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Seismic Shifts: The COVID-19 Pandemic’s Gendered Fault Lines and Implications for International Law

Shruti Rana*

One of the most striking initial consequences of the COVID-19 pandemic was the speed with which it pushed nearly all public life into the private realm, fracturing both. Seemingly overnight, in spring 2020 much of the world entered quarantine and shuttered economic and social activity. Work, school, and what was left of social life swiftly entered the walls of the home, colliding with private lives and reshaping the boundaries between public and private.

While the shutdowns and quarantines were framed as temporary, their impact on the global legal landscape will be more lasting. In some ways, the impact and weight of this initial stage of the pandemic has brought more attention to and lifted the curtain on human rights abuses usually silenced within the home or shielded by state power in public. As people retreated into their homes, for example, reports of intimate partner and gender-based violence rose dramatically, spiking 30% or more worldwide.¹ At the same time, however, the pandemic and its impacts have also exacerbated existing inequalities as new barriers rise in other areas, cutting people off from the state or private services and support that previously offered pathways out of poverty or inequality. Moreover, inequality has been both deepened and exacerbated as the pandemic’s impacts accumulate and intensify along the lines of marginalization. In the U.S., for instance, Black, Latino, Indigenous and Asian Americans are bearing the brunt of deaths and economic repercussions of the pandemic,² while globally, “the pandemic is deepening pre-existing inequalities [and] exposing vulnerabilities in social, political, and economic systems which are in turn amplifying the impacts of the pandemic.”³

The devastating cumulative impacts of the pandemic and shutdowns, coming on the heels of sustained challenges to the global legal order, threaten to unravel many of the international human rights gains of the last three decades. Ironically, the year 2020, “marking the twenty-fifth anniversary of the Beijing Platform for Action, was intended to be ground-breaking for gender equality. Instead, with the spread of the Covid-19 pandemic even the limited gains made in the past decades are at risk of being rolled back.”⁴

The pandemic’s sudden seismic shifts between the public and private also have deeper implications for the international legal system. The fault lines exposed and intensified by the

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¹ United Nations, Policy Brief: “*The Impact of COVID-19 on Women*” (Apr. 9, 2020); available at <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf>.

² Catherine Powell, *The Color and Gender of COVID*, Council on Foreign Relations, June 4, 2020, available at <https://www.thinkglobalhealth.org/article/color-and-gender-covid-essential-workers-not-disposable-people>. Linda Villarosa, ‘*A Terrible Price*’: *The Deadly Racial Disparities of Covid-19 in America*, The New York Times, Apr. 29, 2020, available at <https://www.nytimes.com/2020/04/29/magazine/racial-disparities-covid-19.html>; Katherine Kam, *Why Asian American Women Have Had Highest Jobless Rates During the Last 6 Months of Covid*, NBC News, Jan. 27, 2021, available at: <https://www.nbcnews.com/news/asian-america/why-asian-american-women-have-had-highest-jobless-rates-during-n1255699>.

³ UN Policy Brief, *supra* note 1 at 17-18.

⁴ *Id.* at 2.

pandemic have been further underscored by the divisions between states and institutions that have failed to protect their populations and those that have taken swift or decisive action to preserve the health, rights, and trust of their people.⁵ As a result, in many ways the pandemic appears to be reinforcing and accelerating the forces that had already left the liberal international order in crisis and in retreat.⁶ The speed with which the gains of the past three decades are being lost, then, is both a reminder and an indicator of the fragility of the international legal order, and a warning to understand and address these tensions before it is too late.

One entry point into the lasting legal consequences of these developments is to explore the ways that the impact of the pandemic has played out along gendered fault lines, and how the resulting clash between public and private spheres of people's lives on a global scale might reshape the international legal order. Fault lines that arise across physical landscapes are defined as ruptures in space, signifying deeper divisions with serious potential consequences including the power to crack foundations and undermine surface stability.⁷ Along these lines, feminist legal theorists challenging inequalities in international human rights law and practice have long critiqued the division between the realm of public order and the private domestic sphere in liberal thought.⁸ When extrapolated to the international legal order this split parallels divisions between the state and society, and separates the "public" sphere subject to legal regulation from the sphere of personal autonomy where the law seldom intrudes.⁹ Feminist advocates and legal scholars have challenged these divides for decades, with many of the most recent gains dating to the post-Cold War period when the transnational vocabulary and culture of international human rights grew dramatically as a form and mechanism of global governance.¹⁰

Over the past year, the pandemic has begun transforming human rights by making the "private" into issues of public concern more rapidly than perhaps any recent social or human rights movement. Human rights violations have continued to soar, while states and institutions have diverged widely in their responses. The breadth and scope of the shifts between public and private stemming from the COVID-19 pandemic present opportunities for re-imagining or recalibrating these distinctions, and the ways they are reflected in international law and the protection of human rights.

