9. 'Sexing' consent in international law

*Siobhán Airey**

I. INTRODUCTION

In this chapter I apply an innovative feminist legal method called 'sexing' to the legal concept of consent in international law. My aim with this chapter is to link and demonstrate the value of feminist legal method(s) to critical research on international law that examines how international law perpetuates projects of dubious distributive outcomes through legally constituted and legitimised hegemonic relations. In doing so, I suggest that an international feminist legal analytic does not have to begin with gender as its starting point and has much greater conceptual and political relevance to the pursuit of justice in an international legal context than is implied by its popular association with the advancement and mainstreaming of a liberal feminist agenda through law.[1] I do this by bringing feminist legal thought on the concept of consent in rape and sexual assault to bear on the concept of consent in international law as outlined in the 1969 Vienna Convention on the Law of Treaties (VCLT).[2] This latter concept is fundamental to both the nature and functioning of international law, and especially so in the contentious area of contemporary international treaty-making on trade liberalisation. I suggest that this method, inspired by a 'sexing' methodology developed and utilised by feminist legal theorists,[3] deepens the insight and widens the

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[1] One insightful take on this kind of feminist project in international law has utilised the concept of Governance Feminism, defined as feminism that seeks not only to analyse and critique the problem (of, in this instance sexual violence), 'but to *devise, pursue and achieve reform to address the problem in the real world*': Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 Harvard Journal of Law and Gender 356 at 348. This approach seeks to explore the issues that arise when feminist projects are introduced and adopted in distinctly non-feminist spaces.

[2] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[3] A feminist approach to 'sexing' the law is a mode of theorising and inquiry about how law assigns and 'naturalises' a particular sex identity to a subject, while making the male heterosexual the normative standard for subjectivity in law. See examples from the edited collection by Ngaine Naffine and Rosemary J. Owens (eds), *Sexing the Subject of Law* (North Ryde, NSW: Sweet and Maxwell, 1997). Also Dianne Otto, 'Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and Its Others* (Cambridge: Cambridge University Press, 2006) 318. In this chapter, I focus not on the identity of the human subject, but on the subjectivity of the state. The approach to 'sexing'

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potential reach of critical research on international law in two ways. It further reveals how contemporary international treaty-making on trade liberalisation continues to rely on coercive practices that remain invisible to international law, and it suggests potential fruitful avenues for further critical research and engagement.

This chapter proceeds as follows: first, I offer a brief summary of the concept and method of 'sexing' as a feminist legal method. Secondly, I examine the concept of consent contained within the VCLT and I explore how its articulation elides from view modes of international engagement between states that are clearly coercive, while promulgating a fictive notion of bounded statehood. I illustrate this by reference to recent endeavours by the European Union (EU) to conclude regional trade agreements called Economic Partnership Agreements (EPAs) with African regional organisations. These have been heavily critiqued by African political leaders and others as coercive, even if they are not recognised as such by the concept of consent in international law. Thirdly, I turn to feminist legal theory. It has developed a number of insights on the concept of and approach to consent in the crime of rape and sexual assault, as well as proposals for new ways of legally conceptualising power relations in negotiations and decision-making. I suggest that these are particularly helpful to problematising the consent of less-powerful states to international treaties on trade liberalisation. Fourthly, I demonstrate how feminist insights in international law can deepen and extend the purview of critical perspectives on international law and legal process by reference to recent research on the phenomenon of 'unequal treaties', a term referring to international legal agreements identified as forced or imposed. I conclude with a short reflection on the value of innovative – and innovating with – feminist legal methods to critical research on international law.

II. 'SEXING' AS FEMINIST LEGAL METHOD

In this chapter I draw from Charlesworth's approach to 'sexing' as a method of focusing on the mechanisms through which the character of the state in international law is expressed through particular beliefs about sexual difference. Here, analysing the state as a human body more clearly reveals how the language of territorial integrity and sovereignty, emphasising independence and autonomy, derives from the Western liberal notion of personhood and a particular view of the male body and its sexual intercourse with the female body.[4] Charlesworth suggests that one outcome of this characterisation

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taken here is also informed by ideas on performativity and subjectivity – that subjects and subjectivity in international relations (and in this instance, international law) are the ontological effects of practices that are performatively enacted. See Cynthia Weber, 'Performative States' (1998) 27 Millennium Journal of International Studies 77. Weber draws from and adapts ideas from Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990).

[4] See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) in which they characterise the state as a heterosexual male body, which 'has no "natural" points of entry, and its boundedness makes forced entry the clearest possible breach of international law', at 129.

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is that it makes it more difficult to represent women's interests in international legal discourse and it naturalises beliefs about sexual difference.[5]

I extend Charlesworth's approach to sexing the state to examine how a 'sexed' lens applied to international legal concepts that underpin notions of statehood and permissible international relations in international law might better reveal how international law remains blind to international relations that are deeply coercive, thereby enabling and legitimising them. By sexing the concept of consent in the VCLT, the ideas inherent in the concept and the mechanisms that underpins consent by which international law defines certain international practices as permissible, and others as not so, are more clearly revealed. I suggest that the application of a sexed lens to the ideas and mechanisms that underpin the concept of consent has two effects. First, it reveals the partiality and historical contingency of international law, thereby undermining its claims to neutrality and universality. Secondly, it reveals more clearly the problematic politics by which particular projects are pursued through international law – in this case, the liberalisation of international trade – the complicity of international law with these, and its legitimation of both the process and dubious outcomes of these projects.

III. THE CONCEPT OF CONSENT IN INTERNATIONAL LAW AND IMPLICATIONS FOR CONTEMPORARY INTERNATIONAL TREATY-MAKING

The principle of consent is widely recognised to be one of the foundational principles of international law, central to its authority, legitimacy, validity and law's role in the wider international order,[6] with international law generally acknowledged to be 'based on' the concept of consent.[7] In contemporary international law, the methods of expression of consent recognised as legitimate are articulated in Articles 11–17 of the VCLT.

Article 11 of the VCLT identifies five means by which a state expresses consent to be bound by a treaty – by signature; exchange of instrument constituting a treaty;

[5] Hilary Charlesworth, 'The Sex of the State in International Law' in Naffine and Owens (eds), *supra* note 3, at 251.

