfortunately, this fundamental error – calling equal treatment between men and women as the manifestation of non-discrimination – reiterate in CEDAW. CEDAW suggests that nothing need be changed except stereotypes and formal barriers to access: just let the women in, and that's that.<sup>41</sup>

### **3.5. Making International Law More Gender Responsive**

Apart from its effort in promoting and secure women's rights, international law that still reflect men's view and value, brings up issue in the manifestation of women's rights. Therefore, there shall be a transformation toward more-gender responsive international law. Some of those transformation featuring the reformulation and/or reinterpretation of international law, involvement more women as state representatives in international law-making process; and the parity of men and women in various international court.

#### **3.5.1. Reformulation and/or reinterpretation of International Law**

Given the existence of social constraints against women and the existence of a formalistic understanding of the human rights law principles and norms, some jurists believe that there should be a change in international law norms and the language in which it has been produced so far, or at least as expressed by Rosa Ehrenreich Brooks that feminists shall fill in the silence that left by international law in fulfillment of women's rights.<sup>42</sup> The change in norms means to change the existing laws which had been developed throughout the time being influenced by the male-dominated society.<sup>43</sup>

This idea may look radical; hence it may lead to a fundamental change in international human rights law. However, this idea shall get serious consideration. Women's human rights – including women's equality in civil and political rights – cannot be embodied well- by using norms that merely use masculine point of view.

Reformulation of international human rights law can be carried out through the formation of new norms outlined in international conventions, providing interpretations for existing international legal norms that favour women, as well as through the establishment and

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<sup>41</sup> Ibid., 351.

<sup>42</sup> Ibid., 352.

<sup>43</sup> Sabohi, Maher, and Hassan, "Feminist Perspective of International Law and Its Effect on International Courts and Tribunals."

identification of norms and customary law which provides protection and benefits to women, one of which is through international courts.

### **3.5.2. More Women Representatives in International Law-Making Process**

The formation of new international law norms through international treaties is the main domain of the state. Although international organizations can enter into international agreements, the main actor in the formation of an international treaty is the state. The crucial issue that needs to be considered in this regard is the involvement of more women and feminist-oriented experts as state delegates in the making of an international treaty. Additionally, the involvement of women's delegations in making international agreements is not only limited to issues traditionally categorized as women's concerns. As noted by feminist scholars, male attributes are always attached to the concept of international law and international relations. Basic concepts in international law, such as 'states,' 'security,' 'order' and 'conflict' are actually "gendered and sexed, which is synonymous with masculinity. This results, as mentioned by Smith - a devaluation of femininity.<sup>44</sup> Women are often marginalized when discussing matters related to international security or the settlement of armed disputes, even though these issues directly or indirectly intersect with the interests of women.

### **3.5.3. Parity of Women in Various International Court Bench**

International courts are one of the important actors in transforming international law to be more sensitive to women's issues. The decisions of the ICTY, and ICTR, which recognize and confirm sexual crimes as an international crime, as well as the SCSL decisions which for the first time confirmed forced marriage as a gender-based crime that constitutes an international crime, are examples of the contribution of the international courts in positive developments in international law. The presence of female judges in these courts has provided a breakthrough in decisions relating to international crimes. However, the involvement of female judges that are limited to cases directly related to women is an issue. The limited number of female judges in the tribunal outside the court which is directly related to women's issues, can eliminate women's voices and views on issues that are very important in life, including for the benefit of women. Tribunals such as the World Trade Organization and the Tribunal on Law of the Sea have little representation

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<sup>44</sup> Steve Smith, "'Unacceptable Conclusions' and the 'Man' Question: Masculinity, Gender, and International Relations," in *The "Man" Question in International Relations*, ed. Marysia Zalewski and Jane Parpart (London: Routledge, 2019), 54–72.

of the female gender exist for testing the extreme of nature among human needs and offenses, which are grave in nature. The real issue is the actual life. the issue shall be faced by women in their daily life.<sup>45</sup>

#### **4. Conclusion**

In its earlier period, the making of international law, either through international treaties, court decisions, or doctrines, was a product of men. After the 2nd World War, women began to be involved in the formation of international law either through making international treaties or court decisions. Women movement success in promoting CEDAW as the international convention that specifically provide women's rights. Women also success participated in making international law through international Judgement. However, women's involvement in international law making still limited due to gender bias in international law-making processes by differentiating gender involvement in international issues. The making of international law also still bound on the male parameter, put aside the substantive understanding of social and economic condition of women that makes the norm merely formality.

As a result of the strong domination of men in the formation of international law, international norms including norms that guarantee women's rights, do not fully have a positive impact on women. These norms are merely formal so they can be detrimental to women because they ignore substantive understanding of women's problems. Therefore, to embody equality between men and women including in enjoying civil and political rights, it is necessary to reformulate and reinterpretation international law, involving more women as state delegate in international law-making process, and the parity of women in International Court Bench.

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<sup>45</sup> Sabohi, Maher, and Hassan, "Feminist Perspective of International Law and Its Effect on International Courts and Tribunals."

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