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see value in both positions. Scholars are developing more sophisticated theories spelling out the conditions under which national and international judges, lawyers, litigants and other actors can cooperate to expand the influence of supranational law, and under which states and other "legislators" will acquiesce.¹⁰³

V. CONCLUSION

The atrocities regime is a rich and fascinating area of study. Yet it is not the bare rules of the Geneva Conventions or the procedures of the ICTY that create this fascination; it is the political conflict played out in their creation and design, the struggle to imbue them with meaning, the effort to use them to modify undesirable behavior. As this symposium makes clear, many intellectual approaches can shed light on such complex social phenomena. Yet IR theory (a rich and multifaceted creation) has a particularly important contribution to make, for it has been developed—and is evolving—to illuminate just this kind of issue. IR is not a "legal method" in the narrow sense. Coupled with the study of law and legal institutions, though, it can be the cornerstone for a deeper understanding of international governance.

KENNETH W. ABBOTT*

FEMINIST METHODS IN INTERNATIONAL LAW

I have mixed feelings about participating in this symposium as the feminist voice. On the one hand, I want to support the symposium editors' attempt to broaden the standard categories of international legal methodologies by including feminism in this undertaking. On the other hand, I am conscious of the limits of my analysis and its unrepresentativeness—the particularity of my nationality, race, class, sexuality, education and profession shapes my outlook and ideas on international law. I clearly cannot speak for all women participants in and observers of the international legal system. I also hope that one day I will stop being positioned always as a feminist and will qualify as a fully fledged international lawyer. My reservations are also more general because presenting feminism as one of seven rival methodological traditions may give a false sense of its nature. The symposium editors' memorandum to the participants encouraged a certain competitiveness: we were asked, "Why is your method better than others?" I cannot answer this question. I do not see feminist methods as ready alternatives to any of the other methods represented in this symposium. Feminist methods emphasize conversations and dialogue rather than the production of a single, triumphant truth.¹ They will not lead to neat "legal" answers because they are challenging the very categories of "law" and "nonlaw." Feminist methods seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis. The term "gender" here refers to the social construction of differences between women and men and ideas of "femininity" and "masculinity"—the excess cultural baggage associated with biological sex.

¹⁰³ See, e.g., Helfer & Slaughter, *supra* note 40; Geoffrey Garrett, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. at 177.

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¹ See J. Ann Tickner, *You Just Don't Understand: Troubled Engagements between Feminists and IR Theorists*, 41 INT'L STUD. Q. 611, 628 (1997).

The philosopher Elizabeth Grosz has pointed out that feminist theorizing typically requires an unarticulated balance between two goals. Feminist analysis is at once a reaction to the "overwhelming masculinity of privileged and historically dominant knowledges, acting as a kind of counterweight to the imbalances resulting from the male monopoly of the production and reception of knowledges" and a response to the political goals of feminist struggles.² The dual commitments of feminist methods are in complex and uneasy coexistence. The first demands "intellectual rigor," investigating the hidden gender of the traditional canon. The second requires dedication to political change. The tension between the two leads to criticism of feminist theorists both from the masculine academy for lack of disinterested scholarship and objective analysis and from feminist activists for co-optation by patriarchal forces through participation in male-structured debates.³

Feminist methodologies challenge many accepted scholarly traditions. For example, they may clearly reflect a political agenda rather than strive to attain an objective truth on a neutral basis and they may appear personal rather than detached. For this reason, feminist methodologies are regularly seen as unscholarly, disruptive or mad. They are the techniques of outsiders and strangers. Just as nineteenth-century women writers used madness to symbolize escape from limited and enclosed lives,⁴ so twentieth-century feminist scholars have developed dissonant methods to shake the complacent and bounded disciplines in which they work. At the same time, most feminists are constrained by their environment. If we want to achieve change, we must learn and use the language and methods of the dominant order.