As we look towards the horizon to the end of the pandemic, this article examines some lessons we may draw by viewing the pandemic's impacts on the international legal order through a gendered lens. It argues that in the short-term, the pandemic has reinforced public-private divides in international law, reinvigorating previous debates over the power and reach of the

⁵ See Peter Danchin, Jeremy Farrall, Shruti Rana, and Imogen Saunders, *The Pandemic Paradox in International Law*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW, 598 (2020) ("A distinctive feature of the COVID-19 crisis has been the absence of effective global leadership to drive responses to this escalating threat. International organizations, great powers, and their leaders, have distinguished themselves by their incapacity or unwillingness to take the steps necessary to respond effectively and collectively to the pandemic.").

⁶ See *id.* (discussing the "pandemic paradoxes" further weakening the already threatened international legal order). See also G. John Ikenberry, *The End of the Liberal International Order?* 94 INTERNATIONAL AFFAIRS 7-23 at 7 (2018) ("Today, this liberal international order is in crisis.").

⁷ Cambridge Dictionary Definition, available at <https://dictionary.cambridge.org/us/dictionary/english/fault-line>.

⁸ Hilary Charlesworth, Christine Chinkin, Shelley Wright, *Feminist Approaches to International Law*, 85 Am. J. Int'l L 213, 621-22 (1991) (discussing the gendered, "male" orientation of the organizational and normative structures of international law).

⁹ Hilary Charlesworth, *The Public/Private Distinction and The Right to Development in International Law*, 12 THE AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW, 190-204 (1992).

¹⁰ Sally Engle Merry, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO GLOBAL GOVERNANCE*, pp. 72-73 (Chicago 2006).

state into social relations and its role in protecting from as opposed to perpetrating harm. In the long-term, these developments in turn threaten to unravel the most recent gains in international law and global governance that have operated to support and expand the recognition of human rights to marginalized groups. Left unaddressed, this unraveling will further entrench these divides and contribute to the further retreat of the liberal international order.

Three developments in particular have marked the gendered fault lines of the pandemic. Examining these fault lines and their implications can help us re-imagine a post-pandemic legal order that offers more protection for human rights and civic participation, even as international multilateral institutions and cooperation sputter or fail.

(1) The Return to “Private” Spaces has Turned the Clock Back on State Protection of Gender-based Rights

The pandemic has reinforced one of the primary gender-based critiques of the liberal international order, that it is predicated upon a public/private dichotomy that is itself gendered. This critique argues that the distinction between public and private spheres of law and state action operates to allow impunity and shield human rights abuses for matters deemed of “private” concern, which covers much of the lived reality of women’s lives worldwide.¹¹ International law operates in a public world of nation-states, with “private” matters left primarily to the states; in turn, at the domestic level the “private realm” of the family, home, and sexuality, associated with women, is left mostly shielded from the law’s intrusion.¹² Thus, the very structure of international law can be viewed as built upon and reinforcing the silencing of women in both the public and private spheres.¹³

These divides persist despite years of advocacy around women’s rights and gendered human rights violations in the international sphere.¹⁴ Human rights discourses can thus simultaneously be powerful tools for condemning state acts that violate basic principles of citizenship, but remain inaccessible for many women because a human rights framework that “construes the civil and political rights of individuals as belonging to public life while neglecting to protect the infringement of those rights in the private sphere of familial relationships” fails to provide the “necessary political and legal protections to ensure the basic rights of life, integrity, and dignity” of people in the private sphere.¹⁵

The pandemic has rapidly intensified this dichotomy for women globally and is particularly visible in the increasingly fractured state approaches to gender-based violence. The

¹¹ Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUSTRALIAN Y.B. INT’L L. 190, 190-192 (1988-89).

¹² See Charlesworth, *supra* note 13, at 193-194.

¹³ See Charlesworth, *What are “Women’s International Human Rights”?* in GENDER ISSUES AND HUMAN RIGHTS I at 550 (“the very structure of [international human rights] law has been built on the silence of women. The fundamental problem women face worldwide is not discriminatory treatment compared with men, although this is a manifestation of the larger problem. Women are in an inferior position because they have no real power in either public or private worlds, and international human rights law, like most economic, social, cultural and legal constructs reinforces this powerlessness.”).