[6] Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 European Journal of International Law 599 at 601; Matthew Lister, 'The Legitimating Role of Consent in International Law' (2010–2011) 11 Chicago Journal of International Law 663. See also Samantha Besson, 'State Consent and Disagreement in International Law Making; Dissolving the Paradox' (2016) 29 Leiden Journal of International Law 289.

[7] See PCIJ, *S.S. Lotus Case (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Rep Series A No 10, para. 35: 'The rules of law binding upon states … emanate from their own free will.' Also ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3, para. 47: 'Here, as elsewhere, a body of rules could only have developed with the consent of those concerned.'

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ratification; acceptance, approval or accession; 'or by any other means if so agreed'.[8] It is clear from the details of Articles 11–17 that the concept of consent implied is one in which actions (signature, exchange, approval etc.) are assumed to express the clear and unambiguous intention of the state.[9] But how does the VCLT view differences between states that may manifest as inequalities of power and possibly affect the freedom of less-powerful states to consent to be bound by a treaty? Article 52 notes that if a treaty has been 'procured' by the threat or use of force 'in violation of the principles of international law embodied in the Charter of the United Nations',[10] then the treaty is 'void'. Similarly, if a state's expression of consent to be bound by a treaty has been 'procured by the coercion of its representative through acts of threats directed against him', this expression 'shall be without any legal effect'.[11] The ideas of 'threat' and 'use of force' here in the VCLT limit the meaning of those terms to only those forms that are 'in violation of the principles of international law'. In other words, only those forms of threat and force currently already recognised by international law *as such* can be the basis of a determination of coercion of a state, potentially resulting in the voiding of the treaty in question. Peters notes that reference to the Charter implies that 'force' means only military force.[12] The limited scope of that term was controversial during the drafting process, with some African and socialist states arguing for the inclusion of a prohibition on economic and political pressure. Though an additional declaration was subsequently added to the VCLT that 'condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent',[13] no clause was inserted into the VCLT proper that further elaborated on the concept of 'freedom of consent' such that the kinds of political or economic coercion that would nullify a treaty could be identified.

Maria Drakopoulou makes the point that the founding of law's jurisdiction always announces a discontinuity with, and rejection of, the past. Yet, despite this demarcation, it remains closely linked with this past '… (because) the axiom of non-law (or corrupt

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[8] This chapter primarily focuses on the earlier means as these are acknowledged to be the most prevalent practices, though 'by any other means if so agreed' has seen some evolution in recent years. Malgosia Fitzmaurice, 'Consent to Be Bound – Anything New Under the Sun?' (2005) 74 Nordic Journal of International Law 483.

[9] This approach primarily stems from the common law tradition, which emphasises the freedom of parties to contract (and the responsibility of both parties to be fully informed on the nature and consequences of the contract – the *caveat emptor* principle), over the historical emphasis of the civil law tradition, which takes account of the overall fairness of the contract to both parties and the impact of the contract on the wider community.

[10] Article 2 of the Charter refers to 'the threat or use of force against the *territorial integrity* or *political independence* of any state' (emphasis added).

[11] Article 51 VCLT.

[12] Anne Peters, 'Treaties, Unequal' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press online). Available at opil.ouplaw.com/home/EPIL, at 52.

[13] Final Act of the United Nations Conference on the Law of Treaties A/CONF.39/26. United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969. A/CONF.39/1 l/Add.2.

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law) founds the new law's jurisdiction'.[14] In this context, we can see that, against a former international legal order that enabled and legitimised a colonial order based on a denial of sovereign statehood and legal personality to people and territories not characterised as 'civilised',[15] the VCLT is established as the legal code through which international treaties will be developed into the future. In this 'new' order, the VCLT for the first time brings into being an idea of coercion as a basis for the invalidation of treaties that have been consented to, but whose rubric is based *only* on military intervention. By focusing on military coercion only, this particular articulation of the concept of consent actually institutionalises and legitimises centuries-old modes of economic and political coercion utilised by colonial powers to progress their relations in areas such as free trade (some of which were highly dependent on racist and gendered tropes in political discourses as we will see in relation to the phenomenon of unequal treaties). Thus, these modes of non-military coercive power in international treaty-making are placed beyond the legal lens of the VCLT and thus can continue in contemporary international treaty-making unchallenged.[16]

However, the VCLT also legalises other implicit ideas about the state and international relations. The recognition of military incursion only as invalidating state consent reveals that the VCLT also institutionalises a very limited idea of sovereignty solely bound up with the physical integrity of its territorial boundaries. The idea that sovereignty may include autonomy in other aspects of statehood, such as economic decision-making, is excluded from consideration.[17] This bounded approach to the state has three further implications. First, the idea of the state promulgated is a singular one, devoid of internal features and interests. Thus, the needs of particular groups within the state, such as minorities or women, that may be particularly disadvantaged by particular clauses in international agreements remain invisible. Secondly, the VCLT also presents a very unique temporal order, one focused on the future, not one cognisant of the cumulative effects of a history of unequal relations through colonisation and imperialism. Thirdly, it also excludes from consideration the possibility of coercion of a state, or a bloc of states, by a larger bloc of states, resulting in differentially negative consequences between regions globally. In order to better examine how the VCLT's approach to the concept of consent facilitates these factors, I now turn to recent

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[14] Maria Drakopoulou, 'On the Founding of Law's Jurisdiction and the Politics of Sexual Difference: The case of Roman Law' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Abingdon: Routledge Cavendish, 2007) at 54.

[15] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Gerrit W. Gong, *The Standard of 'Civilisation' in International Society* (Oxford: Clarendon Press, 1984).

[16] Matthew Craven, 'Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade' (2015) 3 London Review of International Law 31.

[17] Note that in doing so, the VCLT takes a very definite stance on an issue that was hotly debated within the UN on many occasions over the 1960s and 1970s. The issue of economic sovereignty had emerged frequently in debates at that time on international relations between North and South and was clearly articulated in several Declarations. See, for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples GAR 1514 (XV) of 14 December 1960, affirming 'that peoples may, for their own ends, freely dispose of their natural wealth and resources *without prejudice to any obligations arising out of international economic co-operation*' (emphasis added).