Feminist methods also encourage reflection on the production of knowledge by feminists.⁵ What system of social and cultural relations is involved in writing (his paper)? On what economic and institutional support does it depend? I have the freedom to speak because I earn my living working in a university in a "developed" country and have time to think and write. I have been around for long enough not to have to be concerned that writing about feminism will threaten my tenure or promotion in the academy. I can engage in academic work because I share the care of my children and household with a supportive partner. More generally, I benefit from a particular conjunction of economic and political circumstances on which the opportunity for feminist theorizing depends. As Rey Chow has pointed out:

Feminism . . . belongs to a juncture in time when the Western thought's efforts at overcoming itself are still, relatively speaking, supported by a high level of material well-being, intellectual freedom, and personal mobility. . . . Even though it often, if not always, speaks the language of oppression and victimization, Western feminism owes its support to the existence of other populations who continue to experience daily exclusions of various kinds, many of which are performed at territorial borders. It is the clear demarcation of such borders which allows us the comfort and security in which to theorize the notion of "exclusion" itself.⁶

In writing about feminist perspectives on the law concerning human rights abuses in armed conflict, I am conscious that I am able to do so precisely because I am not at daily

² See Elizabeth Grosz, *A Note on Essentialism and Difference*, in *FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT* 332 (Sneja Gunew ed., 1990).

³ *Id.*

⁴ See SANDRA M. GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION* (1979).

⁵ See, e.g., *FEMINIST CULTURAL THEORY: PROCESS AND PRODUCTION* (Beverly Skeggs ed., 1995).

⁶ Rey Chow, *Violence in the Other Country: China as Crisis, Spectacle, and Woman*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 81, 98 (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres eds., 1991).

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risk of these harms. In other words, feminist "madness" in international law is only possible because our lives are neither disoriented nor mad.

Here, I want to describe two feminist methods that can illuminate the study of international law and then consider the questions they might raise in the particular context of accountability for human rights violations in internal armed conflict. These techniques can be used across the spectrum of feminist theories. Within feminist scholarship there is a tendency to pigeonhole theorists into fixed categories such as "liberal," "cultural," "radical," "postmodern" and "postcolonial." But when confronted with a concrete issue, no single theoretical approach or method seems adequate. A range of feminist theories and methods are necessary to excavate the issues. In this sense, feminist explorations can be likened to an archaeological dig.⁷ There are various layers of practices, procedures, symbols and assumptions to uncover and different tools and techniques may be relevant at each level. An obvious sign of power differentials between women and men is the absence of women in international legal institutions. Beneath this is the vocabulary of international law, which generally makes women invisible. Digging further down, many apparently neutral principles and rules of international law can be seen as operating differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law; for example, "states," "security," "order" and "conflict."

Broad theoretical brushes may be required initially to clear the site of the obvious debris of sexist practices and increasingly refined methods to unpack and examine hidden assumptions. Use of a range of techniques, however, can lead to charges of methodological and theoretical impurity. I think that this impurity is inevitable in the analysis of complex situations. Feminist investigations of international law require "situated judgment" rather than an overarching theory to work out the most appropriate technique at any time.⁸

I. FEMINIST METHODOLOGIES

Searching for Silences

A methodology sometimes employed to question the objectivity of a discipline is that of detecting its silences. All systems of knowledge depend on deeming certain issues as irrelevant or of little significance. In this sense, the silences of international law may be as important as its positive rules and rhetorical structures. Permeating all stages of the excavation of international law is the silence of women. This phenomenon does not emerge as a simple gap or hollow that weakens the edifice of international law and that might be remedied by some rapid construction work. It is rather an integral part of the structure of the international legal order, a critical element of its stability.

Women are not completely absent from the international legal order: for example, a specialized area of women's human rights law has been developed and there is some specific acknowledgment of women in other areas of international law. But, by and large, when women enter into focus at all in international law, they are viewed in a very limited way, often as victims, particularly as mothers, or potential mothers, in need of protection. Even the Platform for Action adopted by the Fourth World Conference on Women held

⁷ See NGAIRE NAFFINE, *LAW AND THE SEXES* 2 (1990).