¹⁴ Susanne Zwingel, TRANSLATING INTERNATIONAL WOMEN’S RIGHTS: THE CEDAW CONVENTION IN CONTEXT at 60 (Palgrave 2016) (noting that despite significant strides between 1945 and 1975, and from 1995 to the present, the current (pre-pandemic) period “is shaped by disappointment in light of the fact that global awareness raising, as powerful as it may have been, has not translated into significant change for women.”).

¹⁵ Romany, Celina, “*Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*,” 6 Harvard Human Rights Journal 87, at 87-88(1993).

Covid-19 pandemic-related closures of public spaces and the shift of significant portions of paid employment into the home has underscored that for many women and families, the “private” realm is not a refuge or sanctuary that must be kept free of state intrusion, but rather can be the site of some of the gravest forms of violence and inequality. For many women worldwide the default to the home created another crisis, simply trading the threat of disease for the threat of violence just as workplaces, schools, courts and legal offices closed, abruptly cutting off those most in need from legal access and support services.¹⁶ The retreat into private spaces only further shielded these harms from public view and action, encouraging impunity.¹⁷ In addition, the growing gulf between public services and private spaces itself became a new tool in abuser’s arsenals. The UN described this as the addition of “a new complexity [to the problem of violence against women]: exposure to Covid-19 is being used as a threat; abusers are exploiting the inability of women to call for help or escape; women risk being thrown out on the street with nowhere to go.”¹⁸ States themselves seized upon this new weapon of state violence. In the U.S., a number of states utilized the threat of Covid-19 to bar women from seeking reproductive health care and abortions by deeming them “non-essential” services (while deeming mask mandates inappropriate restrictions on freedom).¹⁹ Again, these impacts rippled through populations unevenly, landing with greatest force on the most marginalized and compounded across intersectionalities.²⁰

Furthermore, these gendered human rights abuses are escalating just the legal protections available to fight them are eroding. One of the key achievements of the post-WWII liberal international order has been the post-Cold War “rise since the 1990s of specialized governance regimes” in the realms of human rights, trade, migration and other areas which rely on a “proliferation of complex managerial vocabularies” that focus not on sovereignty or rules “but about ‘objectives’ [and] ‘values’” such as equality and inclusion.²¹ The recognition, enforcement and fulfillment of women’s human rights was greatly enhanced with the expansion of these regimes, as such transnational advocacy fostered and was supported by domestic recognition and enforcement of these human rights (and their expansion into the “private” sphere).²²

¹⁶ UN Women, UN Women raises awareness of the shadow pandemic of violence against women during COVID-19, May 2020, available at <https://www.unwomen.org/en/news/stories/2020/5/press-release-the-shadow-pandemic-of-violence-against-women-during-covid-19>.

¹⁷ See United Nations, *supra* note **Error! Bookmark not defined.**, at 19 (“Without access to [truly] private spaces, many women will struggle to make a call or to seek help online”).

¹⁸ See *id.* (“[a]longside the increase in numbers, violence against women is taking on new complexity: exposure to Covid-19 is being used as a threat; abusers are exploiting the inability of women to call for help or escape; women risk being thrown out on the street with nowhere to go” while “crowded homes, substance abuse, limited access to services and reduced peer support are exacerbating these conditions.”).

¹⁹ Cahn, Naomi R. and McClain, Linda C., *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, GEORGETOWN JOURNAL OF GENDER AND THE LAW (forthcoming 2020) at 9, available at SSRN: <https://ssrn.com/abstract=3689285>.

²⁰ See Joint Statement by the Special Rapporteur and the EDVAW Platform of Women’s Rights Mechanisms on Covid-19 and the Increase in Violence and Discrimination Against Women, July 14, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26083&LangID=E> (“restrictive measures can lead to compounded and intersectional forms of discrimination against women belonging to disadvantaged and marginalized groups including, but not limited to, women and girls from minorities, indigenous, afro-descendant, migrant and rural communities, older women, women and girls with disabilities, homeless women, women deprived of liberty and victims of trafficking, who are particularly affected by the crisis”).

²¹ See Peter Danchin, Jeremy Farrall, Jo Ford, Shruti Rana, and Imogen Saunders, *Navigating the Backlash Against Global Law and Institutions*, 30 AUSTRALIAN Y.B. INT’L L. (2020).

²² See Merry, *supra* note 10.