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developments in trade negotiations between the EU – one of the world's most powerful trade blocs – and states and regional entities in the African, Caribbean and Pacific (ACP) region,[18] on regional trade agreements (RTAs) called Economic Partnership Agreements (EPAs).[19]

Recent decades have witnessed an unprecedented increase in the number of RTAs in which a distinctive feature of this wave of regionalism is the increasing number of RTAs between developing and developed countries. Though theoretically RTAs can enhance welfare through trade creation, from a developing country and least developed country (LDC) perspective, these North-South RTAs have been found to have a number of deficiencies that can favour the interests of the developed country party and its domestic groups.[20] The inclusion of unfavourable rules towards developing countries in some North-South RTAs can be explained by the asymmetric positions of the parties negotiating these agreements. Developing countries are often at a disadvantaged position in such negotiations due to asymmetric bargaining positions in RTAs that involve a powerful trading party (such as the EU or the US) and a small developing country or group of such. Such bilateral and asymmetric settings are more susceptible to generate trade rules that favour the interests of domestic groups within developed countries.[21]

At issue in disputes between the EU and ACP states and regions on EPAs (as regional trade agreements) are the development impacts of the economic, social and cultural development which they expect.[22] Over the duration of the EPA negotiations from 2002 until the time of writing, ACP states have consistently protested against certain measures proposed by the EU for inclusion in EPAs on the basis that these

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[18] The ACP bloc consists of seven regions – West Africa, Central Africa, Eastern and Southern Africa, the East African Community, the Southern African Development Community, the Caribbean and the Pacific regions. These include 79 Member States, all of them signatories to the Cotonou Partnership Agreement (2000–2020) – 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific. Many of these are Least Developed Countries (LDCs), designated as such by the United Nations, and whose status as LDCs is also recognised by the World Trade Organization (WTO). LDC status confers rights to preferential access to EU markets under the EU's 'Everything But Arms' scheme. Developing countries have preferential access to EU markets under the EU's Generalised System of Preferences (GSP) and GSP+ schemes.

[19] These EPAs are negotiated as part of a wider trade, aid and international relations agreement between the EU and nearly 80 African, Caribbean and Pacific states called the Cotonou Partnership Agreement (CPA) (2000–2020).

[20] Such RTAs often apply more restrictive rules to trade in agricultural products (compared to industrial goods) in which developing countries may have a competitive advantage. For example, stringent rules of origin, and particularly restrictive ones applied to products of importance for developing countries (such as agricultural or textile goods), restrict the economic benefits accruing to developing parties. Moshe Hirsch, 'North-South Regional Trade Agreements: Prospects, Risks and Legal Regulation' in Yong-Shik Lee, Gary Horlick, Won-Mog Choi and Tomer Broude (eds), *Law and Development Perspective on International Trade Law* (Cambridge University Press online, 2011) at 7.

[21] *Ibid.*

[22] Though Article 37(4) of the Cotonou Partnership Agreement is a clause that specifically affirms flexibility in EPA negotiations in recognition of the level of development and socio-economic impact of trade measures on ACP countries.

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threaten their national and regional development priorities and lock them into undesirable path-dependent modes of economic development.[23] EU-ACP EPA negotiations

[23] Issues of contention have included first, the EU's liberalisation demands to ACP states in EPAs, which South Centre has unfavourably compared with what is available to WTO Developing Country Members, LDC Members and the unofficially designated Small and Vulnerable Economies (SVE) Members within the WTO under the Doha Declaration. Thus, in relation to market access for agricultural products, the EU was requesting a 100% reduction (elimination) of applied tariff rates for 80% of all tariff lines, whereas under Doha, LDC Members are not required to undertake any tariff reductions in bound or applied duties; SVE Members have to cut their bound rates by 24% and Developing Country Members by 36%. Taking the CARIFORUM EPA as a template, the EU were asking ACP states to liberalise 65–75% of all services sectors and subsectors, while it liberalises 90%. South Centre point out that in the Doha round, further GATS commitments by WTO Members are voluntary, and based on a request-offer approach, thus Developing Country Members need not offer services liberalisation commitments unless they choose to. South Centre, 'EPAs and WTO Compatibility – A Development Perspective', Analytical Note SC/TDP/AN/EPA/27, November 2010 at 27. Gathii highlights the effectiveness of the EU's 'forum shifting' approach to trade liberalisation from the WTO to EPAs. Thus, the commitments that the EU won in the CARIFORUM EPA were considerably larger than those that the CARIFORUM states have committed to in their GATS 1994 schedules and offered in the GATS 2000 schedules. For example, Suriname went from 15 to 75%; Granada from 23 to 69% and Guyana from 19 to 82%. Gathii points out that the small economies of Suriname and Grenada, which now have become much more open to competition from more efficient European firms, may well suffer not only job losses, but also a decline in innovation and scaling up of local firms, further hindering their local development. James Thuo Gathii, 'The Neo-Liberal Turn in Regional Trade Agreements' (2011) 86 Washington Law Review 422 at 448.

Secondly, liberalisation rules are not the only matter at issue. ACP states fear that they will face a substantial loss of tariff revenues as trade liberalisation is implemented, a matter of key concern to poorer ACP states for which customs revenue constitutes a significant proportion of total government revenue. A European Commission report in 2008 estimated that, on average, ACP countries were forecast to lose 70% of tariff revenues on EU imports in the long run, or 26% of total ACP tariff revenues: Lionel Fontagné, David Laborde and Christina Miraritonna, *An Impact Study of the EU-ACP Economic Partnership Agreements (EPAs) in the Six ACP Regions*, Final Report, January 2008 (Paris: CEPII, 2008), available at http://trade.ec.europa.eu/doclib/html/138081.htm. Related to this is the EU's position of also seeking the elimination of 'community levies' in regions where they are currently applied, e.g. in the ECOWAS region. Community levies are a means by which regional institutions obtain funding for their activities (e.g. ECOWAS charges a 0.5% levy on all non-community imports), and the lack of funding, and its secure base, is recognised as a key challenge to the establishment and effective operation of the necessary institutional mechanisms to operate a regional economic entity. While GATT Article XXIV: 8(b) requires the elimination of duties and other restrictive regulations of commerce on substantially all trade in products originating in the territories, it is arguable whether community levies, given their clear development purpose, should be considered exempt from this: T. Dinka and W. Kennes, 'Africa's Regional Integration Arrangements: History and Challenges. ECDPM Discussion Paper 74 (Maastricht: ECDPM, 2007), available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/0AFF1EE6DDE15146C12579CE004774B2?OpenDocument#sthash.y6RUJa5g.dpuf.