⁸ See Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1718-19 (1990). Donna Haraway has used a similar term, "situated knowledges," to advocate "shared conversations" on methodology that can lead to better accounts of the world than provided by a single perspective. Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Accounts of the Perspective*, 14 FEMINIST STUD. 575, 580 (1988).

in Beijing in 1995 endorses this circumscribed idea of womanhood. Debate in Beijing about what might constitute "balanced and non-stereotyped" images of women resulted in a paragraph referring to women's experiences as including the "balancing [of] work and family responsibilities, as mothers, as professionals, as managers and as entrepreneurs."⁹ Dianne Otto has noted that this list of women's major life experiences "neatly encapsulates the dominant possibilities for women which are approved by the Platform: the traditional role of mother remains central, but is now augmented by the addition of a role in the free market economy."¹⁰ Many aspects of many women's lives are obscured in this account.

One technique for identifying and decoding the silences in international law is paying attention to the way that various dichotomies are used in its structure. International legal discourse rests on a series of distinctions; for example, objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence. Feminist scholars have drawn attention to the gendered coding of these binary oppositions—the first term signifying "male" characteristics and the second "female."¹¹ Like many other systems of knowledge, international law typically values the first terms more greatly than their complements. Carol Cohn has written of her "participant observation" study of North American defense and security affairs analysts that "[c]ertain ideas, concerns, interests, information, feelings, and meanings are marked in national security discourse as feminine, and are devalued."¹² For this reason, they are both difficult to say and difficult to hear. They seem illegitimate, embarrassing and irrelevant.¹³ In a similar way, the symbolic system and culture of international law is permeated with gendered values, which in turn reinforce more general stereotypes of women and men.

The operation of public/private distinctions in international law provides an example of the way that the discipline can factor out the realities of women's lives and build its objectivity on a limited base. One such distinction is the line drawn between the "public" world of politics, government and the state and the "private" world of home, hearth and family. Thus, the definition of torture in the Convention against Torture requires the involvement of a public (governmental) official.¹⁴ On this account, sexual violence against women constitutes an abuse of human rights only if it can be connected with the public realm; for example, if a woman is raped by a person holding a public position for some type of public end. The Declaration on the Elimination of Violence against Women, adopted by the General Assembly in 1993,¹⁵ makes violence against women an issue of international concern but refrains from categorizing violence against women as a human rights issue in its operative provisions. The failure to create a nexus between violence against women and human rights was due to a fear that this might dilute the traditional notion of human rights. It was said that the idea of human rights abuses

⁹ Beijing Platform for Action, UN Doc. A/CONF.177/20 & Add.1, Ann. II, para. 245(b) (1995), reprinted in 35 ILM 401, 457 (1996).

¹⁰ Dianne Otto, *Holding up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women*, 6 AUSTL. FEMINIST L.J. 7, 21 (1996).

¹¹ E.g., Carol Cohn, *War, Wimps and Women: Talking Gender and Thinking War*, in GENDERING WAR TALK 227, 231 (Miriam Cooke & Angela Woollacott eds., 1993).

¹² *Id.*

¹³ *Id.*

¹⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, Art. 1, 1465 UNTS 85.

¹⁵ GA Res. 48/104 (Feb. 23, 1994), reprinted in 33 ILM 1049 (1994).

required direct state involvement and that extending the concept to cover private behavior would reduce the status of the human rights canon as a whole.¹⁶

This type of public/private distinction in international human rights law is not a neutral or objective qualification. Its consequences are gendered because in all societies men dominate the public sphere of politics and government and women are associated with the private sphere of home and family. Its effect is to blot out the experiences of many women and to silence their voices in international law.

World Traveling

A second methodological issue for feminists in international law is how to respond to the many differences among women. International law asserts a generality and universality that can appear strikingly incongruous in an international community made up of almost two hundred different nationalities and many more cultural, religious, linguistic and ethnic groups. Thus, the abstract commitments of the Convention on the Elimination of All Forms of Discrimination against Women will be translated in greatly varying circumstances, from political systems that do not allow women to vote, to systems of more subtle discrimination. The occasional nod in the direction of diversity among women in international instruments remains at a very general level; for example, the use of classifications such as "Western women" and "Third World women." These monolithic categories carry a lot of baggage: assumptions of wealth, education, work and progress, on the one hand, and of poverty, oppressive traditions, illiteracy and overpopulation, on the other.¹⁷ In reality, as Chandra Mohanty has pointed out, "[w]omen are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not 'women'—a coherent group—solely on the basis of a particular economic system or policy."¹⁸