But these gains, dating back only to the 1990s in many cases, have proved to be among the most fragile gains in international law and the focus of some of the most vigorous backlash to and rejection of the liberal order.²³ The first international instrument specifically addressing violence against women dates back only to 1993, and the Beijing Declaration and Platform for Action followed just shortly thereafter in 1995.²⁴ They were accompanied by efforts at the domestic level to enact laws against domestic violence, with, for example, the US enacting the Violence Against Women Act in 1994, succeeded rapidly by similar laws in Costa Rica, Germany, and France, and quickly spreading worldwide.²⁵

These advances are now at risk, both *de facto* and *de jure*. The pandemic-related pressures that have ratcheted up violence and weakened support structures came on the heels of years of sustained effort by multi-national coalitions to overturn and eviscerate the legal protections and remedies for gender-based violence.²⁶ In recent years, populist and authoritarian-leaning leaders around the world, including in the U.S., Russia, Turkey, and the Philippines, have succeeded in weakening international and domestic laws against gender-based violence. For example, in the U.S. the Violence Against Women Act was gutted over time and ultimately expired during the Trump administration in 2019;²⁷ in Russia, domestic violence was decriminalized in 2017;²⁸ and in Europe (particularly Eastern Europe) opposition to the ratification of the Istanbul Convention on Preventing and Combating Violence against Women

²³ See *supra* note 21 at Consequences, describing the backlash to international human rights and the language and institutions supporting this arena as a key site of backlash to and domestic and populist rejection of the liberal international order).

²⁴ The UN General Assembly adopted the Declaration on the Elimination of Violence Against Women in 1993 and the Beijing Platform was adopted in 1995, see *Women's Rights are Human Rights*, United Nations Human Rights Office of the High Commissioner (2014), at 13-14, 74, available at <https://www.ohchr.org/documents/events/whrd/womenrightsarehr.pdf>.

²⁵ See Violence Against Women Act, S.2754, 101st Cong. (1990). <https://www.congress.gov/bill/101st-congress/senate-bill/2754>; Melanie Randall, Vasanthi Venkatesh, *Criminalizing Sexual Violence Against Women in Intimate Relationships: State Obligations Under Human Rights Law*, AM. J. INT'L L. (2015); See *Handbook for Legislation on Violence Against Women*, 52 Division for the Advancement of Women in the Department of Economic and Social Affairs of the United Nations Secretariat (2010), available at <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf/>.

²⁶ See Conny Roggeband and Andrea Krizsan, *Democratic Backsliding and Backlash Against Women's Rights: Understanding the Current Challenges for Feminist Politics*, Expert Paper prepared for the UN Women Expert Group Meeting, Sixty-Fourth Session of the Commission on the Status of Women (CSW 64) 'Beijing + 25: Current Context, Emerging Issues and Prospects for Gender Equality and Women's Rights', EGM/B+25/BGP.1, New York, New York, 25-26 September, 2019, pp. 14-15, available at <https://www.unwomen.org/en/csw/csw64-2020/preparations/expert-group-meeting#background-paper>.

²⁷ See National Coalition Against Domestic Violence (NCADV), *Yes, VAWA Expired: What This Means, How We Got Here, and What Happens Next*, NCADV Blog, January 5, 2019, available at <https://ncadv.org/blog/posts/yes-vawa-expired-what-this-means-how-we-got-here-and-> (“The Violence Against Women Act (“VAWA”) is one of the pillars of the federal government’s response to domestic violence, sexual assault, dating violence, and stalking. Initially passed in 1994, VAWA has been reauthorized three times, each time expanding and updating to meet the needs of victims, survivors, advocates, and other stakeholders. ... VAWA’s authorization lapsed (“expired”) at midnight on December 21, 2018. VAWA is currently unauthorized.”) The Act has not been re-authorized as of the date of this writing, although legislation is currently pending in Congress. See <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/08/statement-by-president-biden-on-the-introduction-of-the-violence-against-women-reauthorization-act-of-2021/>

²⁸ See Stefania Kafka and Nadine Kops, *Putting an End to Impunity: Russia's Systematic Failure to Protect Women from Domestic Violence*, LeidenLawBlog, February 4, 2020, available at <https://leidenlawblog.nl/articles/putting-an-end-to-impunity-russias-systematic-failure-to-protect-women-from-domestic-violence>.

and Domestic Violence has spread rapidly over the last several years, with Turkey withdrawing from the treaty entirely in March 2021.²⁹ At the same time, populist and authoritarian leaders are pushing for a return to “traditional families” marked by gendered hierarchies of power, promoting “state projects to enforce heteronormative and patriarchal family models” while women “are referred back to their roles as mothers and reproducers of the nation.”³⁰ These domestic grievances, projected to the global stage, are not only eroding legal protections for women and in the private sphere but are central to the growing backlash to the legal order.³¹

Thus, the pandemic-related intensification of violence struck just as the global protective legal and social framework for protection against gender-based or domestic violence was at its weakest in decades. Applying a gendered lens shows that this one-two punch has not only exposed critical weaknesses in the international legal order across a gendered faultline, but has also rolled back the gains of the last decades initially left standing in the wake of the most recent populist and authoritarian backlashes.