Thirdly, the inclusion by the EU in EPA negotiations of the so-called Singapore issues (on competition policy, investment and transparency in government procurement), along with intellectual property rules in addition to TRIPS which would erode many of their TRIPS flexibilities, is also identified as eroding the right of ACP states to determine their national

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have been characterised by periods of prolonged stalemate, broken by measures that can only be described as coercive from the EU, which, in turn, have resulted in halting and unwilling responses by ACP states and regional organisations. For example, at the end of 2007 in response to several missed deadlines for completion of EPA negotiations, the EU introduced the signing of 'interim' EPAs (iEPAs) as one strategy to meet a schedule on WTO compatibility.[24] However, this measure was only partly successful[25] with most ACP states not signing these arrangements, and some who had earlier *initialled* a draft iEPA not *signing* these subsequently.[26] Several years later, on 30 September 2011, again to encourage conclusion of protracted EPA negotiations, the European Commission announced that countries that had concluded EPAs, but that had not taken the necessary steps to ratify them, would no longer benefit from preferential market access to Europe from 1 January 2014.[27,28] Civil society commentators noted at the end of 2014 that the ultimatum had the desired effect, with several new EPAs being

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development strategies and priorities: South Centre, 'EPAs and WTO Compatibility – A Development Perspective', Analytical Note SC/TDP/AN/EPA/27, November 2010 at 23–24.

[24] The WTO waiver for EU preferences under the Cotonou Agreement was scheduled to expire in 2007.

[25] By the initial scheduled deadline of 2007, only 18 African states (including most non-LDCs and some LDCs) had initialled interim EPAs, as had two Pacific non-LDCs (Fiji and Papua New Guinea), while Caribbean countries had approved a full EPA: ODI, ECDPM, 'Interim EPAs in Africa: What's In Them and What's Next?' ICTSD (2008) 7 Trade Negotiations Insights No. 3 available at http://www.ictsd.org/bridges-news/trade-negotiations-insights/news/interim-epas-in-africa-what%E2%80%99s-in-them-and-what%E2%80%99s-next.

[26] Namibia originally initialled the draft EPA but did not later sign it: Henning Melber, 'Namibia and the Economic Partnership Agreement', *Pambazuka News*, 14 August 2013. See also BIDPA Briefing, 'Signing of the Interim Economic Partnership Agreement' BIDPA, September 2009, available at www.bidpa.bw. Some 'regional' iEPAs were actually only signed by one Member State of that region at that time, e.g. 'Central African' interim EPAs had been signed in 2009 by Cameroon only and the 'Pacific' interim EPA had been signed in 2009 by Papua New Guinea and Fiji only.

[27] The Commission identified 18 countries of the 36 countries that had initialled or signed an agreement that had either to sign and start the ratification of their existing EPA or conclude a new regional EPA. The group included Haiti, which had been struck by a catastrophic earthquake in 2010. This was to be achieved by the withdrawal of market access under Market Access Regulation (MAR) 1528 of January 2008, which required countries to initiate EPA ratification processes 'within a reasonable period of time'. See Council Regulation (EC) no 1528/2007 as regards the exclusion of a number of countries from the list of regions or states that have concluded negotiations. European Commission proposal on amending Annex I to Council Regulation (EC) No 1528/2007, Brussels, 30.9.2011 COM(2011) 598 final. The European Parliament, by a large majority, granted the African countries an extension until October 2014 to ratify their iEPAs: 'EU Pressures Seven Africa countries to complete trade agreements', EURACTIV, 23 April 2013, available at http://www.euractiv.com/section/development-policy/news/eu-pressures-seven-african-countries-to-complete-trade-agreements/.

[28] International relations scholars have identified this action as a credible ultimatum – a threat backed by a deadline, whose implementation could be unilaterally implemented by the EU: Annika Björkdahl and Ole Elgström, 'The EPA Negotiations – A Channel for Norm Import and Export?' in Annika Björkdahl, Natalia Chaban, John Leslie and Annick Masselot (eds), *Importing EU Norms: Conceptual Framework and Empirical Findings* (Cham Switzerland: Springer, 2015) 133 at 147–148.

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initialled.[29] The success of this coercive strategy was evident as, later again in June 2016, media and NGO reports announced that the EU was set to ratchet up pressure once more on recalcitrant African states to ensure continual progress on implementation of EPAs, this time with Ghana, Ivory Coast, Kenya, Botswana, Namibia and Swaziland.[30] According to these reports, the EU had prepared draft delegated acts that would exclude the six non-LDC countries from the list of African states benefiting from preferential EU market access under the European Market Access Regulation (MAR1528) if they missed a 1 October 2016 deadline for EPA ratification or provisional application.[31]

Unsurprisingly, over the years, the EU's approach to the conclusion of EPA negotiations has been roundly condemned by politicians from the ACP states and regional organisations, from civil society organisations and within the EU itself, and more recently from the ACP institution.[32] However, the EU's approach is perhaps better understood if a *longue durée* view of EU–ACP relations is taken. The EU's narrative of relations with ACP states is that of a 'partnership' whose most recent legal iteration through the Cotonou Partnership Agreement (2000–2020) aims at 'eradicating poverty in the longer-term … [c]ontributing to peace, security and a stable and democratic political environment in the ACP states, with the ACP countries playing a strengthened and equal role in the international context'.[33]

A critical reading of this narrative would highlight how it captures well the melding of two projects of 'civilisation and commerce' particularly dominant within organised international relations since World War II, with precedents in the colonial era. The first project aims at an international community engendered through international law based on a particular idea of the nation-state. The second promotes an idea of development

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[29] CONCORD, 'EU ultimatum brings EPA negotiations to conclusion', CONCORD Cotonou Working Group Briefing Paper, December 2014, available at http://concordeurope.org/. The new EPAs were signed by West Africa, Southern Africa and the East African Community.

