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**The American University in Cairo**  
**School of Global Affairs and Public Policy**

**FEMINIST ENGAGEMENT IN INTERNATIONAL CRIMINAL LAW:  
A HISTORIOGRAPHICAL ANALYSIS**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for the degree of  
Master of Arts in International Human Rights Law**

**By**

**Sarah El Saeed**

**December 2014**

The American University in Cairo  
School of Global Affairs and Public Policy

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Master of Arts in International Human Rights Law  
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The American University in Cairo  
School of Global Affairs and Public Policy  
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FEMINIST ENGAGEMENT IN INTERNATIONAL CRIMINAL LAW:  
A HISTORIOGRAPHICAL ANALYSIS

Sarah El Saeed

Supervised by Professor Alejandro Lorite

ABSTRACT

This text aims at providing a broad analytical historiography of feminist engagement in international criminal law from the early 20<sup>th</sup> century until the formation of the modern international legal field with the drafting of the Rome Statute and establishment of the International Criminal Court. It traces the evolvment and coming of age of both the global feminist movement and the international criminal legal project, and the manner in which they came to intersect. The text outlines the modes and methods of feminist engagement in the field, provides a proposed model of the involvement of feminist typologies in international criminal law, and specifically examines the manner in which liberal feminism, versus others, has interacted with various areas of international law.

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## **INTRODUCTION**

Reflection, analysis, and critique of separate and distinct areas or eras of feminist involvement in international criminal law are abundant, but a broad-spectrum analytical historiography of feminist engagement in the field has yet to be introduced. The intended scope of this text is for it to be an all-encompassing mapping of the relationship between the sphere of international criminal law and women's rights, and the manner in which the feminist movement has come to exist and function within the international criminal legal field, with a specific examination of liberal feminism versus 'other' forms of feminism. This mapping project includes a historical presentation of the establishment of the separate spheres, and an illustration of the manner in which they came to be interrelated. It also includes an analysis of the positions in which the feminist movement occupied the major moments of international criminal law, from the early 20<sup>th</sup> century until the drafting of the Rome Statute and formation of the International Criminal Court. A model for the phases of different types of feminist engagement in international criminal law is presented, with an assessment of the role of liberal feminism in various fields of international law.

Chapter one offers a history of feminist engagement with international criminal law from the First World War to the Cold War era. It includes an introduction to early forms of domestic and international feminism, as well as the stage-setting elements for the birth of modern international criminal law, and the manner in which women engaged in both. Chapter two tells the story of the birth of the global feminist movement, centered mostly in the field of international human rights law. It also introduces Karen Engle's model for feminist involvement in international human rights law. Chapter three illustrates the birth of modern

international criminal law, and the approaches and methods used by feminist groups to engage in the field, with an emphasis on an analysis of this period by Janet Halley. Chapter four puts forth a model of feminist engagement in international criminal law, of liberal feminism versus 'others'. Finally, Chapter five examines a proposed pattern with regards to feminist engagement in international law relating to the role of liberal feminists versus 'others'.

## **I. A History of Feminist Engagement with International Criminal Law From The First World War to the Cold War**

### **A. World War I**

International criminal law is often associated with the era of the International Criminal Tribunals and the establishment of the International Criminal Court of the 1990's, but the development of the field of modern international criminal law can be traced much further back.<sup>1</sup> However, the consolidation of the international criminal legal sphere is, correctly, closely linked to the establishment of international criminal courts, and the punishment of international crimes by these courts. It is perhaps because of this that the earliest antecedent to the establishment of a solidified body of international criminal law in twentieth century modern history can be traced to the World War I, the atrocities of which caused the Allies to convene a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to investigate culpable conduct by the Central Powers (Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire) during the First World War.<sup>2</sup>

#### **1. The Emergence of the Concept of International Criminal Responsibility**

The Commission was also tasked with considering the feasibility of placing criminal responsibility on particular individuals, not just on states, by setting up trials to investigate these crimes. In 1919, the Commission presented its final report to the Paris Peace Conference, which was negotiating peace agreements with the Central Powers.<sup>3</sup> The report concluded that the crimes “against the laws and customs of war and of the laws of humanity” committed by the Central Powers should be

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<sup>1</sup> M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 540-566 (M. Cherif Bassiouni ed., Koninklijke Brill NV, 2<sup>nd</sup> ed. 2013) (2003) [hereinafter *Bassiouni*].

<sup>2</sup> *Bassiouni*, *supra* note 1, at 541.

<sup>3</sup> *Id.*

prosecuted before an “international high tribunal”.<sup>4</sup> On June 28 1919, the Versailles Peace Treaty, requiring Germany to accept full responsibility for instigating the war and to pay reparations to compensate for this, was signed.<sup>5</sup> Most important for the purpose of tracing the foundations of international criminal law are Articles 227-229 of the Versailles Peace Treaty.<sup>6</sup> Article 227 charged Kaiser Wilhelm II, the former German Emperor, with “supreme offence against international morality and the sanctity of treaties”, and sanctioned the creation of a special tribunal to try the accused.<sup>7</sup> Articles 228 and 229 allowed for the creation of special military tribunals to try individuals accused of the commission of “acts in violation of the laws and customs of war”.<sup>8</sup> By the time the Versailles Treaty entered into force, however, the former German Emperor had fled, and thus Article 227 was never enforced; neither were Articles 228 and 229, as the Allies’ resolve to enforce individual criminal responsibility seemed to dissipate in the immediate postwar period.<sup>9</sup> The World War I experiment with international criminal justice was thus short-lived.

The period following World War I included the establishment of the League of Nations, meant to “safeguard the peace of nations”, which featured its own judicial branch, the Permanent Court of International Justice (PCIJ)—the precursor of today’s International Court of Justice of the United Nations.<sup>10</sup> In 1920, an advisory commission for the League of Nations proposed a recommendation to create a permanent international criminal court, which was to have jurisdiction over “crimes

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<sup>4</sup> THE COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, REPORT OF COMMISSION TO DETERMINE WAR GUILT, 6 MAY 1919.

<sup>5</sup> GERHARDE WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 1-13 (TMC Asser Press) (2005) [hereinafter *Werle*].

<sup>6</sup> *Werle*, *supra* note 5 at 3.

<sup>7</sup> The Treaty of Versailles art. 227, 1919.

<sup>8</sup> The Treaty of Versailles art. 228-229, 1919.

<sup>9</sup> *Werle*, *supra* note 5 at 5.

<sup>10</sup> *Bassiouni*, *supra* note 1, at 544.

constituting a breach of international public order or against the universal law of nations”.<sup>11</sup> This proposal, however, was rejected and deemed “premature” by the League of Nations, with the sentiment that the PCIJ had already been created as a judicial branch of the League of Nations with civil jurisdiction over states.<sup>12</sup>

## 2. World War I and Women

An important facet of the peace treaties that ended the First World War was the use of the extensive use of plebiscites employed in Central and Eastern Europe to determine the boundaries of newly created nation states. While, by the end of the nineteenth century, they had come to be “abandoned by diplomats, condemned by the majority of writers on international law, and forgotten by the world at large”, plebiscites, and the underlying principle of self-determination, were promoted as the foundation for the creation of new frontiers drawn during the Paris Peace Conference of 1919.<sup>13</sup> However, plebiscites were also a significant moment for women, in that they marked the first time women had the right to contribute to expressions of popular sovereignty at the international level. In light of the fact that women’s suffrage was still a contentious issue in most of Europe and the United States (in fact, only two of the five powers constituting the Supreme Council at the Paris Peace Conference—Britain and the United States—were even close to enshrining women’s right to vote), it was notable that women were able to vote in all plebiscites held during the post-World War I peace process.<sup>14</sup>

Women’s groups attempted to play a role in the post-World War I peace settlement negotiations, and sought to be involved in the general post-World War I atmosphere conducive to the formation of the plebiscites and women’s equal

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<sup>11</sup> Bassiouni, *supra* note 1, at 545.

<sup>12</sup> *Id.*

<sup>13</sup> Karen Knop, *Of the Male Persuasion: The Power of Liberal Internationalism for Women*, 93 AM SOC OF INTL LAW 177, 177-185 (1999) [hereinafter *Knop*].

<sup>14</sup> *Knop*, *supra* note 13, at 179.

participation in them.<sup>15</sup> International women's organizations had begun forming long before the Paris Peace Conference, and a multitude of international conferences composed of women were convened with the sole goal of having an influence in the peace process.<sup>16</sup> The leaders of the international women's movement during the immediate post-World War I period, at the time predominantly white, Western, well educated, and well-connected (thus benefiting from a substantial degree of contact with the statesmen and diplomats who most influenced the peace process), lobbied the delegations to the Paris Peace Conference on issues pertaining to the peace process and the proposed League of Nations, particularly in the area of women's rights.<sup>17</sup>

### 3. The Early Days of the Modern Feminist Movement

The issue of women's right to vote in the plebiscites was related to two key initiatives, the first of which was the campaign for women's suffrage, mainly in Europe and the United States.<sup>18</sup> For example, in the United States, the campaign for women's suffrage seized the opportunity when President Wilson made various proclamations on self-determination during the post-war peace process to highlight the duplicity between Wilson's famous promotion of democracy abroad and his administration's apathy towards women's suffrage in the United States<sup>19</sup>. The second initiative closely connected to women's right to vote in the plebiscites was that of the women's peace movement and their advocacy of their principle of self-determination.<sup>20</sup> This initiative is also an illustration of one of the earliest significant divides amongst feminist activism at the international level. While the radical

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, at 180.

suffrage movement, exemplified by the militant National Women's Party (NWP), attempted to integrate the principle of self-determination into the basis for women's suffrage, the pacifist suffrage movement instead approached the matter by integrating women's suffrage into the principle of self-determination.<sup>21</sup> In 1914, Emmeline Pethick-Lawrence popularized feminist pacifism.<sup>22</sup> Pethick-Lawrence had been part of the British radical suffrage movement, but had separated from the movement over disagreements with the radical suffrage movement's leader, Emmeline Pankhurst, over Pankhurst's use of violence in campaigning for women's right to vote.<sup>23</sup>

Pethick-Lawrence's feminist pacifism combined a proposal for permanent peace with the basic ideology of the women's suffrage movement.<sup>24</sup> The proposal included the principle of self-determination and the advocacy for the use of plebiscites during the peace process.<sup>25</sup> To combine both platforms, the pacifist suffrage movement, with the leadership of Pethick-Lawrence, lobbied the delegations at the Paris Peace Conference for the inclusion of women's suffrage in plebiscites to determine the division of territories.<sup>26</sup> In general, the radical and pacifist suffrage movements used highly contrasting platforms for the advocacy of women's right to vote. On one hand, radical suffragettes endeavored to highlight the inconsistency of equal voting rights between men and women based on the portrayal of women as equally contributive towards patriotism and militarism.<sup>27</sup> On the other hand, pacifist suffragettes appealed not to women's "sameness", but by

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, at 182.

stressing on women's difference, and linking women to ideals of peace.<sup>28</sup> Pacifist suffrages argued that women were more naturally inclined towards peace, especially given the societal roles they played, and would thus further the goal of a successful peace process.<sup>29</sup> Therefore, the argument was based on the need for women's equal voice in the process of self-determination and democracy in general.

It was the pacifist platform—the liberal strand of feminism that existed at the time—that had relatively more success during the post-World War I peace process.<sup>30</sup> In an official hearing before the commission on the League of Nations, the International Women Suffrage Alliance, composed of mainly pacifist suffragists from the Allied states, called for the admission of women into all permanent bodies of the League, granting women's suffrage, and the prohibition on the trafficking of women and children.<sup>31</sup> The only noteworthy outcome of this, however, was that Article 7 of the Covenant of the League of Nations stated that all positions in the League were to be open to women, although the goal of including a provision on women's suffrage did not succeed.<sup>32</sup> By 1937, the advocacy of several women's organizations led to the League's General Assembly forming a Committee of Experts to conduct a comprehensive inquiry into the legal status of women worldwide, with the purpose of promulgating a convention specifically codifying women's rights.<sup>33</sup> However, the work of the Committee was short-lived, as World War II broke out soon afterwards. Nonetheless, by the time the war erupted, a growing discourse of women's equality

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, at 183.