Two other emerging gendered fault lines threaten to further exacerbate and reinforce these *de jure* and *de facto* losses.

(2) The COVID Care Crisis is Entrenching Gendered Hierarchies that Impede Equality

Second, the merging of home, school and the workplace as the pandemic spread has made the gendered division and devaluation of labour and its consequences more visible. Just as the pandemic created a “double” or “shadow” pandemic” of domestic violence, it has also highlighted and heightened the “double bind” facing women who shoulder the burdens of caretaking, household labour, and now children’s education along with formal employment or civic participation. This has led to one key irony of the COVID-19 pandemic: as it has played out as a public health crisis and flipped some of the most underpaid and undervalued workers into “essential” workers, the gendered devaluation of care and service work has simultaneously rendered these workers most subject to exploitation as “disposable”³² workers.

The pandemic has revealed that these “disposable” care workers actually operate as society’s safety net, with their own precarity serving as a cushion for others.³³ Women’s professional advancement³⁴ and productivity³⁵ have stalled and historic employment and salary

²⁹ See Roggeband and Kriszsan, *supra* note 26; Kareem Fahim, *Erdogan Pulls Turkey out of European Treaty Aimed at Protecting Women from Violence*, *The Washington Post*, 21 Mar. 2021, www.washingtonpost.com/world/erdogan-turkey-istanbul-convention-femicide/2021/03/20/6f3b3736-897b-11eb-be4a-24b89f616f2c_story.html.

³⁰ See Shruti Rana, *The Populist Backlash to Gender Equality in International Fora: Analyzing Resistance and Response at the United Nations*, 35 *Maryland Journal of International Law* 156 (2020), available at SSRN: <https://ssrn.com/abstract=3769714>. See also Roggeband and Kriszsan, *supra* note 26, at 14-15.

³¹ *Id.*

³² See Powell, *supra* note 2.

³³ Anne Helen Peterson, *Other Countries Have Social Safety Nets. The U.S. Has Women*, *Culture Study*, November 11, 2020, available at <https://annehelen.substack.com/p/other-countries-have-social-safety>.

³⁴ Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree*. *THE NEW YORK TIMES*, May 6, 2020, available at <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html>.

³⁵ Caroline Kitchener, *Before we continue...*, *The Lily*. *TheLily.com* (2020), available at <https://www.thelily.com/women-academics-seem-to-be-submitting-fewer-papers-during-coronavirus-never-seen-anything-like-it-says-one-editor/>.

gains for women are being rapidly overturned³⁶ in the wake of this shift into the domestic sphere. Moreover, because of the concentration of women in healthcare and service jobs, women are also bearing the brunt of the fallout from the economic and safety impact of the crisis. Women make up nearly 70% of all healthcare workers worldwide³⁷, and over half of the workers in retail³⁸ fields which focus on hospitality and service. Furthermore, they are concentrated in the lowest-paying and most precarious of these positions³⁹, now on the frontlines of exposure to COVID-19—but with little power to demand protections like protective equipment. Indeed, the highly skewed economic impact of the pandemic on caretaking and other jobs predominantly held by women has led to forecasts that the pandemic will lead to a “shession,”⁴⁰ with women suffering the majority of the job losses and unemployment. This is a marked contrast to the “mancession”⁴¹ of the 2008 financial crisis which narrowed gaps in employment and pay between men and women. Again, women of color have suffered the largest losses and sharpest erosion in recent gains.⁴²

This fault line too has implications for the international legal order. With the inclusion of the “Covid care crisis,”⁴³ the gendered impact of the pandemic can be described as a triple punch: the initial job losses in the areas where women dominate the labor force, followed by a second wave of losses in government jobs, where women outnumber men; and finally, care responsibilities pushing women not only out of jobs but out of the workforce entirely as carework prevents them from seeking new positions.⁴⁴ Women who remain employed are seeing their trajectories and promotions stalled and power decline.⁴⁵ Similarly, these developments could lead to a triple-punch for human rights protections. That is, these losses in traditional measures of gender equality such as employment rates, pay, and professional advancement, if they continue, would further erode in practice the gains stemming from the legal protections also now being gutted, as discussed above. Substantive equality as well as formal equality would be deeply diminished, and the gendered stereotypes that lead to inequalities in and the devaluation

³⁶ Amrita Bahri, *Women at the Frontline of COVID-19*, *Journal of Economic Law* Vol. 23, 565-566 (2020); Alisha Gupta, *Why Some Women Call This Recession a ‘Shession,’* *The New York Times*, May 9, 2020, available at <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html>.