[30] The end of the preferential access enjoyed by these six countries would have dramatic consequences for the countries' public finances. For countries in West Africa in general, it is expected that they would lose approx. €3.2 billion per year in lost customs duty from 2020 onwards.

[31] Cécile Barbière, 'Brussels to End Preferential Trade Access for Uncooperative African Countries', 10 June 2016, EURACTIV, available at http://www.euractiv.com/section/development-policy/news/brussels-to-end-preferential-trade-access-for-uncooperative-african-countries/. Also S2B, 'The EU destabilizes and blackmails African states to secure its economic interests', 15 June 2016, available at http://www.s2bnetwork.org/eu-blackmails-african-states/.

[32] See Para 58 of the Declaration of the 8th Summit of ACP Heads of State and Government of the ACP Group of States issued on 1 June 2016 in Port Moresby in Papua New Guinea, which stated: 'We are concerned that all ACP States have not been able to conclude Economic Partnership Agreements (EPAs) due to the excessive demands from the European Union that has weakened regional economic integration processes.' http://www.acp.int/content/declaration-8th-summit-acp-heads-state-and-government-acp-group-states.

[33] European Commission HRFASP, *Evaluation of the Cotonou Partnership Agreement*, Brussels, 15.7.2016 SWD (2016) 250 final at 6. Available at http://ec.europa.eu/europeaid/news-and-events/results-evaluation-cotonou-partnership-agreement-announced_en.

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centred on economic growth.[34] For both projects, the formation of states able to promote international commerce is a shared lynchpin, justifying a 'structural logic' of circular interventions from the international to the national, legitimised and facilitated through international law.[35]

This critical approach traces continuities in iterations of these twin projects between the current aims and provisions of the Cotonou Partnership Agreement to key points in EU–ACP relations in the past. Precedents include the 1957 Treaty Establishing the European Economic Community, whose Article 131 created an Association of Overseas Countries and Territories 'to bring into association with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands' in order to 'permit the furthering of the interests and prosperity of the inhabitants of those countries and territories in such a manner as to lead them to the economic, social and cultural development to which they expect'.[36] These sentiments echoed the earlier Schumann Declaration of 9 May 1950, which signalled the founding of the European Coal and Steel Community (widely viewed as the precursor to the current EU). It included the following paragraph:

> This production will be offered *to the world as a whole* without distinction or exception, with the aim of contributing to *raising living standards and to promoting peaceful achievements*. With increased resources Europe will be able to pursue the achievement of *one of its essential tasks*, namely*, the development of the African continent*. In this way, there will be realised simply and speedily that *fusion of interest* which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.[37]

That rationale was also evident in the Berlin West Africa Conference of 1884–1885.[38] The Preamble of its 'General Act' described its purpose of managing the ongoing process of colonisation in Africa thus: 'Wishing to regulate in a spirit of good mutual understanding the conditions most favourable to the development of commerce and of

[34] For a detailed analysis of how these projects came to characterise peace-time international law after World War II, see generally Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

[35] I use the term 'structural logic' here drawing from its use by Matthew Craven, who describes it as a range of interventions that occupy 'the "gap" between reality and aspiration', which can well have perverse outcomes. *Supra* note 16 at 57–58.

[36] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023.

[37] By production, Schumann was referring to the Franco-German production of coal and steel. It was to be 'under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe'. Declaration of 9 May 1950 delivered by Robert Schumann. Available at www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf (emphasis added).

[38] Most of the participants at the conference were European and included Prussia (Germany), France, the Netherlands, Portugal, Hungary, Belgium, Denmark, Spain, the United Kingdom, Italy and Luxembourg. Note that many of these were early members of the EU.

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civilisation in certain regions of Africa.'[39] The perceived parallel between EPAs, and historic unequal economic relations between Africa and Europe under colonialism, was not lost on many observers.[40]

The use by the EU of its undeniably stronger economic and political weight to obtain ACP regions' and states' consent to the proposed EPAs remains invisible in international legal terms according to the approach to consent captured by the VCLT.[41] EPA critiques to date have largely focused on the content of EPA proposals by the EU and the likely development impacts on ACP states and regions of their implementation.[42] In this chapter I draw from feminist legal insights to show how a sensibility towards sexual differentiation reveals more deeply the subject positions legally ascribed to developed and developing country states in contemporary trade negotiations that are underpinned and legitimised by the form of consent as expressed by the VCLT.

IV. FEMINIST LEGAL APPROACHES TO THE CONCEPT OF CONSENT, NEGOTIATION AND FREEDOM TO NEGOTIATE

Even though consent is an ambiguous concept, it has become the dominant paradigm in both legal and lay discourses for distinguishing sex from sexual violence. Consent is now the marker of *legitimate* sexual activity.[43] It legitimises an otherwise dubious or forbidden act and normatively transforms the legitimacy of that act. Consent, as the

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[39] General Act of Conference of Berlin Concerning the Congo, signed at Berlin, 26 February 1885, 1909 3 AJIL 7. Article 6 exhorted '[a]ll Powers [to]engage themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence and to strive for the suppression of slavery and especially of the negro slave trade; they shall protect … all the institutions and enterprises religious, scientific or charitable, created and organised for these objects or tending to instruct the natives and to make them understand and appreciate the advantages of civilisation'.

[40] The Kenya Human Rights Commission (a private NGO) circulated an advertisement on EPAs in Kenya's most widely circulated daily newspaper, *The Daily Nation*, on 5 December 2008, with the stark title 'EPA = Recolonisation of Kenya' over an image of Africans in chains evoking slavery motifs (image on file with author). This link to colonial history was also prominent in more restrained, yet still critical, EPA commentary from stakeholders such as NGOs. See, for example, Timothy Kondo, *Alternatives to the EU's EPAs in South Africa* (Dublin: Comhlamh, 2012) at 6. The power of the 're-colonisation' motif used by anti-EPA activists was recognised as difficult to challenge by EU and African state representatives at the time (communications on file with author).