<sup>33</sup> *Id.*

was emerging through the advocacy of various international women's organizations.<sup>34</sup>

## B. World War II: The Nuremberg and Tokyo Tribunals

The various failures of the League of Nations, originally meant to prevent the outbreak of world war once again, exposed the weaknesses of the organization, especially throughout the 1930's, and eventually led to the outbreak of World War II in 1939.<sup>35</sup> The post-World War II period was a critical point that marked a change of course for international criminal law. This period brought about the establishment of two international tribunals for the prosecution of international crimes: the International Military Tribunal for the Trial of German Major War Criminals (the IMT, often known as the Nuremberg Tribunal), and the International Military Tribunal for the Far East (the IMTFE, or Tokyo Tribunal).<sup>36</sup> These tribunals, established by the Allies, were to prosecute high level Germany and Japanese military and civilian authorities whose crimes "had no particular geographic localization".<sup>37</sup> International judicial proceedings before these tribunals were a catalyst for the commission of hundreds of trials before various military and civilian tribunals in the many zones of occupation in Europe and the Pacific.<sup>38</sup> The Nuremberg and Tokyo Charters were drafted to outline the jurisdictions and capacities of the respective tribunals.<sup>39</sup>

The Nuremberg and Tokyo Charters, under Articles 6(a) and 5(a), respectively, gave the tribunals the jurisdiction to prosecute for "crimes against the peace", which were defined as the "planning, preparation, initiation or waging of a

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<sup>34</sup> *Id.*

<sup>35</sup> *Bassiouni, supra note 1, at 549.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, at 551.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

war against aggression, or a war in violation of international treaties, agreements or assurances".<sup>40</sup> These prosecutable war crimes, defined in subsection (b) of the respective articles, included "murder, ill-treatment of deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war of persons in the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages, or devastation not justified by military necessity"<sup>41</sup>. Subsection (c) of the respective articles also gave the courts the jurisdiction to prosecute "crimes against humanity", defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".<sup>42</sup>

The Nuremberg Tribunal tried 21 Nazi leaders, three of whom were acquitted, seven were sentenced to prison terms, and the remaining 11 were sentenced to death.<sup>43</sup> As for the Tokyo Tribunal, which tried 25 Japanese defendants, seven of whom were sentenced to death, and the remaining of whom received prison sentences.<sup>44</sup> While the development and outcome of the Nuremberg and Tokyo tribunals are essential milestones in the development of international criminal law, the majority of post-World War II prosecutions did not actually occur before these two tribunals, but were instead carried out by the Allied powers in

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<sup>40</sup> Charter of the International Military Tribunal, 82 UNTS 279; 59 Stat. 1544; 3 Bevens 1238; 39 AJILs 258 (1945).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Werle, supra* note 5, at 8.

<sup>44</sup> *Id.*, at 11.

their respective zones of occupation.<sup>45</sup> A fundamental example of this was Allied Control Council Law No. 10, largely a reflection of the Nuremberg Charter, which resulted in 12 important United States-authorized trials in Germany.<sup>46</sup> A key contribution of Control Council Law No. 10, which still has an effect in international criminal law today, was the elimination of the nexus to war crimes or crimes against peace required by the Nuremberg Charter to prosecute crimes against humanity.<sup>47</sup> In total, the combined trials commissioned by the Allied powers in their respective occupation zones resulted in more than five thousand trials for German and Japanese authorities indicted for the commission of war crimes and crimes against humanity.<sup>48</sup>

It is vital to recognize the immense significance of the post-World War II period to the development of the field of international criminal law. Collectively, the various aforementioned legal proceedings established several core principles of modern international criminal law, and tribunals several decades later continued to cite the outcomes of these proceedings as key legal precedent. Most importantly, the Nuremberg and Tokyo tribunals established the concept that many violations of the law of war, or international humanitarian law, which had previously only held states liable for responsibility, also, with these tribunals, gave rise to individual criminal responsibility for the participation in the commission of these crimes. Moreover, the two tribunals ascertained, and codified, the primacy of international law over domestic law—while the conduct many defendants were accused for was authorized by domestic law, the Charters of both tribunals highlighted that crimes

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<sup>45</sup> *Id.*, at 12.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

against humanity, especially, were prosecutable and punishable “whether or not in violation of the domestic law of the country where perpetrated”.<sup>49</sup>

Furthermore, the Nuremberg and Tokyo Charters officially codified the promulgation of two new, and crucial to the international criminal field, groups of crimes: crimes against the peace and crimes against humanity.<sup>50</sup> While the inclusion of these crimes was controversial in terms of the legality principle of international law, *nullum crimen sine lege, nulla poena sine lege* (individuals cannot be punished for conduct that had not been deemed a crime at the time of the commission of the act), the Tribunals, Nuremberg in particular, ruled that this objection was inapplicable in light of the magnitude of the nature and degree of the atrocities committed.<sup>51</sup> When defendants in the Nuremberg trials argued that they could not, under international law, be prosecuted for certain acts which were not technically crimes under international law at the time these acts were committed, the Tribunal’s response was that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>52</sup>

Finally, the Tribunals confirmed that “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”—and thus rejected previously held common law doctrines of the immunity of sovereigns and heads of state that could have removed liability from particular defendants, or that individuals executing superior orders should be acquitted.<sup>53</sup> The Tribunals also set the precedent for not only convicting civilian and military

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<sup>49</sup> *Bassiouni, supra* note 1 at 560.

<sup>50</sup> Beth Van Schaack & Ron Slye, *A Concise History of International Criminal Law* 34-38 (Saint Clara University School of Law, 2007) [hereinafter *Van Schaack*].

<sup>51</sup> *Van Schaack, supra* note 50, at 35.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*, at 37.

authorities, but private actors as well, such as financiers and industrialists, for their participation in war crimes and crimes against humanity.<sup>54</sup> Collectively, the principles and precedents emerging from the post-World War II tribunals, now known as the “Nuremberg principles”, have formatively shaped the field of international criminal law.

### C. The War is Over: Now What?

#### 1. Post WW II: The United Nations Charter

The post-World War II period ushered in an upsurge of optimism and belief in the power of law and international judicial institutions in the protection of populations and the reigning in of state violence. However, a period of stagnation in the development of the field of international criminal law set in with the onset of the Cold War, relatively soon after the post-World War II period. Nonetheless, this stagnation did not occur immediately. The United Nations, with its Charter outlawing the use of force under Article 2(4), was established.<sup>55</sup> The United Nations Charter was also the first international agreement to assert the equality of men and women’s rights as a fundamental human right.<sup>56</sup> Among the purposes of the United Nations Charter, as stated in Article 1, is “To achieve international cooperation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>57</sup> The drafting process at the United Nations Conference on International Organization in San Francisco in 1945 was attended by nine women’s organizations, a tiny portion of the

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<sup>54</sup> *Id.*

<sup>55</sup> Torild Skard, *Getting Our History Right: How were the Equal Rights of Men and Women Included in the Charter of the United Nations?* 37-60 (Norwegian Institute of International Affairs, Paper No. 1, 2008).

<sup>56</sup> Skard, *supra* note 55, at 38.

<sup>57</sup> U.N. Charter art. 1, para.3.

160 organizations that participated in the Conference.<sup>58</sup> Even then, there were clear divides amongst the small number of feminist organizations, mainly based along nationality lines. Latin American women's groups, who had only recently emerged from or were still in the process of struggling for political rights in their own countries, were insistent on the specific inclusion of women's equality as a founding principle for this new international organization.<sup>59</sup> On the other hand, American, British, and Canadian groups rejected the notion of singling out women in the language of human rights, insisting that this would lead to the further segregation of women, and viewed the Latin American stance as reminiscent of early 20<sup>th</sup> century militant feminism.<sup>60</sup> The final equality clause of the Charter was a compromise between both sides, led by Chinese and Norwegian women's groups who occupied an "in between" position.<sup>61</sup>

Moreover, besides the codification of a general equality clause between men and women in the Charter, no mention of the manner in which women had specifically suffered during World War II, and conflict in general, was made in the Charter or in the peace agreements following the war.<sup>62</sup> For example, what is estimated to be between 100,000 and 200,000 women were made to be "comfort women" for Japanese troops by being forced into government-sanctioned military brothels during World War II.<sup>63</sup> During subsequent peace agreements, these "comfort women" were not referred to during peace agreements with Japan, nor were they included under the prisoner of war clause in article 16 of the Peace

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<sup>58</sup> *Id.*, at 43.

<sup>59</sup> *Id.*, at 47.

<sup>60</sup> *Id.*, at 48.

<sup>61</sup> *Id.*, at 49.

<sup>62</sup> Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 McGill L.J. 217, 217-240 (2000).

<sup>63</sup> Copelon, *supra* note 61, at 221.

Treaties with Japan, which provides for indemnification of prisoners of war who “suffered undue hardship”.<sup>64</sup>

## 2. Post WWII: The Genocide Convention and the Geneva Conventions

The immediate post-World War II era was also witness to the promulgation of the 1948 Genocide Convention and the four Geneva Conventions of 1949 for the protection of the wounded, shipwrecked, prisoners of war, and civilians in times of conflict.<sup>65</sup> The proliferation of these key treaties substantiated a newfound expectation for the establishment of individual criminal responsibility for breaches of international law. The Geneva Conventions, especially, codified the various war crimes under the Nuremberg and Tokyo Charters, identifying them as “grave breaches”, a category of crimes that carried on throughout the promulgation of various instruments in international law.<sup>66</sup> The Genocide Convention and Geneva Conventions ushered in the promulgation of various other multilateral treaties prohibiting torture, various forms of terrorism, and war crimes in non-international armed conflict.<sup>67</sup>

## 3. Post WWII: Early Attempts at the Formation of an International Criminal Court

The immediate post-war period also bore witness to efforts by members of the international community to build a permanent judicial institution to prosecute international crimes—one that not was dependant upon victors’ justice—apart from the International Court of Justice, the judicial branch of the United Nations, the jurisdiction of which was only over states.<sup>68</sup> Thus, in 1947, the General Assembly established the International Law Commission (ILC) to promote the development and codification of public international law, but also requested of the Commission to

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<sup>64</sup> *Id.*

<sup>65</sup> *Bassiouni, supra note 1, at 563.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Van Schaack, supra note 50, at 39.*

study “the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes”, the subject matter of jurisdiction of which would incorporate the Nuremberg and Tokyo principles.<sup>69</sup> In other areas of international law, the international community also worked towards creating a structured field of international human rights law, which in many ways constituted a product of the crimes against humanity charge at Nuremberg.<sup>70</sup>

#### 4. Post WWII: The Universal Declaration of Human Rights and the Covenants

In 1948, the landmark Universal Declaration of Human Rights was adopted, and followed in 1966 by two Covenants, one protecting civil and political rights, and the other economic, social, and cultural rights.<sup>71</sup> Women’s participation in the Universal Declaration of Human Rights came mainly through the participation of the female delegates of the Commission on the Status of Women (CSW), which was established by the United Nations in 1946 as a mechanism for monitoring and promoting the rights of women.<sup>72</sup> The first draft of the Universal Declaration of Human Rights displayed a high degree of gender insensitivity. For example, its first article began with the statement “All men are brothers”.<sup>73</sup> The CSW, called to the drafting table due to initially minor concerns about possible gender bias in the language of the Declaration, worked towards ensuring a gender-neutral language of the text (changing the aforementioned statement, for example, first to apply to “all people” and finally to “all human beings”), as well as contributing to debates on Article 16 and 25, related to marriage and family status.<sup>74</sup> The Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights,

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<sup>69</sup> *Id.*, at 40.

<sup>70</sup> *Id.*, at 41.

<sup>71</sup> NIAMH REILLY, WOMEN’S HUMAN RIGHTS 86-92 (Polity Press 2009).

<sup>72</sup> REILLY, *supra* note 67, at 87.

<sup>73</sup> *Id.*, at 88.

<sup>74</sup> *Id.*

and the International Covenant on Economic, Social, and Cultural Rights, all explicitly prohibited discrimination on the basis of sex, but further than that, little of the provisions of these treaty specifically addressed women.<sup>75</sup>

#### D. The Cold War Era

##### 1. The Stagnation of International Criminal Law and Establishment of Feminist Legal Theory

With the onset of the Cold War, the first major crisis of which began with the Berlin Blockade in 1948, work on the codification of international human rights norms, and the codification of international law in general, either slowed down considerably or come to a standstill. In particular, the proposed project for the creation of a permanent international criminal court called for by the General Assembly came to a halt, mainly because delegates of the Assembly were unable to agree on a concise definition of the “crime of aggression” while the world witnessed proxy wars by the United States and the Soviet Union throughout the developing world.<sup>76</sup> Domestically, however, the 1960’s ushered in a crucial era for feminist activism. A new wave of feminism, dubbed ‘second wave’ feminism (as opposed to the ‘first wave’ of feminist activity centered around gaining women’s suffrage), began in the United States in the 1960’s and broadened the women’s rights debate to issues of sexuality, family, the workplace, reproductive rights, and various legal and de facto inequalities.<sup>77</sup> The movement, while closely connected to the civil rights movement and the antiwar movement in the United States, eventually spread throughout Europe and certain states in Asia.<sup>78</sup> In the United States, ‘second wave’ feminism also led to a dramatic increase in the number of female students and

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<sup>75</sup> *Id.*, at 92.