³⁷ Courtney Connley, *How women could be uniquely impacted by the coronavirus*, *CNBC*, March 18, 2020, available at <https://www.cnn.com/2020/03/18/how-the-coronavirus-could-impact-women-in-health-care.html> *CNBC*.

³⁸ Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, *The New York Times*, April 18, 2020, available at <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html>.

³⁹ *Id.*; see also Bahri, *supra* note 36.

⁴⁰ Gupta, *supra* note 12; see also Bahri, *supra* note 36.

⁴¹ Daniel Indiviglio, *The Fed Explains the Mancession*, *The Atlantic*, March 2, 2010, available at <https://www.theatlantic.com/business/archive/2010/03/the-fed-explains-the-mancession/36928/>.

⁴² Diane Coyle, *Women of Color Were Making Progress. Then the Coronavirus Hit*, *THE NEW YORK TIMES*, January 14, 2021, available at (noting that nearly all of the job losses coming at the end of 2020 in the U.S. were lost by women of color).

⁴³ See <https://hls.indiana.edu/covid-symposium/index.html>. The conveners of the “Covid Care Crisis” Symposium, Shruti Rana, Meera Deo, and Cyra Choudhury, built on the term “care crisis” or “crisis del cuidado” reportedly coined by the UN Economic Commission of Latin America and the Caribbean (CEPAL) in 2009, in *Panorama Social de America Latina* (2009), https://www.cepal.org/sites/default/files/publication/files/1232/S0900786_es.pdf.

⁴⁴ See Bahri, *supra* note 36; Patricia Cohen, *Recession with a Difference: Women Face Special Burden*, *The New York Times*, November 17, 2020, available at <https://www.nytimes.com/2020/11/17/business/economy/women-jobs-economy-recession.html>

⁴⁵ See *supra* note 43.

of care work would be more deeply entrenched.⁴⁶ The combined effect could turn back the clock on post-Cold War gains in human rights protections and progress as discussed in section 2 above.

The triple punch comes, then, as the cumulative impact of erosions in gender equality and the deepening of gendered and raced hierarchies and stereotypes further play into the hands of the populist and authoritarian leaders who rely on misogyny, racism, and xenophobia to further their claims to power.⁴⁷ Because much of the recent attempts to rollback gender-based human rights protections globally have been driven by populist or authoritarian-oriented movements to restore national power and prestige, both globally and domestically,⁴⁸ the economic and social devastation wrought by the COVID-19 pandemic could lead to an acceleration of these trends. Economic recessions are believed to trigger negative gender stereotypes about women's leadership and governance, while simultaneously reducing funds and state capacity that could absorb the impacts of a recession.⁴⁹ The rage attributed to the impacts of the 2008 financial crisis that has been credited with fueling the most recent global wave of populism and authoritarianism could find further support if the pandemic sets off long-lasting economic declines.

The third gendered fault line builds on the prior ones and threatens to not only reinforce the first two, but to also trigger a spiral that would further threaten the international liberal legal order.

(3) Global and Domestic Responses to the Pandemic Have Sharpened Democratic-Authoritarian Divides

Third, as the pandemic's economic, social, and legal divides harden, they are also influencing geo-political dynamics that are also playing out in gendered ways. These dynamics in turn are further deepening the fault lines discussed above and compounding their impacts, with implications for the currently struggling liberal international order.

As noted above, the 2008 "mancession" is viewed as contributing⁵⁰ to the populist rage that has fueled the contemporary turn against globalization and towards authoritarianism around the world. The authoritarian leaders who rose to power on this wave are now struggling to weaponize and do battle against a virus different in form from their usual scapegoats, and have further embraced and exploited gender stereotypes during the crisis in ways that run counter to public health and safety, as well as escalate the gendered dynamics of this crisis. Figures like Trump, Bolsonaro and Johnson, wary of showing vulnerability and prioritizing highly masculinized views of strength, have flouted public health experts and derided protective⁵¹

⁴⁶ *Id.*

⁴⁷ See *supra* note 30.