[41] This is in spite of references to the universal recognition of principles of 'free consent' and 'good faith' in the preamble.

[42] These critiques, though immensely valuable for revealing the inequalities inherent in the negotiations processes on EPAs and the problematic nature of the clauses on trade liberalisation of EPAS vis-à-vis what is permissible under international trade law, accept as given the rationales underpinning international trade law and the subjectivities ascribed to developing country and LDC states, and strategically seek ways to maximise LDC and developing country interests within this framework.

[43] Tanya Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in Alan Reed and Michael Bohlander (eds) with Nicola Wake and Emma Smith, *Consent – Domestic and Comparative Perspectives* (Abingdon: Routledge, 2017) at 9.

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granting of permission, becomes almost like a permit that awards differential rights on the actor and consenter. Certainly, it reduces or removes the consenter's right to complain about the act.[44] Though it is welcomed as a progressive move away from previous problematic physical force-based approaches, Palmer holds that consent remains a flawed model for identifying legitimate sexual activity for four reasons. In the following paragraphs, I summarise these, tracing points of relevance of these insights for the concept of consent in international law, with particular implications for developing countries and LDCs involved in international trade treaty-making.[45] First, she highlights how consent is enmeshed with the notion of the rational, bounded, autonomous liberal subject who exercises their will free of external or internal influence and emotion.[46] Several facets of this approach resonate with the notion of the state as a bounded singular entity and the means by which statehood is recognised in international law.[47] This approach both decontextualises states from the web of history, relations and influences that have shaped their contemporary political and economic status, and their interests in engaging in international treaty-making. In a trade treaty context, it negates the differences within and between states that challenge the premise that international trade operates to equalise prices, incomes and welfare levels across countries.[48]

Secondly, in the context of sexual activity, the framing of an interaction as consensual characterises that interaction as inherently reactive and asymmetrical, with one (active) 'initiator' doing something to another (passive) 'responder'. Palmer makes the point that the distribution of these roles is strongly influenced by wider gendered cultural values, expectations and practices associated with masculinity as agency, and femininity as violability. This places greater attention on the complainant's comportment in any investigation of illegitimate sexual activity.[49] This insight draws our attention to the legal as well as political obstacles that developing country and LDC members of the WTO face in bending international trade rules and relations to better address their development goals.[50] This became especially evident in the aftermath of

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44 Alasdair Maclean, *Autonomy, Informed Consent and Medical Law* (Cambridge: Cambridge University Press, 2009) at 117.

45 In this section, I mainly refer to trade treaty-making within the multilateral system of the WTO. Though treaty-making within the WTO has stalled and regional trade treaty-making has become more prominent in recent years, the institutional context for international trade negotiations and implementation remains anchored in the multilateral system.

46 *Supra* note 43, at 11–12.

47 James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006) at 37–93, where he elaborates the criteria of 'effective' statehood.

48 Hendrik Van den Berg, *International Economics: A Heterodox Approach* (3rd edn, New York: Routledge, 2017); see in particular chapter 7 – 'International Trade, Human Happiness and Inequality'.

49 *Supra* note 43 at 13.

50 Thus, the ineffectiveness of special and differential treatment provisions (SDT) in WTO agreements as a mechanism through which the trade-and-development needs of developing country and LDC members can be either recognised or addressed has been exposed as being weakly enumerated; lacking in significance when weighed against other legally binding obligations in the agreements; and undertaken at the desire of developed country members. See, for example, Frank J. Garcia, 'Beyond Special and Differential Treatment' (2004) 27 Boston

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the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) in 1994, whose introduction dramatically altered the international legal landscape with regard to intellectual property rights, particularly in relation to access to medicines.[51] Socio-legal studies on the subsequent transnationalisation and implementation of TRIPS reveal how the framing by law of a highly political issue (access to medicines for the poorest) as a technical one (patent protection), within a wider context of already pre-existing inequalities in the global distribution of power and resources, has exacerbated these inequalities further.[52]

Thirdly, consent in sexual encounters presupposes the idea of an act that is defined and uniform in character, such that autonomous participation in the act can be captured by the giving or withholding of consent. Palmer highlights how distant this is from reality, with sexual activity encompassing a range of activities, several of which happen simultaneously. Consent viewed in the context of a singular act only, therefore, misrepresents the context and type of communications and negotiations involved in consensual sex.[53] For international trade treaty negotiations, the legal expression of consent captured in the VCLT fails to reflect the complexity of the negotiations process and the points of tension, disagreement, compromise and reservation that inevitably form the background and continue to exist after formal consent to a trade treaty is given. Consent thus gives the legal illusion of a blank slate, with both parties engaged in a future-oriented activity where contentious issues raised in the antecedent negotiations process have been satisfactorily resolved.

Fourthly, consent abstracts the sexual encounter from the particular circumstances within which it takes place and the wider social and structural context that underpin that encounter. Palmer draws on the concept of 'coercive control' in intimate relationships to draw attention to the powerful influence wielded through patterns of behaviour and practices across several domains of women's lives such as money and income, communications, transport, work and employment, social and family life etc. that

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College International & Comparative Law Review 291; Jeffrey Dunoff, 'Dysfunction, Diversion and the Debate over Preferences: (How) do Preferential Trade Policies Work?' in Chantal Thomas and Joel P. Trachtman (eds), *Developing Countries in the WTO Legal System* (Oxford: Oxford University Press, 2009).

[51] The TRIPS Agreement is one of the multilateral agreements of the WTO. Developing countries faced subsequent legal challenges (e.g. South Africa), and continue to face political difficulties (e.g. India, Brazil) to use TRIPS flexibilities to increase access to medicines: Carlos Correa and Duncan Matthews, 'Discussion Paper – The Doha Declaration Ten Years on and Its Impact on Access to Medicines and the Right to Health', 20 December 2011. UNDP available at www.undp.org.