<sup>76</sup> *Van Schaack*, *supra* note 50, at 41.

<sup>77</sup> Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CAL L. REV. 381, 381-429 (2012).

<sup>78</sup> Bartlett, *supra* note 76, at 383.

faculty in law schools in the 1970's, and for the first time, law schools offered specific courses on women and law.<sup>79</sup> This new legal movement, led by an up and coming generation of women's rights lawyers, was exhibited through an interrelated combination practice and theory, now know as feminist legal theory.<sup>80</sup>

Feminist legal theory emerged as a response to the feminist belief in the inadequacy existing legal theories' understanding of the situation of women vis-à-vis the law.<sup>81</sup> Feminist legal theory is based on the idea that the law, as it stands, has been a fundamental participant in the historical subordination of women. While feminist jurisprudence attempts to illustrate the manner in which the law has contributed towards women's subordination, feminist legal theory seeks to reform the status of women through modifying the law and its approach to gender.<sup>82</sup> An understanding of existing feminist legal theories is crucial in understanding the feminist project on the international legal level. Feminist theories can be presented in a variety of different manners, and it must be stressed that feminist scholars, and ideas, rarely fit neatly into any one specific feminist category. A rough typology of legal feminism, or a charting of the major "schools" of feminist legal theory, however, may prove useful in studying the manner legal feminism is reflected in the international sphere.

## 2. Schools of Feminist Legal Theory

One school of feminist legal theory is liberal feminism, which often phrases its arguments in terms of individual rights and usually accepts the language and goals of existing domestic legal orders.<sup>83</sup> The primary goal of liberal feminist is to

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<sup>79</sup> *Id*, at 384.

<sup>80</sup> *Id*.

<sup>81</sup> HILARY CHARLESWORTH AND CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW 38-337 (Manchester University Press 2000).

<sup>82</sup> Charlesworth, *supra* note 81, at 38.

<sup>83</sup> *Id*, at 39.

achieve equality between men and women in the public sphere, in areas such as political participation and representation, and equality in terms of paid employment and educational opportunities.<sup>84</sup> Liberal feminist Sandra Harding describes the school's platform as the idea that "bad law is the problem, not law-as-usual".<sup>85</sup> Liberal feminism has been criticized for being inadequate in "transform[ing] a world in which the distribution of goods is structured along gender lines", in that "the promise of equality as 'sameness' to men only gives women access to a world already constituted by men and with the parameters determined by them".<sup>86</sup>

Another school of feminist legal theory, 'difference' feminism, is concerned with the identification of the traits and perspectives classified as being particular to women, and emphasizes the notion that women's subordination allows them to produce more complete and precise accounts of nature and social life that are "morally and scientifically preferable" to those formulated by men.<sup>87</sup> Difference feminist approaches have been controversial due to the theory's insinuation that women are "naturally" endowed with certain qualities, which can actually perpetuate inequality.<sup>88</sup> Moreover, critics of the theory, such as Catherine Mackinnon, have questioned the legitimacy of qualities categorically grouped under "the feminine", stating that what is deemed "feminine" is actually defined by a patriarchal structure.<sup>89</sup>

A different perspective on feminist legal theory comes from radical feminism, which explains women's subjugation and inequality—presented as both political

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, at 40.

<sup>88</sup> *Id.*, at 41.

<sup>89</sup> *Id.*, at 42.

and sexual inequality—as a direct cause of men’s domination of women.<sup>90</sup> Catherine Mackinnon has been a consistent advocate of this approach, arguing that social relations are organized in a manner “that men may dominate and women must submit”, and that the law directly subordinates women by maintaining a hierarchical system based on sex.<sup>91</sup> Mackinnon’s arguments have been controversial both within and outside feminist circles, especially with regards to questions of how Mackinnon can identify as an “authentic woman’s voice” in a world she describes as completely controlled by men.<sup>92</sup> Other criticism have been made regarding radical feminism taking an essentialist position without taking into consideration other influencing factors such as race or sexuality.<sup>93</sup>

On the other hand, another school of legal theory, post-modern feminism, is cynical of modern, universal theoretical accounts of women’s inequality and instead seek to incorporate “the fractured identities of modern life”.<sup>94</sup> Carol Smart, a strong exponent of post-modern feminism, for example, has doubted the utility of “Grand Feminist Theory” in achieving women’s equality in that these constructions, according to post-modern feminism, “do not capture the contextualization and partial nature of our knowledge”.<sup>95</sup> Proponents of this approach advise avoiding broad, conceptual theories and instead concentrating on the different realities of women’s experiences, and examining the inconsistencies and contradictions in legal rule with regards to gender.<sup>96</sup> Post-modern feminism finds that the law does not function in a monolithic way to subjugate women, and thus the idea of telling “one

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, at 43.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*, at 44.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*, at 45.

<sup>96</sup> *Id.*

true story” of the law’s subordination of women should be avoided.<sup>97</sup> Certain feminist activists and scholars, however, have criticized post-modern feminism for focusing on “localized narratives [that] produce too weak a discourse to respond to the global structure of continued oppression of women”.<sup>98</sup>

Feminist theories have not been limited to Western feminists, or feminists from the “North”. Third world feminism refers to feminist theories developed by both women in the “South” as well as women of color in the “North”.<sup>99</sup> Third world feminist approaches have taken a variety of different forms depending on different historical perspectives, and are often based on contexts of nationalist struggle.<sup>100</sup> Third world feminists often criticize feminist theories originating from the North for their “wholesale application of Western feminist theories” both domestically and internationally, especially liberal feminism’s approach towards the elimination of sex discrimination.<sup>101</sup> Third world feminists argue that while gender, as a factor on its own, may be the main influencing factors in the subordination of women in the West, third world women also have to cope with key additional causing factors that include their subjugation based on race and imperialism.<sup>102</sup> More recently, third world feminist movements have moved from strong links to nationalist struggles to focusing on the influence of poverty on the inequality of women.<sup>103</sup> Thus, they argue that feminism, as an entire movement, must broaden its agenda to more than solely women’s oppression based on sex, and must incorporate the interrelated factors of gender, race, class, colonialism, and global capitalism.<sup>104</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, at 46.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, at 47.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

In terms of tangible outcomes, it was liberal feminism that was able to lay claim to most of the success stories of second wave feminism in the United States. With regards to legislation, the liberal feminist movement was at the forefront in advocating for, and realizing, legislation related to gender-based discrimination. One of the most famous pieces of legislation that arose from the domestic liberal feminist movement in the United States was the Equal Pay Act of 1963, which made gender-based wage discrimination illegal.<sup>105</sup> The Civil Rights Act of 1964, Title VII of which prohibited employers from discrimination on the basis of gender, as well as race, color, religion, or national origin, was a key achievement of the civil rights movement, the feminists of which were mainly of the liberal strand. However, it has been argued that “radical feminists...created the atmosphere of urgency in which liberal feminists were finally able to pass the Equal Rights Amendment through Congress and most of the states.”<sup>106</sup> Perhaps this is true—radical feminists were from absent throughout second wave feminism. It was radical feminists who were responsible for famously staging various forms of theatrical activism in 1969 against the portrayal of women in the Miss America Pageants, for example.<sup>107</sup> In general, radical feminists during this time period did produce “a prodigious output of leaflets, pamphlets, journals, magazine article, newspaper and radio and TV interviews”.<sup>108</sup> But who was it that was able to get results? The liberals.

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<sup>105</sup> Barbara L. Epstein, *The Successes and Failures of Feminism*, 14 J. WOM. HIST. 118, 118-125 (2002).

<sup>106</sup> Ellen Willis, *Radical Feminism and Feminist Radicalism*, 9/10 SOC TEXT 91, 91-118 (1984).

<sup>107</sup> Epstein, *supra* note 105.

<sup>108</sup> ELLEN WILLIS, *NO MORE NICE GIRLS* 118 (University of Minnesota Press 2012) (1992).

## **II. The Birth of the Global Feminist Movement and Feminist Engagement in International Human Rights Law**

### **A. The Globalization of Feminism**

#### **1. The Early Years**

National women's movements in a number of countries, not just within the United States, during the 1970's prompted the more noticeable emergence of women's rights on the international agenda. In 1975 in Mexico City, 1980 in Copenhagen, and 1985 in Nairobi, the United Nations organized three world conferences on the status of women, indicating the start, middle, and end of the UN-sponsored "Decade for Women".<sup>109</sup> The official themes of this Decade were both equality and development, but the majority of the weight continued to be about general and widely encompassing measures of social development rather than violations of individual women's rights.<sup>110</sup> Reference to women's rights during these conferences was primarily made in the context of under-development. Issues of women's rights at the conferences were also often connected with a variety of highly charged political issues, such as East-West hostility and the Palestinian question, which "deflected attention from the whole issue of women's rights".<sup>111</sup>

The Declaration on the Equality of Women and their contribution to Development and Peace that emerged in Mexico in 1975 began the process of women's increased inclusion in international human rights law by incorporating declarations of women's equal rights and responsibilities with regards to society, family, and employment and "all other rights to full and satisfying economic activity", as well as freedom of choice on issues of matrimony and reproductive

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<sup>109</sup> MARY E. HAWKESWORTH, *GLOBALIZATION AND FEMINIST ACTIVISM* 90 (Rowman and Littlefield Publishers, Inc. 2005).

<sup>110</sup> *Id.*

<sup>111</sup> Felice Gaer, *Women, International Law, and International Institutions: The Case of the United Nations*, 32 *WOM STUD. INT. FORUM* 60, 60-66 (2009).

rights.<sup>112</sup> The stated standard of the Declaration was equality with men.<sup>113</sup> At the World Conference on Women in Copenhagen in 1980, continued emphasis was made on the interrelatedness of inequality and under-development. Significantly, the topic of violence against women began being discussed in Copenhagen; however, the framework of the discussions was not women's human rights, but domestic violence in social and health contexts.<sup>114</sup>

The fact that the narrative regarding women's issues had yet to be fully linked to the issue of human's rights, or women's human rights, is significant in that in 1979, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) had been adopted by the General Assembly by 130 votes to none, with ten abstentions.<sup>115</sup> The text of the Convention was prepared mainly by working groups within the CSW, as well as a working group of the Third Committee of the General Assembly between 1976 and 1979.<sup>116</sup> Drafting of the Convention was promoted during the UN Conference in Mexico City in 1975, where calls had been made for the promulgation of a convention on the elimination of discrimination against women, with "effective procedures for implementation", with the General Assembly pushing for the completion of the Convention in time for the conference in Copenhagen in 1980.<sup>117</sup>

While the Convention was conveyed by the General Assembly to be a reformative instrument for women's rights, reception of the Convention varied. The mainstream view held by most participants in the drafting process, namely women of the CSW and the independent monitoring body composed of 23 elected experts,

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<sup>112</sup> *Id.*, at 63.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*, at 62

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

was that it was instrumental in the advancement of women's rights in that it aimed at establishing previously non-existent stands for women's rights on a global level, providing a universal definition for discrimination against women, and helping "make violence against women a human rights issue". However, CEDAW was not a unanimously celebrated instrument—considerable critique of the Convention came from both within and outside feminist circles. Certain critics find that CEDAW "failed to create gender equality because its scope remains limited to women" and that its "focus on women enshrines an understanding of sex as a binary of men/women with a perpetrator victim relationship".<sup>118</sup> Similarly, feminist international law scholar Hilary Charlesworth has applied this critique to the establishment of a "women's branch" human rights law in general, stating that doing so has allowed for its marginalization and that it has further perpetuated a situation whereby "mainstream human rights institutions have tended to ignore the application of human rights norms to women".<sup>119</sup> Critiques of CEDAW have also come from a third world feminist perspective that have voiced concerns of cultural relativism, in that the Convention "fails to recognize those rights that a woman may possess in relation to her group membership in her class, her caste, and her ethnic group that may in fact be more beneficial to her well-being in that society".<sup>120</sup> These objections were most significantly exemplified by tensions between drafting members from developed and developing countries over the issue of female circumcision. As per the aspirations of the General Assembly, however, CEDAW had been adopted before the start of the UN Conference on Women in Copenhagen in 1980.<sup>121</sup>

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<sup>118</sup> Daren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COL. J. GENDER & LAW 98, 98-163 (2011).

<sup>119</sup> Charlesworth, *supra* note 81.

<sup>120</sup> Rosenblum, *supra* note 109, at 121.

<sup>121</sup> Gaer, *supra* note 111, at 63.