Various methods have been proposed for feminist explorations in an international context. For example, Isabelle Gunning has described a technique of "world traveling" that requires "multicultural dialogue and a shared search for areas of overlap, shared concerns and values."¹⁹ Particularly in the discussion of human rights issues in other cultures, Gunning has counseled feminist international lawyers, first, to be clear about their own historical context; second, to understand how the women involved in the human rights situation might see them; and third, to recognize the complexities of the context of the other women.²⁰ In turn, Rosi Braidotti has argued that feminists should use "multiple literacies" in engaging the global range of feminisms.²¹ This technique requires "being able to engage in conversation in a variety of styles, from a variety of disciplinary angles, if possible in different languages."²² Braidotti has advised feminists in the international arena to "relinquish the dream of a common language" and to accept that we can achieve only "temporary political consensus on specific issues."²³

Another strategy for feminists working with international issues has been suggested by Mohanty. She has developed the idea of an "imagined community" (first elabo-

¹⁶ See Hilary Charlesworth, *Worlds Apart: Public/Private Distinctions in International Law*, in PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES 243, 256-59 (Margaret Thornton ed., 1995).

¹⁷ See Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, FEMINIST REV. 61 (1988).

¹⁸ *Id.* at 74.

¹⁹ Isabelle Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 191 (1991-92). See also Karen Engle, *Female Subjects of International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992).

²⁰ Gunning, *supra* note 19, at 191.

²¹ Rosi Braidotti, *The Exile, the Nomad, and the Migrant: Reflections on International Feminism*, 15 WOMEN'S STUD. INT'L F. 7, 9 (1992).

²² *Id.* at 10.

²³ *Id.*

rated by Benedict Anderson)²⁴ in the context of problems of writing about Third World feminisms in a general, but worthwhile, way. For Mohanty, the epithet "imagined" is used in contrast to existing boundaries—of nation, color, sexuality, and so on—to indicate the potential for collaborative endeavor across them; the term "community" refers to the possibility of a "horizontal comradeship" across existing hierarchies. An imagined community of feminist interests does not imply homogeneity, a single set of feminist concerns, but rather a strategic, political alliance.²⁵ Mohanty has written: "it is not color or sex which constructs the ground for these struggles. Rather it is the way we think about race, class, and gender—the political links we choose to make among and between struggles."²⁶

How can these various responses to diversity among women in the international community be reflected in international legal analysis? I think that they suggest a number of related moves. First, feminist international lawyers must be aware of the limits of their experience, that is, wary of constructing universal principles on the basis of their own lives. Second, the technique of asking questions and challenging assumptions about international law may be more valuable than generating grand theories of women's oppression. Third, international lawyers must recognize the role of racism and economic exploitation in the position of most of the world's women.²⁷ They should attend to the "multiple, fluid structures of domination which intersect to locate women differently at particular historical conjunctures"²⁸ rather than invoke "a notion of universal patriarchy operating in a transhistorical way to subordinate all women."²⁹ This requires an appreciation of the forms and intersections of systems of oppression. Donna Haraway has wryly observed on the difficulty of this task: "It has seemed very rare for feminist theory to hold race, sex/gender and class analytically together—all the best intentions, hues of authors, and remarks in prefaces notwithstanding."³⁰

Some feminists have argued that a more complex understanding of oppression indicates that in some circumstances a purely gendered or women-centered analysis may not be appropriate. Chow has described her response to the question "how should we read what is going on in China in terms of gender?" posed after the Tiananmen Square massacre in 1989, as "We do not, because at the moment of shock Chinese people are degendered and become simply 'Chinese.'"³¹ She has argued that using a single analytical category to "read" a political crisis is both inaccurate and presumptuous:

The problem is not how we should read what is going on in China in terms of gender, but rather: what do the events in China tell us about gender as a category, especially as it relates to the so-called Third World? What are gender's limits, where does it work, and where does it not work?³²

Chow has criticized the notion of "women" used in liberal feminism as "pinned down to the narrowly sexualized aspect of that category, as 'women' versus 'men' only."³³ At the

²⁴ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE SPREAD OF NATIONALISM* (1983).