[52] See Emilie Cloatre, *Pills for the Poorest* (Houndmills: Palgrave Macmillan, 2013) in which she uses actor network theory to explore the implementation of TRIPS by Djibouti and Ghana (who had no role in the drafting of TRIPS) and its translation into domestic health care system practice. Her research reveals how, through the global pharmaceutical industry's ability to 'act at a distance', Djibouti's health care system became more reliant on patented innovator brands than generics. In the situation of Ghana, local discourses on counterfeit drugs have created confusion over their relationship to generics, causing doctors and patients to prefer patent-protected medicines over generics. This has frustrated government efforts to use generics, thereby reducing costs and widening publicly funded access to medicines.

[53] *Ibid.* 14–15.

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enmesh women in abusive relationships and limit their opportunities to meaningfully exercise autonomy.[54] For less-powerful states engaging in international trade treaty-making, this draws our attention to the wider institutional context, and the cumulative effects of discourses and policy initiatives across multiple international policy arenas that constrain the autonomy of less-powerful states in their engagement in international trade treaty-making. For example, it is now well recognised that though developing countries have increased their participation and influence within the WTO, this has mainly been by the larger states such as Brazil, India, China and South Africa. In response, international donors have supported trade capacity-building programmes designed to improve small states' influence on international trade negotiations. However, this has had little result, with research on the effectiveness of these programmes revealing that, in some cases, donor-led initiatives can actually exacerbate the problems of small states in international trade negotiations.[55] Here we see donor commitments to international development aid clearly influencing trade negotiation processes.

In response to these flaws, Palmer proposes a standard of 'freedom to negotiate' as an alternative framework to consent for sexual offences law. Though many laws at the domestic – and more recently international levels[56] – prohibit sexual activity with a person who lacks the freedom to choose, a shift from consent (with its focus on the behaviour of the complainant) to the freedom to negotiate swings attention to the behaviour of the defendant. Did the defendant do anything to restrict the complainant's freedom? Was a fear of violence, or were other power dynamics present? Did financial or other kinds of dependence exist? Palmer points out that this approach provides greater scope for victims of sexual violence 'to articulate on their own terms the ways in which their freedom to negotiate sex was constrained within the context of the particular relationship, rather than categorise their experience as consensual or non-consensual'.[57] In addition, it frames sexual encounters as dynamic processes of

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[54] *Ibid*. 15. Here Palmer draws from Evan Stark's work in her monograph, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford: Oxford University Press, 2007).

[55] One report revealed that donor organisations provided biased information to small states on trade negotiations which supported the donor agenda, rather than the interests of the small state. For example, information provided by donor organisations in St. Lucia and Barbados supported their neoliberal economic agenda rather than allowing space for and supporting the development of alternative economic policies. In addition, donor support of the participation of and input by the private sector and civil society in small state trade agenda and negotiation strategies favoured representation by export-oriented industries, thereby giving this sector more influence than domestic-focused industries in trade policy-making. The report's authors recommended that instead, assistance should be channelled through independent third parties. Emily Jones, Carolyn Deere-Birkbeck and Ngaire Woods, *Manoeuvring at the Margins: Constraints Faced by Small States in International Trade Negotiations* (London: Commonwealth Secretariat, 2010).

[56] See, for example, the evolution in defining and prosecuting rape as a war crime and crime against humanity in international criminal law: Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 36 Boston College International & Comparative Law Review 1207. See also Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Brill online, 2011).

[57] *Supra* note 43 at 23–24.

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interaction and identifies, contextualises and draws attention to factors shaping the power relations between the parties as significant to the decisions reached.

In the context of international trade treaty-making, a focus away from formalised consent and towards 'freedom to negotiate' offers potential as both a means and a method of bringing to the fore the nature of the power relationship and disparities therein between developed and developing country states involved in trade negotiations. It also opens up for identification and analysis important features of the negotiations context that are factors significant to the process, outcome and aftermath of trade negotiations. One possible method for this analysis is that developed by Crump,[58] who, drawing from negotiation theories, developed a framework for mapping and analysing international trade agreements that highlights elements in (i) the negotiation architecture (the parties and 'sides' involved); (ii) context analysis (the historical, cultural and evolving social and legal systems that create the context in which negotiations take place); (iii) structural (power) and relational (communications, reach etc.) analysis; (iv) process analysis (the phases of the negotiations, when turning points happen etc.), and (v) decision analysis (the rules adopted by parties to reach an agreement). Thus the adoption of a 'freedom to negotiate' approach inspired by feminist legal theory to analyse contemporary trade negotiations offers an opportunity for a radical rethink of the adequacy and appropriateness of the approach to consent as the predominant marker of legitimacy in contemporary international treaty-making. At a minimum, it better reveals the factors that shape the context in which negotiations on trade take place and enables their significance to the outcome of the negotiations to be better identified and analysed.

Having explored what feminist insights on the concept of consent and negotiations in the context of the legal recognition of legitimate sexual activity may bring to bear to the concept of consent in international law (which has particular relevance to international trade treaty-making), let us now turn to explore what the application of this 'sexed' approach to legal analysis might bring to critical research on international law and legal process.

V. BRINGING FEMINIST LEGAL INSIGHTS TO BEAR ON CRITICAL RESEARCH ON INTERNATIONAL LAW

The term 'unequal', or 'forced' treaties refers primarily to bilateral treaties in the 19th century between certain Western powers and states in East Asia including Japan, Siam and China, wherein the unequal nature of their substance (e.g. in relation to treaty obligations, non-reciprocity or an extreme restriction of sovereignty) or the unequal procedure of their conclusion (e.g. signed under military coercion) are recognised.[59] Features common to those unequal treaties, such as their primary purpose in opening up those locations for trade (including addressing issues such as fixing import duties, including Most-Favoured Nation (MFN) clauses and provisions for foreign investors); the approach of the Western powers to negotiate as a bloc together; the scale of the

[58] Larry Crump, 'Analysing Complex Negotiations' (2015) Negotiation Journal 131.
[59] Peters, *supra* note 12 at 1.

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treaties in terms of geographical reach, and the lack of provision for their termination[60] contain parallels with the purpose, content and modes of negotiations of contemporary EU-ACP EPAs.