At the UN Conferences on Women in Mexico City and Copenhagen, as well as later in Nairobi, large numbers of women's NGOs attended from various regions of the world and were a driving force behind the discussions at these conferences. During the first two UN conferences on women, disputes arose between different women's groups—for Western liberal feminists, the significant feminist issues of interest were sexual rights, reproductive freedom, and equality before the law. For third world feminists, however, priorities were largely political and socio-economic—these included issues such as poverty, armed conflict, and neocolonialist domination.<sup>122</sup> However, with the global restructuring of capitalism during the early 1980's, feminist activists around the world were faced with new economic, political, and ideological challenges. In response to these challenges, the international women's movement began taking on a transnational character, and the solidarity of feminist activists across border became a key feature of the global feminist movement.

## 2. Feminism Goes Global

The 1980's was a decade that witnessed new forms of governance and forms of activism at the global level, as well as shifts in the global political economy. New governance structures included the growing power and influence of neo-liberal policies that began to be used by multinational corporations, the International Monetary Fund (IMF), and the World Trade Organization (WTO), as well as regional blocks such as the European Union and the North American Free Trade Agreement (NAFTA).<sup>123</sup> These institutions were primarily behind restructuring shifts in the global economy from state-centered economic models to free-market economic

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<sup>122</sup> *Id.*

<sup>123</sup> PEGGY ANTROBUS, *THE GLOBAL WOMEN'S MOVEMENT: ISSUES AND STRATEGIES FOR THE NEW CENTURY*, 68 (Zed Books Ltd., 2004).

approaches in the First World, the shift from socialism to capitalism in the Second World, and structural adjustment programs that were advocated for the Third World.<sup>124</sup> Parallel to the reformation of the global economic system, the 1980's was a period that was also witnessed the emergence of a transnational fundamentalist movement, mostly in the Middle East, North Africa, and South Asia, that aimed at curtailing Western political influences and reclaiming traditional social and gender norms.<sup>125</sup> The response to these various shifts in the overall global structure was collective transnational action taken by various groups that focused mainly on human rights, the environment, and global economic equality.<sup>126</sup> Women, participants of this vast movement of transnational activism, began to organize and unite across borders also in response to changing world modes of organization.<sup>127</sup> Thus, the UN conference on women held in Nairobi in 1985 came at a time when a shift was occurring in the nature and direction of international feminist activism.

The 1985 Nairobi Conference began expanding the consciousness of women's human rights in its discussions about the human rights of women in minority groups and indigenous populations, but the rhetoric was mainly targeted towards guarantees of social, economic, and cultural rights rather than their rights as women.<sup>128</sup> However, progress was made at Nairobi in the contextualization of the topic of violence against women as part of the sphere of women's human rights. The conference called for legal measures to prevent violence against women.<sup>129</sup> However, the proposition was for "national machinery" to deal with the matter, and there remained a lack of a formal suggestion to hold perpetrators accountable

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<sup>124</sup> Antrobus, *supra* note 123, at 68.

<sup>125</sup> *Id.*, at 69.

<sup>126</sup> *Id.*, at 72.

<sup>127</sup> *Id.*

<sup>128</sup> Gaer, *supra* note 111, at 63.

<sup>129</sup> *Id.*

through judicial processes, or place any prescribed responsibility on states to protect women.<sup>130</sup>

It was mainly third-world women's NGOs that emphasized the importance of a law-centered approach with regards to the status of women.<sup>131</sup> The members of these NGOs, mainly third world feminists, highlighted the notion that law, and the legal protection of human rights, was not only a repressive barrier to the equality of women, but a key tool that could be used for transformation.<sup>132</sup> Nevertheless, while these activists were able to raise consciousness on the important interrelationship of the law and women's rights, and while the notion of legal approaches was well received in Nairobi, concerns remained that a legal approach, alone, would be insufficient without an accompanying vision of social transformation.<sup>133</sup> It was also at this time, during the mid-1980s, that feminist consensus making was being made across both regional and ideological divisions. A women's movement of a new type had emerged: the transnational feminist movement.<sup>134</sup>

Thus, while women's organizations, even when participating in international conferences, had previously been restricted to domestically based organizations that worked on localized community concerns at the grassroots level, the 1980's marked the start of a shift in this dynamic whereby women began making connections between the local and global level. A prime example of this is the manner in which violence came to be discussed at the UN conferences on women. Discussions around violence against women first emerged as a community-based narrative, and this was the case up until the 1980 conference in Copenhagen. In

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<sup>130</sup> *Id.*

<sup>131</sup> Antrobus, *supra* note 123, at 33.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Gaer, *supra* note 111, at 63.

Nairobi in 1985, however, the issue was framed as a global one.<sup>135</sup> In addition, the fact that it was becoming organizationally easier for local activist groups to form networks with one another meant that the 1980's was a decade of increased transnational activism in general. Therefore, this phenomenon was not only restricted to women, rather, environmental and other social movements changed from being domestic-based to evolving into gaining a transnational character.<sup>136</sup> With regards to women's movements, however, the start of framing the issue of violence against women as a human-rights issue, a development that occurred in Nairobi in 1985, was also a key factor in the framing of women's rights in general as a transnational concept.<sup>137</sup>

#### B. Feminist Activism in International Human Rights Law: Karen Engle

Feminist scholar Karen Engle has described the period of time between 1985 and 1990 as a time of "liberal inclusion" for feminist activism, theory, and critique of international human rights law, with "liberal inclusionist" feminists arguing that women should, and could, be significantly incorporated in the international human rights field.<sup>138</sup> The assumption, therefore, was that women should be treated as subjects of international law just as men were, and that international law, if properly applied, could successfully incorporate women's rights issues. The main narrative, according to Engle, of the liberal inclusion period was for "doctrinal inclusion and institutional expansion".<sup>139</sup> Liberal inclusionists believed that women, in principle were protected from a variety of concerns under international law: from rape in armed conflict under international humanitarian law, and from domestic

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<sup>135</sup> *Id.*

<sup>136</sup> Antrobus, *supra* note 123, at 68.

<sup>137</sup> Gaer, *supra* note 111, at 63.

<sup>138</sup> Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in *International Law: Feminist Approaches* (Doris Buss and Ambreena Manji, ed., 2005).

<sup>139</sup> *Id.*, at 52.

violence, clitoridectomy, and health abuses by international human rights law. For these feminists at the time, if international law was not being used to protect women's rights, it was not because of a lack of existing protective law, but a lack of enforcement.<sup>140</sup>

Some liberal inclusionists focused on enforcement. Others attempted to analyze why international institutions did not adequately protect women's rights. Certain feminists of the liberal inclusion phase suggested that increasing the number of women at these organizations might lead to increased focus on women's issues.<sup>141</sup> Others argued that efforts should be made to ensure international institutions recognized that since international law protected women, the mandates of these international institutions must reflect this. Overall, the belief was that the suitable people, or enough attention being addressed to the right issues, in this institutions would inevitably lead to increased importance being given to women's human rights concerns.<sup>142</sup>

Engle describes as a second phase in feminist activism and critique of international human rights law, that of structural bias. It is important to note that Engle emphasizes the fact that these stages overlap, and that certain aspects of each stage can be found in others. Engle places the structural bias stage between 1987 and 1995, when structural bias critics of international human rights law asserted that the simple inclusion of women into the international law structure as it existed was impossible.<sup>143</sup> These feminists argued that international law was male in nature, and, in turn, structurally biased against women.<sup>144</sup> Therefore, the structural bias approach was, in and of itself, a critique of the liberal inclusionist approach.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*, at 53.

Structural bias feminists emphasized that since international law as it stood could never allow for the integration of women, the entire international legal structure had to be changed.<sup>145</sup> While completely differing in basic beliefs about international law, structural bias feminists focused on many of the same concerns as liberal inclusion feminists, including domestic violence, clitoridectomy, and the law of war. However, structural bias critics saw that while various areas of international law offered protections against supposed violations of women's rights, it did so either for the wrong reasons, or with the wrong emphasis.<sup>146</sup> For example, structural bias feminist Hilary Charlesworth contended that while rape during armed conflict was a definite violation of international humanitarian law, the emphasis in the law was on rape being an issue of women's honor (and thus about the men affected by the attack on this honor), and not about women, qua women, as equal subjects under international law.<sup>147</sup>

While most structural bias feminists agreed with liberal inclusionist feminists on the idea that international institutions did not adequately concentrate on women's issues, their idea for reform was the major restructuring of both international law and these institutions in order to accommodate women.<sup>148</sup> Structural bias feminist Dorothy Thomas elucidated this when she stated that "the fundamental challenge for the movement for women's human rights is that it not become a reformist project; its recipe should not read 'Add women and stir', but 'Add women and alter'".<sup>149</sup> Structural bias feminists also classified "a series of dichotomies in public international law that perpetuated the inability of

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM J. OF INT LAW 613, 613-645 (1991).

<sup>148</sup> Engle, *supra* note 112, at 53.

<sup>149</sup> Dorothy Thomas, *Conclusion in Women's Rights, Human Rights* (J. Peters and A. Wolper, ed., 1995).

international human rights law to attend to women”.<sup>150</sup> The most frequently discussed of these dichotomies was that of public versus private distinction. Structural bias feminists focused much of their critique on women’s “private” lives, and generally considered women to be more directly subordinated by their families than their states, although they viewed governmental inaction as both the facilitator and the perpetuator of this dynamic.<sup>151</sup> Structural bias feminist analysis, while heavily centered on the public versus private dichotomy, also included various others that were viewed as key influencers of the structural bias against women, such as the prioritization by international law of the state over civil society.<sup>152</sup>

For both liberal inclusion and structural bias questions, there existed what Karen Engle dubs two “elephants in the room”—that is, two crucial questions that challenged both critiques.<sup>153</sup> The first was question was, “what is feminist about women’s human rights advocacy?”<sup>154</sup> This question of whether either liberal inclusion or structural bias analyses was unique to issues of gender challenged both approaches. The second question, or “elephant in the room”, was the issue of culture, or the “exotic other female”, whom Engle describes as “an imagined women—generally from the third world—who is seen to defend and promote practices that liberal and structural bias critics view as violations of women’s human rights”.<sup>155</sup>

The two elephants that challenged liberal inclusion and structural bias stages of feminist analysis of human rights law acted as a catalyst for the mergence of Karen Engle’s third proposed stage: third world feminist critiques of international

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<sup>150</sup> Engle, *supra* note 112, at 54.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*, at 57.

law, beginning in 1992.<sup>156</sup> Engle argues that these “elephants” significantly dented two central assumptions of structural bias feminism especially: first the “elephants” suggested that other modes of analysis could be similar to feminist methods and that, second, that the “male/female divide might not be the defining bias in international law”. Engle thus believes that it is not surprising that third world critiques of international law emerged in the early 1990’s, when an articulate theory of structural bias was being formed, because “the elephants were...in the room from the moment feminists began to articulate critiques of human rights law”.<sup>157</sup> Interestingly, Engle divides third world feminist analysis of international law and its institutions into two types that mirror the two aforementioned feminist critiques, liberal inclusion and structural bias.<sup>158</sup> The liberal inclusion position of third world feminists is that international law and its establishments has disregarded the specific concerns of third world women and should incorporate them within the existing structure.<sup>159</sup> The structural bias position of third world feminists argues that international law is so structurally biased specifically against third world women that the international legal system must be significantly modified in order to assimilate women into it.<sup>160</sup>

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<sup>156</sup> *Id.*, at 59.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*, at 60.

<sup>160</sup> *Id.*

### III. Feminist Engagement with Modern International Criminal Law

#### A. The Revival of International Criminal Law

Simultaneously, the period of time between the late 1980's and the early 1990's signified the reawakening of the international criminal legal project. During this time, a large group of Latin American and Caribbean states began seeking an international mechanism to address and combat transnational illicit drug trade, an issue of crucial importance to these states.<sup>161</sup> Per request of the General Assembly, the International Law Commission (ILC) began, once more, focusing on drafting a statute for a permanent international criminal court. The ILC finalized a draft statute in 1994 that created the foundation for increased consideration by an Ad Hoc Committee on the Establishment of an International Criminal Court, and, subsequently, a Preparatory Committee on the Establishment of an International Criminal Court.<sup>162</sup>

##### 1. The First Tribunal: Yugoslavia

The period of time during which the draft statute for a permanent international criminal court was being composed witnessed a return of genocide to the European continent, exhibited through mass killings, various forms of ethnic cleansing, and extreme violations of international law that occurred during the territorial war that accompanied the disintegration of the former Yugoslavia.<sup>163</sup> In particular, widespread pressure began mounting for an international legal response to extensive rapes and other violent abuses against women in the area of conflict.<sup>164</sup> As the war raged on, the UN Security Council attempted to address the conflict through a series of resolutions. Resolution 780, adopted on 6 October 1992 directed

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<sup>161</sup> Beth Van Schaack & Ronald C. Slye, *A Concise History of International Criminal Law*, 7-47 (Santa Clara Univ. Legal Studies, Paper No . 07-32, 2007).