⁴⁸ Alisha Haridasani Gupta, *Across the Globe, A "Serious Backlash Against Women's Rights": The Rise of Authoritarianism has Catalyzed a Rollback of Gender Violence Protections and Support Systems*, N.Y. TIMES (Jan. 22, 2020), available at <https://www.nytimes.com/2019/12/04/us/domestic-violence-international.html>.

⁴⁹ Jennifer Piscopo and Kendall Funk, *Are Women Leaders Better Fighting Covid-19?* WASHINGTON POST, August 26, 2020, available at <https://www.washingtonpost.com/politics/2020/08/26/are-female-leaders-better-fighting-covid-19/>.

⁵⁰ David J. Lynch, *Soaring Joblessness Could Shake U.S. Economy, Politics for Years*, THE WASHINGTON POST, May 8, 2020, available at <https://www.washingtonpost.com/business/2020/05/08/jobs-coronavirus-unemployment-economy-politics/>. See also Danchin et al., *supra* note 21 at 22 (Discussion in Part IV.A of the impact of the global financial crisis beginning in 2007 as fuel for populism globally).

⁵¹ Carol Johnson and Blair Williams, *Gender and Political Leadership in a Time of COVID*, *Politics and Gender* 16, at 944-945 (2020); Rebecca Solnit, *Masculinity As Radical Selfishness: Rebecca Solnit on the Maskless Men of the Pandemic*, *Literary Hub*, May 27, 2020, available at <https://lithub.com/masculinity-as-radical-selfishness-rebecca->

mechanisms like masks and social distancing, while refusing to deploy state power to protect their populations against the virus. They have exploited and flipped the paradigms of positive and negative rights, privileging the “freedom to infect” over the right to protection from harm.”⁵²

Meanwhile, female leaders of nations where democratic institutions and values remain strong, including New Zealand, Germany, Taiwan, and Iceland,⁵³ have been lauded for their success in combating the virus as they sought to foster a sense of interdependence, trust, and shared purpose in mobilizing state resources to protect the health and safety of their populations. That these leaders were able to successfully invoke and rely on traditionally “feminized” values is not an accident (nor primarily attributable to their gender), but rather probably reflects at least in part that healthy democracies with strong democratic and rule-of-law based institutions⁵⁴ are often better able to both sustain these values and create the institutional frameworks that support the election of women leaders.

These contrasts also highlight how state inaction appears to be operating as a mechanism to neutralize obligations for positive action⁵⁵—simply doing nothing favors the status quo and exacerbates inequalities. As feminist scholars have long noted, state inaction is not a neutral act but generally sharpens public and private divides.⁵⁶ Critically, in a crisis like a pandemic, an “underreaching executive misallocates resources by understating a particular risk or underinvesting in a valuable solution, thereby jeopardizing people’s “positive” rights and interests in enjoying safety, security, or other goods.”⁵⁷ Inaction erodes public trust which then diminishes state capacity, further deepening the crisis.⁵⁸

To counter these spiraling crises, then, requires both positive state action and also bottom-up political action. Most recently, in the United States, these dynamics have been reflected in the growing and groundbreaking public protests against police brutality and racism. Coming just after widely publicized images of heavily armed, maskless (and mostly male) protestors storming state buildings⁵⁹ to demand an end to economic shutdowns, the largely peaceful (and largely masked) protestors emerged from their homes to seek an end to a structural form of state violence. These protestors, whose “demands to divest from policing doubles as a call to invest in safety, security, and racial justice⁶⁰”—that is, positive and protective state

solnit-on-the-maskless-men-of-the-pandemic/?fbclid=IwAR2YDc79DLX29rJUfRo-LcmIIB3EgbqyiN_nNalCe9tQWXqqIsAFUV5w97c.

⁵² Ibram X. Kendi, *We’re Still Living and Dying in the Slaveholders Republic*, THE ATLANTIC, May 4, 2020, available at <https://www.theatlantic.com/ideas/archive/2020/05/what-freedom-means-trump/611083/>.

⁵³ See Johnson and Blair, *supra* note 51 at 945 (discussing how the COVID-19 pandemic “has provided unusual opportunities for women leaders to display forms of protective femininity”). Amanda Taub, *Why Are Women-Led Nations Doing Better with COVID-19 Response?*, The New York Times, May 15, 2020, available at <https://www.nytimes.com/2020/05/15/world/coronavirus-women-leaders.html>; see also *supra* note 49.

⁵⁴ Peter Beinart, *The New Authoritarians Are Waging War on Women*, The Atlantic, Jan/Feb 2019, available at <https://www.theatlantic.com/magazine/archive/2019/01/authoritarian-sexism-trump-duterte/576382/>.

⁵⁵ See *supra* note 5.