²⁵ Chandra Mohanty, *Introduction: Cartographies of Struggle*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM*, *supra* note 6, at 1, 4.

²⁶ *Id.*

²⁷ See Grosz, *supra* note 2.

²⁸ Mohanty, *supra* note 25, at 13.

²⁹ M. Jacqui Alexander & Chandra Mohanty, *Genealogies, Legacies, Movements*, in *FEMINIST GENEALOGIES COLONIAL LEGACIES, DEMOCRATIC FUTURES* at xiii, xix (M. Jacqui Alexander & Chandra Mohanty eds., 1997).

³⁰ DONNA HARAWAY, *SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE* 129 (1991).

³¹ Chow, *supra* note 6, at 82. Compare Zalewski's response to a similar question in Marysia Zalewski, *What Is the Feminist Perspective on Bosnia?* 71 *INT'L AFF.* 339 (1995).

³² Chow, *supra* note 6, at 82.

³³ *Id.* at 83.

same time, she has acknowledged that, outside the immediacy of a political crisis, ideas about gender and sexuality can be useful challenges to the authority of traditional schemes of knowledge.³⁴

II. INDIVIDUAL ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES IN INTERNAL CONFLICTS

How might a feminist international lawyer approach the specific question of individual accountability for human rights abuses in armed conflict? There is considerable empirical evidence that women are affected by armed conflict in ways that men are not.³⁵ The savagery of warfare seems closely linked to a wild form of male sexuality, a type of "toxic testosterone" in Michael Ignatieff's words,³⁶ and women and girls are the most obvious objects of this violence. Rape has been understood as one of the spoils of the victor, serving also to humiliate the vanquished. Globally, women form only 2 percent of regular army personnel, but as civilians they suffer disproportionately from armed conflict.³⁷ For example, women and children constitute the majority of the victims in African conflict zones.³⁸ In northern Uganda, young girls have been abducted to become the "wives" of commanders in the Lord's Resistance Army, which is fighting President Museveni's government forces.³⁹ In refugee camps, women tend to be responsible for the collection of food, fuel and water, requiring them to venture from the relative safety of the camps and thus to risk rape, torture and death from rebels, government soldiers and land mines.⁴⁰ Women's lower social status also disadvantages them in the "relief" operations conducted during and after armed conflict. For example, in Somalia relief agencies often consult "household heads" when making decisions about the distribution of food and medicines, and these are usually regarded as the men.⁴¹ In Uganda women survivors of decades of conflict claim that reproductive health has not been adequately attended to in relief work.⁴² Violence against women has been described more generally as "among the most serious and pervasive human rights abuses that the international community [now] confront[s]."⁴³ Nongovernmental organizations have chronicled, in particular, massive violence against women during armed conflict in Bosnia and Rwanda and the failure of their governments, international donors, humanitarian organizations, and reconstruction and development agencies to respond to women's needs in the "postwar" period.⁴⁴

Whether and how individuals should be held criminally accountable for human rights abuses in internal conflicts has increasingly exercised international lawyers. These questions have been prompted by the fact that the major overt manifestation of tension in the international community has shifted from wars between states to armed conflicts within states. What directions do feminist methodologies suggest for analyzing international law in this area? On one level, the acknowledgment of women's lives and the use of the vocabulary of gender in the statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and the international criminal court (ICC) might suggest that feminist

³⁴ *Id.* at 88.

³⁵ See, e.g., Special Rapporteur on Contemporary Forms of Slavery, Final Report on Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (1998).

³⁶ MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 127 (1998).

³⁷ UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 45* (1995).

³⁸ See International Federation of Women Lawyers (FIDA), Statement, Uganda (Oct. 16, 1998) (on file with author).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ HUMAN RIGHTS WATCH, *WORLD REPORT 1998*, at 391 (1998).