<sup>162</sup> *Id.*, at 42.

<sup>163</sup> *Id.*, at 43.

<sup>164</sup> *Id.*

the Secretary-General at the time, Boutros Boutros-Ghali to form a Commission of Experts to record and verify violations of international law committed during the conflict.<sup>165</sup> Simultaneously, various individual states, as well as both governmental and nongovernmental organizations, advocated for the establishment of an ad hoc international tribunal with the purpose of placing individual responsibility for the abuses documented by the aforementioned Commission of Experts. The initial report of the Commission of Experts endorsed the same recommendation.<sup>166</sup>

On 22 February 1993, Resolution 808 was adopted by the Security Council, stipulating a unanimous decision by its members “that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”, with the Secretary General being tasked with outlining a specific proposal for this tribunal.<sup>167</sup> Boutros-Ghali subsequently issued a report outlining a proposed structure for the tribunal and included a draft statute that consisted of clauses constituting existing international humanitarian and criminal law.<sup>168</sup> The Security Council unanimously adopted the draft statute in Resolution 827 in May of 1993 and the International Criminal Tribunal for Yugoslavia (ICTY) was henceforth established.<sup>169</sup> Based on Article 1 of the adopted ICTY Statute, the ICTY ad hoc tribunal has jurisdiction over “serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”.<sup>170</sup> Articles 2-5 of the Statute gave the court jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war,

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*, at 44.

<sup>169</sup> *Id.*

<sup>170</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, 32 ILM 1192 [hereinafter *ICTY Statute*].

genocide, and crimes against humanity—thus, the sources for prosecutable international law crimes under the ICTY were either international humanitarian law or customary law.<sup>171</sup>

## 2. The Second Tribunal: Rwanda

A year later, in 1994, Rwanda became a state overwhelmed with genocide of massive proportions. Within four months, more than 800,000 Tutsi and Hutu citizens were killed—this rate far surpassed that of the Nazi Holocaust.<sup>172</sup> Already having formed a tribunal for the international law violations that occurred in the former Yugoslavia, the Security Council was unable to disregard the critical situation in Rwanda, especially since the international community had largely remained unresponsive during the heightening conflict.<sup>173</sup> Resolution 955 of the Security Council, stating that the extensive violations of international law in Rwanda constituted threats to international peace and security as outlined in Chapter VII of the UN Charter, thus established the International Criminal Tribunal for Rwanda (ICTR), with its own governing statute.<sup>174</sup> Upon establishment by the Security Council, both ad hoc tribunals shared an Appeals Chamber and Chief Prosecutor. However, with observers' arguments that Rwandan prosecutions were not receiving adequate attention from the Chief Prosecutor, the ICTR was appointed its own Chief Prosecutor.<sup>175</sup> The ICTR Statute, under Article 1, had jurisdiction over "serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of

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<sup>171</sup> *ICTY Statute*, *supra* note 155, Art. 2-5.

<sup>172</sup> Van Schaack, *supra* note 146, at 44.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

neighboring States between 1 January 1994 and 31 December 1994.<sup>176</sup> Under Articles 2-4 of the Statute, the ICTR had jurisdiction over genocide, crimes against humanity, and war crimes based on violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.<sup>177</sup>

### 3. The Establishment of an International Criminal Court

A sense of renewed international faith in the international legal project served as a key catalyst for the establishment of a permanent international criminal court.<sup>178</sup> The Preparatory Committee, whose formation was originally prompted by the ILC's draft statute of 1994, convened six times to produce a completed draft Statute that was extensively negotiated at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, famously known as the Rome Conference, in June and July 1998 in Rome, Italy.<sup>179</sup> The participants of the conference constituted 160 states, thirty-three intergovernmental organizations, and a combination of 236 non-governmental organizations.<sup>180</sup> The conclusion of the conference was the adoption of the Rome Statute of the International Criminal Court by a vote of 120 in favor, 7 against, and 21 abstentions.<sup>181</sup>

#### B. Women and the New International Criminal Law

Throughout the process of the creation and operation of the two tribunals and the drafting of the ICC statute, the issue of women was given a comparatively significant degree of attention, largely unprecedented in the drafting of non-women

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<sup>176</sup> Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 ILM 1598 [hereinafter *ICTR Statute*].

<sup>177</sup> *ICTR Statute*, *supra* note 161, Art. 2-4.

<sup>178</sup> Van Schaack, *supra* note 146, at 45.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

specific international instruments.<sup>182</sup> In addition, an understanding of the need for women's inclusion in formal positions of these institutions in terms of appointing staff was much greater than that shown for the formation of previous international institutions.<sup>183</sup> Initially, no women were appointed by the Security Council to the Commission of Experts created to investigate atrocities in Yugoslavia. However, the resignation of one member and death of another led to the Secretary-General selecting two women for these vacancies.<sup>184</sup> The Commission also formed an all-woman investigation team including prosecution experts and female mental health experts that was in charge of investigating and reporting on allegations of rape and sexual violence in Croatia<sup>185</sup>. A subsequent report issued by the Secretary-General stated, "Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women".<sup>186</sup> While this recommendation was not included in the final text of either the ICTY or ICTR Statutes, it was incorporated in the Rules of Procedure and Evidence of both Tribunals with regards to the appointment of staff to the Victim and Witnesses Unit of the tribunals' Registry.<sup>187</sup> The Secretary-General's second and third appointments of the Chief Prosecutor for the ICTY and ICTR were both women.<sup>188</sup>

As for the appointment of judges of the tribunals, the selection process is done through the General Assembly's election from a list submitted by the Security Council, the criteria for which does not include gender—geographical distribution

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<sup>182</sup> Charlesworth, *supra* note 81, at 309.

<sup>183</sup> *Id.*, at 310.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 080 (1993), UN Doc. S/25704, 3 May 1993, at para. 88.

<sup>187</sup> Charlesworth, *supra* note 81, at 311.

<sup>188</sup> *Id.*

by virtue of the judges' nationalities is the main factor.<sup>189</sup> The first bench of the ICTY included two women out of eleven judges, as did the second bench. The ICTR bench included only one female judge.<sup>190</sup> While the inclusion of women from the onset was an improvement on other international judicial institutions such as the ICJ, female representation in the benches of the tribunals was visibly inadequate. Arguments from both within and outside feminist circles have maintained that the presence, in and of itself, of women in international tribunals is crucial in the field of international criminal justice, with regards to increasing the focus on the indictment of offenders of crimes against women as well as facilitating the collection of evidence from female survivors who can be averse to providing men with information about the offenses committed against them.<sup>191</sup>

In general, women's participation in the course of the legal activity of both the tribunals and the ICC was quite significant, largely due to strong forces of feminist activism throughout the process, and beforehand. In early 1993, from within the International Human Rights Law Group, emerged the Women in the Law Project (WILP), which sought to form a small delegation of human rights lawyers to investigate allegations of rape and other sexual violence in the former Yugoslavia.<sup>192</sup> Accordingly, a group of four women—Laurel Fletcher, Karen Musalo, Diane Orentlicher, and Kathleen Pratt—traveled to the area of conflict and, based on their findings, published a report in which their recommendation mirrored that of the Security Council's Resolution 808 with regards to the formation of a special tribunal to be formed for the prosecution of grave breaches of the Geneva Conventions and

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*, at 312.

<sup>192</sup> Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L LAW 1, 1-123 (2009).

other crimes of international humanitarian law, with an additional recommendation from the WILP for rape specifically to be a primary prosecutable crime.<sup>193</sup>

Simultaneously, a group of activists from the International Women's Human Rights Clinic of the City University of New York (CUNY), comprised of Jennifer Green, Rhona Copelon, Patrick Cotter, and Beth Stephens, known as the Green/Copelon Group, charged to influence participants in the drafting of the ICTY Statute, and later published a "blueprint" for the tribunal in which the key conclusion was that "the status of rape and other sexual and reproductive crimes against women will need to be litigated".<sup>194</sup> These efforts by both the WILP and the Green/Copelon Group became the first catalysts for women's groups, within the increasingly connected transnational feminist movement, to mobilize in order to construct a "feminist line" about desired reforms in the operation of the tribunals, specifically with regards to crimes of rape and sexual violence.<sup>195</sup>

## 1. Women and the ICTY

As soon as litigation in the ICTY and ICTR began, feminist activists began lobbying judges on the benches of the tribunals to generate changes in cases when prosecutors failed to charge of sexual violence.<sup>196</sup> A distinct lobbying strategy was used by feminists in both tribunals, with two clear examples of each. The first was in the Tadic case at the ICTY, which marked an important point when the feminist strategy transformed a case into a pivotal moment for the reclassification of rape and other forms of sexual violence as "priority crimes" in the tribunals.<sup>197</sup> In November 1994, Prosecutor Richard Goldstone issued an affidavit on the Dusan Tadic Case that according to Rhonda Copelon "gave decidedly secondary

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<sup>193</sup> Halley, *supra* note 176, at 13.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

consideration to the conditions affecting women and to the severity of rape, for example, treating it as less serious than beatings or omitting discussion of it”.<sup>198</sup> At this point, feminist intervention at the participatory level in the tribunal occurred.

At the hearing on the deferral application of the Tadic Case, Judge Odio-Benito, the only woman on the ICTY panel trying the case “questioned the Prosecutor on these defalcations and an amicus brief, filed by the International Women’s Human Rights Law Clinic, the Harvard Human Rights Program, and the Jacob Blaustein Institute, underscored the trivialization of violence against women”.<sup>199</sup> Promptly after that, Prosecutor Goldstone responded to the feminists who had written the amicus brief, stating his concurrence with their critiques regarding the characterization of rape and that while the declaration’s narrative on rape did not reflect the ICTY’s policy of “equating rape to other serious transgressions of international law”, “apart from the relevance to charges of genocide and crimes against humanity, rape and other sexual assaults will be prosecuted under the Statute’s provisions for torture, inhumane treatment, willfully causing great suffering or serious injury to body and inhumane acts, and other provisions that adequately encompass the nature of the acts committed and intent formulated”.<sup>200</sup> Prosecutor Goldstone was successfully become engaged in the feminist cause, and feminists had finally made their first achievement at the ICTY.

## 2. Women and the ICTR

A similar strategy was used by feminists during litigation at the ICTR. The Akayesu case before the tribunal was already in the process of being tried as a case mainly concerning widespread murder and other violence, until a witness on the

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<sup>198</sup> Joanne Barkan, *As Old as War Itself: Rape in Foca*, DISSENT, Winter 2002, at 60, 63, available at <http://www.dissentmagazine.org/article/?article=663>.

<sup>199</sup> Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243, 253-54 (1994).

<sup>200</sup> Copelon, *supra* note 184, at 253-254.

stand spontaneously testified about a case of gang rape. A subsequent witness followed suit.<sup>201</sup> The only female judge at the ICTR during the trial, Judge Navanethem Pillay, questioned the witnesses extensively about their testimonies regarding rape. After suspicions that these testimonies did not constitute isolated incidents of rape, the judges requested that the prosecution investigate the possibility of gender crimes in Rwanda attributable to Akayesu, and if true, consider amending the indictment to include charges for rape.<sup>202</sup> When the prosecution found significant evidence of rape attributable to Akayesu, an amended indictment was filed that added charges against Akayesu including rape and other inhumane acts as crimes against humanity.<sup>203</sup> Feminist advocates interceded at this point in swiftly filing an amicus brief, prepared by a representation of 80 feminist NGOs, stating that the ICTY Prosecutor had already indicted crimes of sexual violence, and discrediting the ICTR for “lagging behind”<sup>204</sup>. Again, the Prosecutor’s Office was responsive, and filed an amended indictment. The Akayesu case was the first in the tribunals to issue convictions on charges of rape and sexual violence. While these two examples proved that the tribunals witnessed “feminist activists emerging from the sidelines”, they were still “scrambling for a place at the table”.<sup>205</sup>

### 3. Women and the ICC

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) took place in Rome, Italy at the headquarters of the Food and Agriculture Organization from 15 June to 17 July,

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<sup>201</sup> Halley, *supra* note 176, at 17.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*, at 18.