⁵⁶ See Charlesworth, *supra* note 11 (“it is important to note that a deliberate policy of non-intervention by the state does not signify non-control or neutrality.”).

⁵⁷ See David Pozen and Kim Scheppele, *Executive Underreach, in Pandemics and Otherwise*, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 114, pp. 608-17, 2020, available at SSRN: <https://ssrn.com/abstract=3649816>.

⁵⁸ See *id.*

⁵⁹ Veronica Stracqualursi, *Michigan closes state Capitol as protesters gather against stay-at-home order*, CNN Politics, May 14, 2020, available at <https://www.cnn.com/2020/05/14/politics/michigan-state-capitol-protests/index.html>.

⁶⁰ Annie Lowrey, *Defund the Police*, The Atlantic, June 5, 2020, available at <https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/>.

action—have been met with brutish displays of militarized power and (largely maskless) and sometimes violent police power. Yet these ongoing protests, now spreading around the world, have the potential to help transform at least some forms of state power from coercive to protective. They offer a view into how prioritizing public safety, equality, and state capacity in the wake of the pandemic can help re-shape the gendered and racial hierarchical orders that have entrenched inequality in domestic and international law.

Already, gender equality advocates are developing creative legal and social strategies incorporating such bottom-up approaches and capacity building to the threats described above. To bridge the new divides caused by the pandemic, advocates have attempted to further pierce the walls of the home by developing virtual ways to reach and support people experiencing violence at home. Some countries have modified family laws and court procedures⁶¹ to increase access to various forms of protection without having to leave home or travel to court. Others seek to shrink the gulf between public and private spaces by expanding shelters, outreach and support services like hotlines and emergency helplines.⁶² In still other places, we see attempts and calls for the restructuring and expansion of state services to support supposedly “private” needs, such as childcare and eldercare and sick leave.⁶³

Such capacity-building efforts would support not only recovery from the pandemic but also put in place measures or build structural support that enhances equality for socially marginalized people.⁶⁴ Australia, one of the pandemic success stories because of its decisive state action to quell the pandemic, is also noteworthy for its pioneering efforts to protect its indigenous population from Covid-19 by prioritizing indigenous participation and control of pandemic response measures.⁶⁵ Public/private divides can also be bridged by empowering networks comprised of a range of public and private actors including civil society organizations, universities, and corporations, which focus on reaching across these divides.⁶⁶ Efforts like these that enhance inclusion, equality, and human rights protections also strengthen democratic processes and institutions.

These emerging innovative approaches to dismantling barriers offer an opportunity to re-envision ways to expand access to legal systems and support services, while addressing some of the root causes and intensifying factors leading to human rights violations. At the same time, the pandemic has revealed and heightened the urgency of solidifying state capacity and human rights protections in binding laws that can be enforced and less easily rolled back in the face of periodic crises or social opposition. An examination of the pandemic’s gendered fault lines also suggests

⁶¹ Caroline Bettinger-Lopez, *supra* note 1.

⁶² *Id.*

⁶³ See Joint Statement, *supra* note 20 (calling for measures to support women’s empowerment and to “[s]ignificantly overhaul and expand social protection systems to take into account women’s specific needs and vulnerabilities including, but not limited to, paid sick leave, increased support for child and elderly care, housing and food subsidies”).

⁶⁴ See *supra* note 49 (“the critical factor distinguishing countries’ response to covid-19, the disease caused by the virus, is what political scientists call “state capacity”: countries’ ability to govern effectively, efficiently and fairly. High-capacity countries have strong bureaucracies, little corruption, greater income equality and more trust in government.”)

⁶⁵ Richard Glover, *10 Reasons for Australia’s Covid-19 Success Story*, The WASHINGTON POST, March 15, 2021, available at <https://www.washingtonpost.com/opinions/2021/03/15/10-reasons-australias-covid-19-success-story/>

⁶⁶ Anne-Marie Slaughter and Gordon LaForge, *Opening up the Order: A More Inclusive System*, FOREIGN AFFAIRS, March/April 2021.

a path towards arresting authoritarianism trends and shoring up the institutions and frameworks that support democracy.

Ultimately, in a short span of time, the pandemic's collisions between public and private have further exposed and underscored gendered divisions in human rights protections, the economy, and state action and capacity. At the same time, they have opened new spaces for action to address gender-based and state violence while re-igniting the flames of democratic dissent and action. In these ways, the gendered fault lines of the COVID-19 crisis are sharpening debates over the meaning of health, safety, and rights, creating seismic shifts that are and will continue to reshape the landscape of international law and our current legal order.