⁴⁴ See generally HUMAN RIGHTS WATCH, *supra* note 43.

activism has had a progressive effect on the law. On another level, it appears that even the "new" international criminal law remains primarily a system based on men's lives.

International law has traditionally drawn a distinction between the principles of individual conduct that apply in times of armed conflict (international humanitarian law, IHL) and those that operate in peacetime (human rights law). This dichotomy has led to many anomalies and inconsistencies.⁴⁵ From a feminist perspective, the distinction has allowed IHL, with its basis in codes of warriors' honor,⁴⁶ to factor out issues that do not relate to the warrior caste.⁴⁷ For example, the guardian of IHL, the International Committee of the Red Cross (ICRC), was able to consider the Taliban's exclusion of women from any workplace in Afghanistan as completely outside its mandate. Ignatieff has described the self-imposed constraints of the ICRC in this situation: "Its legitimacy depends on its working with warriors and warlords: if they insist that women be kept out of sight, it has no choice but to go along."⁴⁸ The honor of warriors has nothing to say about the oppression of women. Human rights law, while more expansive in its coverage than IHL, has, as indicated above, provided a more limited response to the harms that women generally face compared with those confronting men. International criminal law, the topic of this symposium, is an amalgam of IHL and human rights law. In many ways, it has combined the gendered blind spots of both traditions.

I want to pose questions about three interrelated aspects of the "concrete situation" put to us by the symposium editors. What is the nature of international legal knowledge in this context? What knowledge is privileged and what knowledge is silenced and devalued?⁴⁹

Human Rights Abuses

The category of "human rights abuses" is a contested one from a feminist perspective. Analysis of the understanding of human rights in international law generally has shown that the definition of human rights is limited and androcentric.⁵⁰ The limitations of human rights law with respect to women are intensified in the context of IHL. Take, for example, the way that it deals with rape and sexual assault. Article 27 of the Fourth Geneva Convention places states under an obligation to protect women in international armed conflict "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."⁵¹ The provision assumes that women should be protected from sexual crimes because they implicate a woman's honor, reinforcing the notion of women as men's property, rather than because they constitute violence. This proprietary image is underlined by the use of the language of protection rather than prohibition of the violence.⁵² Additional Protocol I replaces the reference to a woman's honor with the notion that women should "be the object of special respect,"⁵³ implying that women's role in childbearing is the source of special status. Significantly, the provisions on rape are not specifically included in the category of grave breaches of

⁴⁵ See generally Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998).

⁴⁶ This term is used by IGNATIEFF, *supra* note 36.

⁴⁷ For a feminist analysis of international humanitarian law generally, see Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?* 46 INT'L & COMP. L.Q. 55 (1997).

⁴⁸ IGNATIEFF, *supra* note 36, at 146.

⁴⁹ Cohn, *supra* note 11, at 231.

⁵⁰ See generally, e.g., HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994).

⁵¹ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 27, 6 UST 3516, 75 UNTS 287.

⁵² Gardam, *supra* note 47, at 73-74.

⁵³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 76, 1125 UNTS 3.

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international humanitarian law.⁵⁴ In the context of noninternational armed conflict, common Article 3 of the Geneva Conventions does not specifically refer to sexual violence, generally prohibiting violence to life and the person, cruel treatment and torture, and humiliating and degrading treatment.

IHL, then, treats rape and sexual assault as an attack on (the warrior's) honor or on the sanctity of motherhood and not explicitly as of the same order as grave breaches such as compelling a prisoner of war to serve in enemy forces. The statutes of the two ad hoc Tribunals and the ICC, by contrast, provide much fuller responses to sexual violence, constructing it, depending on the circumstances, as potentially a crime of genocide, a crime against humanity and a war crime. This recognition was the result of considerable work and lobbying by women's organizations, but its limitations should be noted. In the statutes of the Yugoslav Tribunal and the ICC at least, all three categories of international crimes are concerned only with acts forming part of a widespread, systematic or large-scale attack. Thus, the "new" international criminal law engages sexual violence only when it is an aspect of the destruction of a community.