<sup>205</sup> *Id.*

1998.<sup>206</sup> The participants of the conference constituted 160 states, thirty-three intergovernmental organizations, and a combination of 236 non-governmental organizations (NGOs).<sup>207</sup> The conclusion of the conference was the adoption of the Rome Statute of the International Criminal Court by a vote of 120 in favor, 7 against, and 21 abstentions.<sup>208</sup> The Ad Hoc Committee for the Establishment of an International Criminal Court previously established by the ILC in 1994 was followed by a Preparatory Committee, which met on an annual basis between 1996 and 1998.<sup>209</sup> While the work of the Ad Hoc Committee focused on the central issue of whether the proposal to create a court was feasible and attainable, the negotiation process within the Preparatory Committee focused on the text of the court's statute.<sup>210</sup>

The Preparatory Committee submitted a final working text during the Rome Conference that contained 116 articles.<sup>211</sup> During the preparation of the working text, the Preparatory Committee had realized that the text touched upon a variety of different areas of international and criminal law. In order to prevent this issue from leading to a lengthy negotiation process, the Committee divided the draft statute by subject matter into sections, allocating each subject to a working group.<sup>212</sup> The task of coordinating between the different sections in order to compose the final draft statute was left to the coordinators of the Preparatory Committee. The negotiation process at the Rome Conference was modeled closely after that of the Preparatory

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<sup>206</sup> Mahnoush A. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AMERICAN J. OF INT'L L. 22, 22-25 (1999).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

Committee.<sup>213</sup> The draft statute, which consisted of thirteen parts, was divided among different working groups. In addition to these working groups, political and regional groups, as well as nongovernmental organizations and lobby groups, played a significant role in the negotiation process at both the Preparatory Committee and the Rome Conference.<sup>214</sup>

The Rome Statute was an important stage in the institutionalization of the role of feminist activism in international criminal law largely due to the fact that the process as a whole was an important stage in the institutionalization of NGOs in general, and governance institutions with regards to the bodies of the United Nations. Accounts of participation in the Rome Conference show that both the Preparatory Committee and the Rome Conference were witness to a new notion: a newfound reliance of state delegations on NGO activists for information and assistance.<sup>215</sup> At least thirty NGOs with the word “women” in their names were on the list of NGOs officially authorized to participate in the Rome Conference.<sup>216</sup> Human Rights Watch point toward the manner in which “women’s rights activists throughout the world—of ever political stripe, faith, sexual orientation nationality, and ethnicity—mobilized at each step of the International Criminal Court process”—the Feminist Majority Foundation, the Women’s Division of Human Rights Watch, Amnesty International, and various other participated in the feminist “reform effort”, thus suggesting that women’s role in the ICC process constituted the participation of a range of feminist NGOs with a variety of feminist views.<sup>217</sup> Despite the large number of participating women’s NGOs, the majority of accounts of the

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Halley, *supra* note 176, at 20.

<sup>216</sup> *Id.*, at 21.

<sup>217</sup> Human Rights Watch, *International Justice for Women: The ICC Marks a New Era* (July 1, 2002), available at <http://www.hrw.org/campaigns/icc/icc-women.pdf>.

process point to one specific entity that truly influenced the process for drafting laws relevant to the feminist agenda: the Women’s Caucus for Gender Justice—this conclusion was made in accounts written by both feminists and non-feminists of their experience of the ICC Statute drafting process.<sup>218</sup>

The Women’s Caucus was a coalition of women’s NGOs consisting of approximately 200 feminist activists at the start of the Rome Conference.<sup>219</sup> Collectively, the Women’s Caucus had secured an articulate and coherent platform for feminist reform, and used this to lobby extensively during the negotiations leading up to the adoption of the Rome Statute. The Women’s Caucus began lobbying governmental delegations at the Preparatory Committee in February 1997.<sup>220</sup> By the time of the Rome Conference, the Women’s Caucus had greatly expanded its support base to include approximately two hundred different women’s organizations from various regions of the world. Besides participation in the Preparatory Committee and the Rome Conference, members of the Women’s Caucus were assigned with lobbying in their respective countries’ capitals, in order to garner the support of diplomatic delegations at the Conference.<sup>221</sup>

During the negotiations at both the Preparatory Committee and the Rome Conference, the main aim of the Women’s Caucus was the “mainstreaming of gender in the creation of this new institution”, the ICC.<sup>222</sup> In doing so, the Women’s Caucus

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<sup>218</sup> Halley, *supra* note 176, at 22.

<sup>219</sup> *Id.*

<sup>220</sup> Barbara Bedont and Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 65-71 (1999).

<sup>221</sup> *Id.*

<sup>222</sup> “Gender mainstreaming” is a concept used in UN language and increasingly in national and regional forums. The United Nations Economic and Social Council has defined gender mainstreaming as “the process of assessing the implications for women and men of any planned action, including legislation,

worked to reveal perceived deficiencies in existing international law relating to crimes of gender and sexual violence.<sup>223</sup> Thus, the initial consensus amongst feminist activists of the Women's Caucus was their desire to establish rape, sexual violence, and sexual slavery as crimes of international criminal law, and for these crimes to be "as high up the hierarchy of ICL codification as they could get them, and in terms that derive from their shared feminist understanding of them".<sup>224</sup> It is thus important to review the existing legal context in which the efforts of the Women's Caucus began.

#### 4. The Stage-Setter: International Humanitarian Law

Most significantly, the body of international humanitarian law served as an important "backdrop" and reference point for the feminist reforms that occurred during the making of the Rome Statute. This mainly included the Nuremberg Charter, with its prohibition of "crimes against humanity"; the Geneva Conventions, with their numerous prohibitions on genocide and torture; and, finally, international customary law governing the conduct of war.<sup>225</sup> Perhaps the most relevant to the plight of the Women's Caucus was Article 27 of the Fourth Geneva Convention of 1949 (applying to the treatment of civilians in international armed conflict), which states "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any other form of indecent assault".<sup>226</sup> While the Geneva Conventions were more explicit in this article in the

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policies or programs, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality".

<sup>223</sup> *Id.*

<sup>224</sup> Halley, *supra* note 176, at 50.

<sup>225</sup> *Id.*, at 51.

<sup>226</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention art. 27*].

prohibition of sexual violence than any other international legal instrument prior to it,<sup>227</sup> the language of Article 27 only calls on military forces to protect women from rape, enforced prostitution, and other forms of “indecent assault”, without being included as part of the Fourth Geneva Convention’s list of “grave breaches”, which were the only types of breaches to the Convention that were subject to universal jurisdiction, or the duty of all states to investigate and prosecute these breaches regardless of the perpetrator committing them or the territory they were committed on.<sup>228</sup> Thus, Article 27 was a critical reference point for the Women’s Caucus, who hoped to ensure that the Rome Statute’s articles moved beyond the limited treatment of gender and sexual crimes.<sup>229</sup> In addition, the feminist advocates of the Women’s Caucus were in uniform agreement that all articles to be drafted regarding gender and sexual violence had to be completely disconnected from the concept of “attacks on honor”, a premise heavily criticized for problematizing the rape of women in terms of their relationship to male or familial relations, and not in terms of the violence of the crime itself.<sup>230</sup> Finally, Common Article 3 to the four Geneva Conventions was an important reference point for the Women’s Caucus because it included protection for combatants in “armed conflict not of an international character”, and thus did not restrict the Caucus’ reference material to only international armed conflict.<sup>231</sup>

While the Women’s Caucus used international humanitarian law as its main point of reference for the drafting of gender-related content in the Rome Statute, the

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<sup>227</sup> For example, Article 46 of the 1907 Hague Convention states “Family honor and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected.”

<sup>228</sup> *Fourth Geneva Convention art. 27, supra* note 211.

<sup>229</sup> Halley, *supra* note 176, at 51.

<sup>230</sup> *Id.*

<sup>231</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *First Geneva Convention art. 3*].

goal was to do so not due to the idealness of the international humanitarian law field, but to use the existing law as a source on which to build upon while incorporating feminist critique of IHL. Feminist critique of the international humanitarian law field generally point to the innate difficulty in working within a field of law that relies on notions of formal equality, whereby the law is “required or expected to deliver substantively equal outcomes, particularly given the fundamentally diverse ways armed conflict impacts upon men and women”.<sup>232</sup> Thus, for many feminist critics of IHL, the field itself is “inherently discriminatory”, in that as a legal field, it automatically prioritizes men, especially male combatants—as for women, the field only addresses them when they are referred to with regards to the status of victims, or awards them legitimacy due to their position as child-bearers.<sup>233</sup> Feminist critics of IHL Judith Gardam and Michelle Jarvis have pointed to the fact that almost half of the 42 provisions of the Geneva Conventions and the Additional Protocols relating to women define women in the context of their roles as either expectant or nursing mothers.<sup>234</sup> Gardam and Jarvis also point to the other instances in which women are mentioned in IHL: in the context of crimes of sexual violence—even then, protections by IHL for crimes of sexual violence are “couched in terms of chastity and modesty of women”.<sup>235</sup> Gardam has criticized the general notion that the existing provisions protect women due to their association with another: “Overall, the existing provisions protect women in terms of their relationship with others, such as when pregnant or as mothers, not as individuals in their own right. Of some 34 provisions ostensibly providing safeguards for women,

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<sup>232</sup> Helen Durham and Katie O’Byrne, *The Dialogue of Difference: Gender Perspectives on International Humanitarian Law*, 92 INT’L REV. RED CROSS 31, 31-52 (2010).

<sup>233</sup> Durham, *supra* note 217, at 34.

<sup>234</sup> JUDITH GARDAM & MICHELLE JARVIS, *WOMEN, ARMED CONFLICT, AND INTERNATIONAL LAW* (Kluwer Law International, 2001).

<sup>235</sup> Durham, *supra* note 217, at 35.

a closer inspection reveals that 19 of them are intended primarily to protect children. Moreover, the protections for women from sexual violence are couched in terms of their honor. In reality a women's honor is a concept constructed by men for their own purposes: it has little to do with women's perception of sexual violence".<sup>236</sup> Critiques of IHL have also centered on the historical lack of prosecution of rape as a war crime, in addition to the fact that rape is not included within the 'grave breach' provisions of the Geneva Convention, thus seemingly being placed at a "lesser status within the strict hierarchy of war crimes".<sup>237</sup>

#### 5. The Women's Caucus: An Agenda

With this existing context in mind, the Women's Caucus had a specific agenda for the relevant gender-related crimes that were to be included in the Rome Statute. The first was for the crime of rape to be classified as a grave breach and not a crime against humanity. Unlike a crime against humanity, which implied that rape harmed humanity, categorizing rape as a grave breach implied the occurrence of a wrong against the actual individual, and would allow the gendered focus of the crime to become apparent.<sup>238</sup> Second, the Women's Caucus wanted rape to be classified as rape, as its own "freestanding crime" in international criminal law, and not as a subsection of another crime.<sup>239</sup> Moreover, they sought to "delink" the crime of rape from the concepts of honor and dignity, again in order to enforce the idea that criminal aspect of rape was in no manner tied to patriarchal/familiar relations of the victim.<sup>240</sup> Finally, the Women's Caucus' most ambitious goal was to expand the jurisdiction of the ICC to peacetime, and not limit the crimes listed under war crimes

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<sup>236</sup> Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, 46 INT'L & COMP. LAW QUART. 55, 55-80 (1997).

<sup>237</sup> Durham, *supra* note 217, at 36.

<sup>238</sup> Halley, *supra* note 176, at 76.

<sup>239</sup> *Id.*, at 77.

<sup>240</sup> *Id.*, at 78.

and crimes against humanity to times of conflict. Based on such reform, they hoped to expand the jurisdiction of the ICC in relation to rape in order to enable its prosecution during peacetime as well.<sup>241</sup>

## 6. Women in the ICC Statute: The Final Outcome

How successful was the Women's Caucus in articulating their agenda in the Rome Statute? The Statute gave the ICC jurisdiction to prosecute and punish crimes against humanity, war crimes, genocide, and aggression.<sup>242</sup> The main feminist contribution was in the category of crimes against humanity and war crimes.<sup>243</sup> Article 7 of the Rome Statute defines crimes against humanity as subject to the jurisdiction of the ICC when they are "committed as part of a widespread or systematic attack directed against a civilian population".<sup>244</sup> Article 7 (g) incorporates sexual violence, which includes the crimes of "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity", as a crime against humanity.<sup>245</sup>

As for Article 8 of the Statute, which defines war crimes, four main subsections are included in the article.<sup>246</sup> Of relevance, Article 8 (2) (a) awards jurisdiction to the ICC to try individuals who commit grave breaches of the Geneva Conventions, and thus this article only applies to international conflicts.<sup>247</sup> Both articles then provide a list of applicable crimes. Article 8 (2) (b) is explicitly restricted to international conflicts and grants the ICC jurisdiction to try individuals

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<sup>241</sup> *Id.*, at 81.

<sup>242</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*].

<sup>243</sup> Halley, *supra* note 176, at 101.