In an exhaustive treatment of the context, content and rationales of unequal treaties, Craven reflects on how consent in the context of unequal treaties comes to be understood '… less as an expression of "autonomous will" and rather more as the formal mode of acceptance an instrument – signified by signature, ratification or accession – in which any psycho-sociology of "agreement" was beyond the domain of law, and in which the presence or absence of duress was largely irrelevant'.[61] He highlights several implications of unequal treaties both for the doctrinal content of the VCLT (for example, that reciprocity or exchange are excluded from a definition of what constitutes a valid treaty)[62] and for contemporary treaty-making relations (as a signal of the persistence of colonial models of power and authority therein today).[63] The latter view is shared by Peters, who, though recognising that one of the outcomes of unequal treaties on the internal and wider international relations of non-European contracting parties was that it became a doctrinal instrument for use within strategies to break from colonial and imperial relations, starkly acknowledges that current international legal doctrine and architecture does not necessarily preclude them from happening again.

> The concept of unequal treaties is extremely vague. Both the prerequisites and the legal consequences of the inequality of a treaty are unclear. Which types of power or influence are relevant? How would they be measured? At what precise point would the inequalities in bargaining power and in the contents of the treaty be so intolerable as to flaw a treaty? … Without the establishment of an international institution to determine authoritatively which treaties are egregiously inequitable, a fair and reasonable test for international treaties seems unworkable.[64]

I suggest that critical legal insight on unequal treaties, and its relevance to contemporary international treaty-making in trade, is strengthened by the application of a 'sexed' lens, as recent research acutely demonstrates. Ruskola's 'queered' analysis of the rhetoric of colonial international law towards China demonstrates how the legal and political subjectivities of the Chinese state were shaped and transformed in ways that made it more or less vulnerable to colonial violence at various times, through the

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[60] Craven, *supra* note 16 at 343–345.

[61] Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) Nordic Journal of International Law 335 at 374–375.

[62] Article 2.1(a) defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

[63] Craven, *supra* note 61 at 380–381.

[64] Peters, *supra* note 11 at para. 75. Li reaches a somewhat less pessimistic if still qualified conclusion, suggesting that the validity of treaties containing substantive and/or procedural inequality could be challenged under the VCLT, though only in very limited and exceptional circumstances: Jangfeng Li, 'Equal or Unequal: Seeking a New Paradigm for the Misused Theory of "Unequal Treaties" in Contemporary International Law' (2016) 38 Houston Journal of International Law 465.

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attribution of gendered and highly sexualised features.[65] Thus, China's 'character' was identified as politically effete. Diplomatic rituals such as the *ketou* (kowtow) by foreign diplomats to the Chinese Emperor came to be seen as violations of the West's sovereign equality, through its erotic conflation with sodomy.[66] In relation to trade, China's regulation of trade with the West was constructed as a violation of a 'right of intercourse' and a violation of 'her international social duty'.[67] To address England's growing trade deficit with China, it was permissible to force China to 'consent' to 'free trade' (coercion to obtain consent was not in violation of international law at the time). However, as Ruskola notes, '[o]nce obtained, consent in turn justifies anything, or as Hobbes put it, "Nothing done to a man by his own consent can be injury"'.[68] Legally, the West introduced multiple legal forms and shifted between these to gain, over time, jurisdictional control of and access to major cities and rivers, and the main lines of communication and transportation in China.[69] This combination of sexualised political rhetoric and legal techniques rendered China a very particular kind of state-as-subject within international law, one with a differentiated and lesser-than sovereign status compared to European states, who possessed their sovereignty 'as a matter of birthright'.[70] While Ruskola's research thoughtfully illustrates how the application of a sexed lens to a particular historical era of Western–Sino relations reveals anew the centrality of a gendered and racialised logic to the colonial constitution of international law, he also utilises this approach to highlight the contemporary ascription of a differentiated legal subjectivity to certain states which is rationalised along gendered, sexualised and racialised tropes in contemporary international relations.[71]

VI. REFLECTIONS ON THE VALUE OF 'SEXING' INTERNATIONAL LAW

In conclusion, then, my aim in this chapter was to assert the value of feminist legal method(s) – in particular that of 'sexing' – to research projects of a critical stance on international law. I suggest that an international feminist legal analytic does not have to begin with gender as its starting point, or indeed focus on more equitable gender relations as its goal. Instead, when applied, feminist legal insights are particularly

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65 Teemu Ruskola, 'Raping Like a State' (2009–2010) 57 UCLA Law Review 1477.

66 *Ibid.* 1513–1514.

67 Daniel Gardiner, *A Treatise on International Law and a Short Explanation of the Jurisdiction and Duty of the Government of the Republic of the United States* (New York: N. Tuttle, 1844) in Ruskola, *supra* note 65 at 1510.

68 *Ibid.* 1508.

69 Ruskola lists these as including the privilege of extraterritoriality (where the subjects of Treaty Powers were exempted from Chinese laws), to Treaty Ports, to concessions to forms of railroad sovereignty to foreign telegraph lines to foreign post offices, to foreign-run customs collection agencies, to leaseholds to formal colonies such as Hong Kong and Macao, 'and every conceivable gradation of intervention and domination in between': *Ibid.* 1526.

70 *Ibid.* 1535.

71 He refers to Gerry Simpson's 'outlaw states' (Iraq, Libya and Yugoslavia) as well as the characterisation of the United States of America as a global leader: *Ibid.* 63–64.

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revelatory of received truth claims of international law's universality and their contingency. In this instance, sexing the concept of consent in international law reveals two features of international law and law-making that otherwise remain legally invisible. First, it shines a light on the existence and influence of coercive practices manifest in contemporary treaty negotiations. Second, it draws attention to the significance of deeper historical and structural factors that both shape the context in which contemporary treaty negotiations are held, and have profoundly influenced the content of earlier international treaties. Both of these features are clearly manifest in recent efforts by the EU (the world's most powerful trading bloc) to conclude RTAs with some of the least developed countries and regions in the world. In addition, this method reveals the reliance of international law and international relations on gendered (as well as sexualised and racialised) subjectivities to underpin its own internal legal logic. I suggest that sexing the foundational concepts and prisms of international law offers a rich agenda for research that seeks to be both intellectually robust and subversive of its received claims to truth and wisdom.

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