An example of this characteristic was the invitation to the prosecution by a trial chamber of the Yugoslav Tribunal, when reviewing indictments against Radovan Karadžić and Ratko Mladić, to consider broadening the characterization of the notion of genocide. It stated that "[t]he systematic rape of women . . . is in some cases intended to transmit a new ethnic identity to the child. In other cases humiliation and terror serve to dismember the group."⁵⁵ This comment suggests that the primary problem with rape is either its effect on the ethnic identity of the child born as a result of the rape or the demoralizing effect on the group as a whole. This understanding of rape perpetuates a view of women as cultural objects or bodies on which and through which war can be waged. The decision in the 1998 *Akayesu* case by the Rwanda Tribunal that rape constituted an act of genocide if committed with the intention to destroy a particular group⁵⁶ also rests on this limited image of women.

The emphasis on the harm to the Tutsi people as a whole is, of course, required by the international definition of genocide, and the *Akayesu* decision on this point⁵⁷ simply illustrates the inability of the law to properly name what is at stake: rape is wrong, not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition.⁵⁸ In this account, the violation of a woman's body is secondary to the humiliation of the group. In this sense, international criminal law incorporates a problematic public/private distinction: it operates in the public realm of the collectivity, leaving the private sphere of the individual untouched. Because the notion of the community implicated here is one defined by the men within it, the distinction has gendered consequences.

Another public/private distinction incorporated (albeit unevenly) in international criminal law—via human rights law—is that between the acts of state and nonstate

⁵⁴ Some jurists argue, however, that the prohibition on rape is implicitly included in this category. See, e.g., Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424, 426–27 (1993).

⁵⁵ Prosecutor v. Karadžić and Mladić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Nos. IT-95-5-R61 and IT-95-18-R61, paras. 94–95 (July 11, 1996), reprinted in 108 ILR 85 (1998).

⁵⁶ Prosecutor v. Akayesu, Judgement, No. 96-4-T (Sept. 2, 1998) <www.un.org/ictt>.

⁵⁷ The Rwanda Tribunal also found Akayesu guilty of war crimes and crimes against humanity through his encouragement of individual acts of sexual violence.

⁵⁸ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. II, 78 UNTS 277.

actors.⁵⁹ Such a dichotomy has gendered aspects when mapped onto the reality of violence against women. Significantly, the ICC statute defines torture more broadly than the Convention against Torture, omitting any reference to the involvement of public officials.⁶⁰ Steven Ratner has suggested, however, that some sort of distinction based on "official" involvement is useful as a criterion to sort out those actions against human dignity that should engender state and individual international criminal responsibility and those (such as common assault) that should not.⁶¹ The problem, from a feminist perspective, is not the drawing of public/private, or regulated/nonregulated, distinctions as such, but rather the reinforcement of gender inequality through the use of such distinctions. We need, then, to pay attention to the actual operation of boundary drawing in international law and whether it ends up affecting women's and men's lives differently. For example, the consequence of defining certain rapes as public in international law is to make private rapes seem somehow less serious. The distinction is made, not by reference to women's experiences, but by the implications for the male-dominated public sphere.⁶²

A different type of silence that might be identified in the legal protection of the human rights of women in armed conflict is the almost exclusive focus on sexual violence.⁶³ Insights generated by the "world traveling" method suggest that this emphasis obscures many other human rights issues in times of armed conflict, particularly the protection of economic, social and cultural rights of women. Conflict exacerbates the globally unequal position of women and men in many ways. We know, for example, of the distinctive burdens placed on women through food and medical shortages caused by conflict.⁶⁴ When food is scarce, more women than men suffer from malnutrition, often because of cultural norms that require men and boys to eat before women and girls.⁶⁵ Humanitarian relief for the victims of conflict regularly fails to reach women, as men are typically given responsibility for its distribution.⁶⁶ Economic sanctions imposed before, during or after armed conflict have had particular impact on women and girls, who are disproportionately represented among the poor.⁶⁷ Although the effect of these practices falls heavily on women, they are not understood by international law to be human rights abuses that would engage either state or individual responsibility.

Internal Conflict

What interests and voices are privileged or silenced in the distinction between international and noninternational conflicts that is the basis of the "concrete situation" devised by the editors? The Geneva Conventions, Additional Protocol II and the statute of the international criminal court regulate noninternational conflicts in a more circum-

⁵⁹ See Ratner, *supra* note 45, at 253.