<sup>244</sup> *Rome Statute*, *supra* note 227, art. 7.

<sup>245</sup> *Id.*, art 7(g).

<sup>246</sup> *Id.*, art. 8.

<sup>247</sup> *Id.*, art. 8(2)(a).

for breaches of the laws and customs of war.<sup>248</sup> Articles 8 (2) (c) and 8 (2) (d) apply to conflicts “not of an international character”.<sup>249</sup> Again, both articles present a list of the crimes pertinent to them. The one item on both lists relevant to this topic can be found in the subsections prohibiting sexual offences. The two lists of crimes applicable to both international and non-international conflicts are identical and include a distinctive subsection dedicated to sexual violence—both lists criminalize “rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence”.<sup>250</sup> The term “any other form of sexual violence” is further restricted to mean “constituting a grave breach of the Geneva Convention” if it is an international armed conflict and “constituting a serious violation of Common Article 3 to the four Geneva Conventions” in the case of non-international armed conflicts.<sup>251</sup>

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<sup>248</sup> *Id.*, art. 8(2)(b).

<sup>249</sup> *Id.*, art. 8(2)(c), art. 8(2)(d).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*, art. 8(2)(e)(vi).

#### **IV. A Classification of Liberal Inclusionist and Structural Bias Feminists in International Criminal Law**

Janet Halley has provided one of the few concise and detailed accounts of feminist engagement in the process at Rome, and thus offers critical insight into the operational details of feminists at the Rome Conference, and the steps preceding it. Halley has positioned herself as a “sex-positive postmodernist, only rarely and intermittently feminist, a skeptic about identity politics, with a strong attraction to ‘queer’ revelations of the strangeness and unknowability of social and sexual life, and a deep distrust of slave-moralistic pretensions to identity-political ‘powerlessness’”.<sup>252</sup> In her accounts of feminist activism at Rome, she has stated that the organizational style of feminists during both the tribunals and the process at Rome was “overwhelmingly coalitional, resulting in a literary “trace” of feminist work that is almost devoid of manifest internal conflict”.<sup>253</sup> Halley has concluded that this feminist “consensus” that was born out of a supposed variety of worldviews and reform agendas was “not, as one might expect, a median liberal feminist view that split the difference between conservative and leftist feminist ideologies”, but instead constituted a “consensus view [that] was an updated radical feminism, strongly committed to a structuralist understanding of male domination and female subordination”.<sup>254</sup> Halley coined the term “Governance Feminism”, or “GFeminism”, to describe a “new feminist organizational style that evolved over the

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<sup>252</sup> JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 15 (Princeton University Press, 2006).

<sup>253</sup> Halley, *supra* note 176, at 60.

<sup>254</sup> *Id.*, at 86.

course of the 1990s”, that has exhibited an “incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power”.<sup>255</sup>

Halley described GFeminism as taking many forms, in that “some parts of feminism participate more effectively than others; some are not players at all”.<sup>256</sup> She stresses that while feminists have not “won everything they want”, they are also not “helpless outsiders”, but rather have reached a level have reached a stage where feminist legal activism has advanced to a stage where “it accedes to a newly mature engagement with power”.<sup>257</sup> Halley characterizes GFeminism as a complex collection of strategies: “It is not a monolithic top-down power. Rather, it piggybacks on existing forms by power, intervening in them and participating in them in many, simultaneous, often conflicting, and, in many examples anyway, highly mobile ways. It has found the novelty and civil-society open-texturedness of “the new governance” and “global governance” to be quite hospitable; it seeks not a monopoly of these forms but rather a plentiful presence within them.”<sup>258</sup>

However, Halley states that GFeminist involvement in international criminal law, specifically in the formation of the ICTs and the ICC, was especially unique in that unlike GFeminist rhetoric surrounding other issues, which had consisted of various fundamental disagreements within the GFeminist movement, and despite the fact that “feminism is uniformly experienced by feminist as a highly contentious field, perhaps even defined by its inability to reach consensus”, GFeminist involvement in its work on sexual violence in international criminal law was “consolidated in its feminist ideology and in its goals”, and that in this sphere,

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<sup>255</sup> Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. LAW & GEND. 335, 335-423 (2006).

<sup>256</sup> Halley, *supra* note 255, at 340.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

“structuralist-feminist worldview animates both argumentation and rule preference”.<sup>259</sup> Halley’s argument continues to assert that the substance of this of this unified feminist vision evolved throughout the 1990’s, but in a cohesive manner that did not display signs of internal dissent from within feminist circles. The process started, according to Halley, with a fairly simple uniform commitment to ensure that rape was both explicitly prohibited and strongly prosecuted in international criminal law, because not doing so was “thought to trivialize or even condone rape”.<sup>260</sup>

However, Halley contends that over the course of the process of the formation of the tribunals and the ICC, feminists involved in the development of the international legal sphere attempted to apply their structuralist ideals in making rape more than merely a “tool of belligerent forces”, but also “part of a global war against women”.<sup>261</sup> Halley names this new uniform feminist design “feminist universalism”, in that feminists formed their goals in a manner in which women were no longer a “particular group of humanity, but a universe of their own. In the new feminist universalist worldview, international criminal law norms relating to armed conflict could be about women”.<sup>262</sup> In a practical sense, this meant that feminists’ focus on legal reforms shifted from wartime rape to everyday rape, and from the ways in which war was defined by men to the ways in which women experience it—and this shift happened collectively, in sync with the general unified feminist vision that Halley states was witnessed at Rome.<sup>263</sup>

However, Halley’s account of the feminists at Yugoslavia, Rwanda, and Rome, there are many problems with the picture Halley paints of a unified feminist

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<sup>259</sup> Halley, *supra* note 176, at 6.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*, at 62.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*, at 65.

movement in the process of the tribunals and the drafting of the ICC Statute, and the idea that feminist engagement with international criminal law as a field in general constituted a “literary “trace” of feminist work that is almost devoid of manifest internal conflict”.<sup>264</sup> Perhaps more problematic, however, is Halley’s classification of liberal versus structuralist feminists in international criminal law. It seems as though Halley continues to use the labels liberal and structuralist for feminists who were defined as such based on their views and activism in a different field—that of international human rights law. In fact, the names of feminists Halley dubs structuralist were in fact characterized by Engle as belonging to the structural bias era of feminist critique of international human rights law. The include Hilary Charlesworth, Rhonda Copelon, Christine Chinkin, Valerie Oosterveld, and other feminist activists whose opinions and positions on matters of international human rights law clearly placed them under Engle’s classification of “structural bias”.<sup>265</sup> This does not mean, however, that, despite the fact that feminist activism in international criminal law constituted many of the same actors present in international human rights law, and in many ways transferred various ideologies and goals present in feminist activism in international human rights law, the same system of classification of these feminists carries onto the field of international criminal law.

#### A. A Classification of Liberal and Structural Bias Feminists in International Criminal Law

I argue that while the notion of the existence of liberal and structural feminists, often in opposition with regards to various substantive issues, exists across the fields of both international human rights law and international criminal

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<sup>264</sup> *Id.*, at 60.

<sup>265</sup> Engle, *supra* note 138, at 53.

law, the classification of these feminists differs across fields. Janet Halley defines feminist “structuralism” as that which is “strongly committed to a structuralist understanding of male domination and female subordination”, contrasted against liberal feminism that “split the difference between conservative and leftist feminist ideologies.”<sup>266</sup> This definition, however, is constricted in its explanation of what liberal feminism and structuralist feminism represent in international law. While Halley states that feminist activism in international law was a direct transfer of actors and ideologies from feminist engagement in international human rights law, her definition of the conceptual background behind the ideologies of these feminist activists even in international human rights law is incomplete, especially her characterization of structural feminism as solely based on an understanding of “male domination and female subordination”.<sup>267</sup> In the context of international human rights law, Engle defined liberal feminism as that which operated under the idea that women should, and could, be significantly included in international human rights law, and that the law, if properly applied, could successfully incorporate issues of women’s rights.<sup>268</sup> On the other hand, Engle described structural bias feminists in international human rights law as centered around the belief that the simple inclusion of women in the international legal structure, as it existed was impossible—since international law, according to structural bias feminists, was male in nature (and therefore structurally biased against women), the integration of women in international law was impossible without changing the entire international legal structure.<sup>269</sup>

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<sup>266</sup> Halley, *supra* note 176, at 63.

<sup>267</sup> *Id.*

<sup>268</sup> Engle, *supra* note 138, at 52.

<sup>269</sup> *Id.*, at 53.

More generally, liberal feminism can be defined as “the view that women are unjustly treated, that their rights are violated, that...reform is needed to improve their situation, and that when a states discriminates or deprives women of these human rights, it commits an injustice, a violation of international human rights law for which it is responsible”.<sup>270</sup> Radical structuralist feminists agree that the situation of women must be improved, but they believe that “liberal institutions are themselves but tools of gender oppression” and that “gender hierarchy necessarily infects the process of legal reasoning itself.”<sup>271</sup> Another definition is provided by Hilary Charlesworth, who defines liberal feminists as those who typically “insist that the law fulfill its promise of objective regulation upon which principled decision-making is based. They work for reform of the law”.<sup>272</sup> Thus, the concept of structural bias being solely about the concept of men’s domination of women is deficient in characterizing the essence of structural bias: while liberal feminists seek the inclusion of women in the law, either through proper enforcement, or basic reform of the law, albeit within the existing legal structure, structural bias feminists, in essence, reject the proposition of simply including women in the law, because they view the existing legal tools and structures as biased, and thus seek to reform the entire legal structure.

#### B. A Model For Liberal Inclusion and Structural Bias for International Criminal Law

Based on this characterization, Halley’s categorization of liberal and structuralist feminists in international criminal law is misplaced. While the feminists participating in the tribunals and process at Rome can be correctly identified as structural bias under international human rights law, this

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<sup>270</sup> Fernando R. Teson, *Feminism and International Law: A Reply*, 33 VA. J. INT’L L. 647, 647-684 (1993).

<sup>271</sup> Teson, *supra* note 270, at 649.

<sup>272</sup> Charlesworth, *supra* note 81, at 39.

characterization changes under international criminal law, and a parallel model of liberal inclusion and structural bias, as described by Engle for international human rights law, emerges for international criminal law as well. Engle described the period of liberal inclusion as distinguished by a narrative of “doctrinal inclusion and institutional expansion”, and a desire to work within the available legal mechanisms based on a belief that women should, and could, be incorporated in the law.<sup>273</sup> The feminists at Rome did just that: they sought to include women’s issues by working within existing legal tools institutions, in a manner that was far from the major restructuring of both international law and international legal institutions that structural bias feminists in any given field seek. The feminists at Rome followed the recipe of “add women and stir”, as put forth by Engle to describe liberal inclusion feminists, rather than the “add women and alter” recipe pushed for by structural bias critics.

#### 1. Liberal Inclusion Feminism in International Criminal Law

Thus, the process of feminist activism in Rome falls in the liberal inclusion phase of feminist activism in international criminal law that seems to have begun in 1993 with the emergence of the Green/Copelon Group up until, at least, the Rome Conference in 1998. Throughout this phase of feminist involvement in international criminal law, it seems as though the feminists most heavily engaged in the process, those involved in the Women’s Caucus for Gender Justice, viewed international criminal law as a field in which women should, and could, be included. They did not seek to alter the structure of the international criminal law, but instead sought to advocate for the addition of “female-friendly” provisions in the field. They sought for

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<sup>273</sup> Engle, *supra* note 138, at 52.

“doctrinal inclusion and institutional expansion”, goals Engle attributes to the liberal inclusion feminism of international human rights law.

The method employed was “add women and stir”, not “add women and alter”—the critique was of a lack of existing provisions, not of the structure of international criminal law as a whole. Thus, the liberal inclusion feminists of international criminal law seem to be those previously characterized as structural bias critics by Engle, but under international human rights law. Under international criminal law, these same feminists, such as Hilary Charlesworth, Diane Otto, Rhonda Copelon, Jennifer Green, and Catherine Mackinnon, no longer appear to be advocates of the notion that the simple inclusion of women into the international legal structure, vis a vis international criminal law, is impossible, as they did in international human rights law. These feminists’ previous emphasis that international law could never allow for the integration of women unless the entire legal structure was changed does not seem to hold true for their engagement in international criminal law: the provisions of the Rome Statute for which the Women’s Caucus is mostly credited for not only simply include women in the existing structure, but also view as an accomplishment the inclusion of these “female-friendly” provisions only as subsets of more general crimes in the Rome Statute.

## 2. Structural Bias Feminism in International Criminal Law

Engle emphasizes in her model of the classification of feminist engagement in international human rights law that the various phases of feminist engagement in international law overlap.<sup>274</sup> The same holds true for feminist engagement in international criminal law. For structural bias critics in international criminal law,

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<sup>274</sup> Engle, *supra* note 138, at 52.

the notion that it has been viewed as a triumph the results of the Women's Caucus, in this model international criminal law's liberal inclusion feminists, is problematic. Therefore, inherent in structural bias critique in international criminal law is a critique of the assumptions and approaches of these now-liberal inclusion feminists in international criminal law. Thus, structural bias critique by feminists in international criminal law is not only a critique of the structure of the law, but of structural issues within liberal feminist inclusion in international criminal law. Much of this critique has come from postmodern feminist schools of thought, but not exclusively.

Certain critique has focused on the problematic structure of international criminal law's inclusion and portrayal of women, as well as problems with the law itself. Carol Smart, for example, argues that law, a discourse of power, reproduces the female in a "sexualized and subjugated form", where their bodies "become sites of power and a mode of political identity."<sup>275</sup> Sharon Marcus argues that women represented in most feminist discourses are "already raped" and "already rape-able" because the female figure is consistently defined and characterized by sexual victimization.<sup>276</sup> She is also critical of the notion of criminal justice for sexual violence, arguing for a "shift of scene from rape and its aftermath to rape situations themselves and to rape prevention".<sup>277</sup>

Some of the structural bias critique vis a vis international criminal law and feminist engagement in the field has focused on problems with feminist assumptions about the centrality of rape in international criminal law. Postmodern feminist scholar Chiseche Mibenge, for example, argues that the focus on women as

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<sup>275</sup> Carol Smart, *Law's Power, the Sexed Body, and Feminist Discourse*, 17 J. LAW & SOC. 194, 194-210.

<sup>276</sup> Sharon Marcus, *Fighting bodies, Fighting Words: A Theory and Politics of Rape Prevention in Feminists Theorize the Political* (Butler J and Scott J, ed., 1992).

<sup>277</sup> Marcus, *supra* note 276, at 385.

victims of rape and sexual slavery can have the effect of “eroticizing rather than challenging hegemonic relations”.<sup>278</sup> Janet Halley herself, a postmodern critic of the liberal inclusion feminism of international criminal law, has argued that prioritizing the prosecution of rape may have important adverse side effect, such as the use of the “badness” of rape as propaganda for war and the advancement of political and national ideologies, and points to the idea that rape may not be the worst thing that can happen to women during times of conflict.<sup>279</sup> Critiques have also been made about the focus on sexual violence against women having the effect of backgrounding male victims of gender-based violence, including sexual violence, and in the process, constructing an “ideal victim subject”.<sup>280</sup> Doris Buss, for example, has argued that the raping of Hutu women and men received little attention from the ICTR because the “authentic victim subject” was primarily the female Tutsi victim.<sup>281</sup> This, Buss argues, “reveals the exclusions that are cast in the shadows by the glare of ‘rape as an instrument of genocide’”.<sup>282</sup>

Other structural bias critique in international criminal law examines structural problems with criminalizing wartime rape in international criminal law with regards to the issue of consent. Karen Engle herself has been critical of the manner in which the increased criminalization of wartime rape can “deny or underplay women’s sexual and political agency”, in that the now dominant narrative of international criminal law produced by liberal feminists of the field that situates women solely as victims of rape can obscure other narratives, including the notion that women can have consensual sexual relations with “enemy” men during

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<sup>278</sup> Chiseche Mibenge, *Investigating Outcomes of a Limited Gender Analysis of Enslavement in Post-Conflict Justice Processes*, 5 J. PEACEBUILD. & DEV. 34, 34-46 (2010).

<sup>279</sup> Janet Halley, *Rape in Berlin*, 9 MELB. J. INT’L L. 78, 78-124 (2008).

<sup>280</sup> Nicola Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 23 SOC. & LEG. STUD. 93, 93-111 (2013).

<sup>281</sup> Doris Buss, *Rethinking ‘Rape as a Weapon of War’*, 17 FEM. LEG. STUD. 145, 145-163 (2009).

<sup>282</sup> *Id.*

conflict.<sup>283</sup> Halley critiques not only the focus on sexual violence during war as the “universal experience of women’s oppression”, but also echoes Engle’s concerns, arguing that the criminalization of rape as torture at the ICTY “removes the agency of the female victims” because they are unable to consent to sexual relations with their male guards.<sup>284</sup> Halley and Engle’s argument is that increased international criminalization of rape invites the possibility of male perpetrators involved in consensual sexual relations with “enemy” females will be unfairly convicted.<sup>285</sup>

Much of this structural bias critique of international criminal law and liberal inclusions feminists’ engagement with it has come following feminist engagement with the tribunals and the process at Rome, but certain critiques, such as those provided by Carol Smart and Susan Marcus, came earlier. As previously stated, the phases of feminist engagement and critique, that of liberal inclusion and structural bias, in international criminal law, overlap. Moreover, while much of structural bias critique in international criminal law includes postmodern feminist thought, it is not solely restricted to contributions by feminists from the postmodern school of thought.

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<sup>283</sup> Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778, 778-816 (2005).

<sup>284</sup> Halley et al, *supra* note 255, at 421.

<sup>285</sup> Engle, *supra* note 283, Halley, *supra* note 255.

## **V. The Pattern, and Why It Exists**

The classification of liberal inclusionist and structural bias in international criminal law is critical in highlighting a consistent pattern in feminist activism across both domestic and international spheres—a pattern to which international criminal law is not an exception. An observation of feminist activism from its early days of participation in the plebiscites of the First World War elucidates the beginning of a trend that carries on throughout a range of feminist points of intervention. With each situation in history during which feminists have interceded on behalf of women's rights, feminist viewpoints have presented themselves, practically, under two different umbrellas: that of the liberals, and that of the 'others'. These 'others' are those who fall outside of the liberal sphere of feminism—they are the ones who follow liberal feminists' entry into difference fields, and bring with them a critique of liberal feminist tactics and exploits in each area.

The categorization of these feminists as a collective 'other' in relation to liberal feminism is in no way out of a lack of regard for the definite fact that these feminists come from a variety of different theoretical backgrounds within feminist thought and activism. Thus, their categorization as a joint 'other' is not a classification of their theoretical or practical backgrounds, but of their mode of interaction with various fields vis-à-vis liberal feminism in these respective fields. Whether domestically or internationally, a pattern has often emerged in which liberal feminists create an entry point into a certain field in which there is perceived room for the improvement, or creation, of women's rights. These liberal feminists, with their motive to reform, and not change, existing structures and laws, use this approach in their activism to gain 'accomplishments' for women's rights in various spheres.

It is at this point that ‘other’ feminists often intervene: as a reaction to the ‘changes’ made by liberal feminists in these different spheres. With them, ‘other’ feminists bring criticism of the liberal feminist method, and liberal feminist ‘achievements’. Additionally, little interaction, let alone cooperation, occurs between the liberals and the ‘others’. Instead, ‘other’ feminists’ entry into different areas of feminist activism is largely reactionary to that of liberal feminist work. The work of ‘other’ feminists lies mostly in their critique of liberal feminists’ work, and not in attaining what liberal feminists view as tangible ‘accomplishments’ with regards to social, political, economic, and legal reform. However, liberal feminists do not seem to engage with criticism from ‘other’ feminists, but instead, after making ‘changes’ within various fields, proceed onto other areas with perceived deficiencies in the rights of women.

Emphasizing equal individual rights and liberties for women and men is the most widely accepted social and political philosophy within feminist schools.<sup>286</sup> This does not only hold true for international law, but for liberal feminism across various spheres, including domestic ones. Liberal feminism probably enjoys greater popular support than other feminist schools for a variety of reasons. Generally, liberal feminism’s aims are more moderate and its views pose less of a challenge existing structures and systems.<sup>287</sup> Liberal feminists do not seek revolutionary changes in society—they seek reforms within the existing social, political, and economic structure, and work within the available system. It has also been argued that feminist liberals, with their roots in classical liberalism, ‘rely upon rationality and the ‘reasoned argument’ to create change’.<sup>288</sup>

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<sup>286</sup> Susan Wendell, *A (Qualified) Defense of Liberal Feminism*, 2 HYPATIA 65, 65-93 (1987).

<sup>287</sup> *Id.*, at 66.

<sup>288</sup> *Id.*

Contemporary liberal feminists tend to believe that the values and structures of liberal democracy, in and of themselves, have the potential to allow for gender equality if women were allowed to fully participate in these value systems and structures. Thus, liberal feminism offers a voice from within feminist schools that does not connect addressing gender oppression with more radical notions of creating new political, economic, and social systems.<sup>289</sup> Thus, liberal feminists' more 'moderate' views and tactics are those that often lead to the most considerable social change with regards to feminist activism for women's rights.

The preeminence of liberal feminism also owes much to the fact that it encompasses a wide variety of related, yet distinctive, views that collectively and comfortably fit within a framework of political liberalism. Thus, liberal feminism does not essentially challenge existing capitalist economic structures, for example, nor does it recommend separatism, as do more radical feminists. Instead, liberal feminism's aims lie in extending a wider range of freedoms to women within the existing liberal democratic society, whether domestic or international, as well as both criticizing practices that deny women equal protection under the law as well as condemning laws that de facto discriminate against women.<sup>290</sup>

Specifically with regards to law, liberal feminists do not regard the legal system itself, domestic or international, as being the contributing factor to the inferior position of women. They assume that the law is generally rational, impartial with regards to sex, and capable of achieving justice. Thus, liberal feminists often work for reform of the law, insisting that the law fulfill what they believe is its objective of impartial regulation, not a dismantling of the legal structure itself. In the

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<sup>289</sup> *Id.*, at 70.

<sup>290</sup> *Feminism, Liberal*, available at <http://blogs.helsinki.fi/seksuaalietiikka2011/files/2010/10/9-Liberal-Feminism.pdf>

international arena, liberal feminists also seek to increase women's participation in the making of international law, and within the institutions that employ it. Moreover, liberal feminist views are often more 'appealing' in that they 'reject utopian visions of an ideal society in favor of one that eliminates coercion and promotes autonomous choices amongst its citizens'.<sup>291</sup>

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<sup>291</sup> *Id.*

## CONCLUSION

Liberal feminists themselves acknowledge that despite more than 200 years of struggle, they have not yet attained their goal of sexual equality. However, 'other' feminists have gone further in arguing that the liberal feminist agenda can never provide meaningful equality to all women: operating within the confines of the current domestic and global political, social, and economic structures, it fails to redress the inequities that constrain different women. For many 'other' feminists, especially structural bias critics, the simple inclusion of women into international law is impossible, since they view international law as inherently male, and therefore structurally biased against women. For 'other' feminists, a major restructuring of both international law itself and its institutions is required in order to truly accommodate women. As Dorothy Thomas put it in critiquing liberal feminist activity in the field of international human rights law, "The fundamental challenge for the movement for women's human rights is that it not become a reformist project; its recipe should not read, "Add women and stir," but "Add women and alter."<sup>292</sup>

With regards to feminist activity in international criminal law, academic and legal reception of the final outcome of the aforementioned Rome Statute articles relating to gender and sexual violence in the Rome Statute has varied. The majority of published responses to the manner of inclusion of gender and sexual violence crimes in the Rome Statute have praised the Women's Caucus for its achievements in enforcing accountability for sexual violence under international crime. Proponents of this view state that the inclusion of female-friendly provisions in the formation of the ICC is a historical moment in international law and is a crucial step

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<sup>292</sup> Thomas, *supra* note 149, at 358.

to protecting women and creating gender equality in the international legal sphere.<sup>293</sup> Others, however, including certain feminists themselves, have stated that the provisions of the Rome Statute advocated for by the Women's Caucus are not "the great leap that some women's organizations claim".<sup>294</sup>

Critiques of the provisions have included several aspects. The first is the issue of the definition of rape under the statute, in that it is a subsection of the articles on crimes against humanity and war crimes. Critics have pointed to the problematic nature of these articles, in that the ICC only has jurisdiction over rape crimes when they can be linked to wider plans towards the community as a whole.<sup>295</sup> The second issue certain critics have proposed is that by presenting the ICC's jurisdiction over wartime rape as a success, less attention is being paid to the concept that gender and sexual violence is a phenomenon of peacetime as well.<sup>296</sup> In recent years, critics of the provisions, many of whom are feminist activists themselves, have pointed to the provisions as possible setbacks, instead of achievements. The debate regarding the efforts of feminist activists in the sphere of international transitional justice is still ongoing.

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<sup>293</sup> Bedont and Martinez, *supra* note 220.

<sup>294</sup> Rana Lehr-Lehnhart, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 319-354 (2002).

<sup>295</sup> *Id.*, at 319.

<sup>296</sup> *Id.*