⁶⁰ Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(2)(e), UN Doc. A/CONF.183/9*, reprinted in 37 ILM 999 (1998) [hereinafter ICC statute]. The statute, however, appears to regard rape and sexual violence as distinct from torture. See Art. 7(1)(g).

⁶¹ Ratner, *supra* note 45, at 254.

⁶² Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 336 (1997).

⁶³ See Judith Gardam & Hilary Charlesworth, *The Need for New Directions in the Protection of Women in Armed Conflict*, 21 HUM. RTS. Q. (forthcoming Aug. 1999).

⁶⁴ See generally Final Report of the Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, UN Doc. S/25240 (1993).

⁶⁵ See United Nations High Commissioner for Refugees, UNHCR Guidelines on the Protection of Refugee Women, UN Doc. E/SCP/67 (1991).

⁶⁶ *Id.* at 49.

⁶⁷ Sarah Zaidi, *War, Sanctions, and Humanitarian Assistance: The Case of Iraq 1990-1993*, 1 MED. & GLOBAL SURVIVAL 147, 153 (1994). See also Committee on Economic, Social and Cultural Rights, General Comment No. 8, UN Doc. E/C.12/1997/8.

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spect way than international conflicts.⁶⁸ The explanation for this distinction is that states are reluctant to give international status to those challenging their authority by force, preferring to classify them as criminals subject to domestic jurisdiction. The category of noninternational conflicts regulated by IHL is a very limited one, excluding "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."⁶⁹ The international/internal dichotomy has a gendered dimension because it underpins a detailed legal regime protecting combatants in international conflicts, almost invariably men, and a more general regime offering considerably weaker (and more contentious) protection to the civilian population, encompassing almost all women. From the perspective of those caught up in the conflict, the international/internal dichotomy makes little sense, as abuses of human rights do not change character according to this criterion.

On a broader level, the dichotomy between international and internal conflict distracts attention from the close relationship between international practices and internal conflict. For example, Anne Orford has drawn attention to the involvement of international institutions in the creation of "internal" tension.⁷⁰ In particular, she has shown how the activities of international economic institutions contributed to the terrible "internal" conflict in the former Yugoslavia and has concluded that "the failure to consider the possibility that the causes of the crisis might be related to the activities of international institutions or the influence of international law has meant that . . . the causes of the conflict [were seen as] 'ethnic' or 'nationalist.'" ⁷¹ The distinction, then, is a construct that obscures both the human suffering created by, and the causes of, "internal" conflict.

The distinction between international and internal conflicts has to some extent been de-emphasized in international criminal law through the definition of the categories of genocide and crimes against humanity and through the inclusion of some human rights norms—for example, the prohibition on torture—that operate in times of war and peace.⁷² However, the categories of crimes against humanity and war crimes as defined in the ICC statute still assume the existence of some type of hostilities (a "widespread or systematic attack" on civilians in the case of crimes against humanity and the planned large-scale commission of crimes in the case of war crimes).

The notions of conflict and attacks are themselves contingent and controversial. When do they begin and end? For many women, violence is not reduced with the cessation of military hostilities, and ostensible times of peace may be full of conflict for women and produce serious human rights violations. For example, Cynthia Enloe has described the social structures surrounding many foreign military bases where women may be abducted and forced into prostitution or become prostitutes in order to survive.⁷³ Thus, in Honduras women living on the fringes of United States bases have become caught up in a web of coercive and economic pressures to satisfy the military's expectation of the sexual services of local women.⁷⁴ Women's experience of violence and sexual abuse at

⁶⁸ See generally Ratner, *supra* note 45.

⁶⁹ ICC statute, *supra* note 60, Art. 8(2)(d). In the case of violations of humanitarian law apart from common Article 3 to the Geneva Conventions, the statute adds that its provisions apply only to "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." *Id.*, Art. 8(2)(f).

⁷⁰ Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443 (1997).

⁷¹ *Id.* at 479–80.

⁷² However, Article 5 of the Statute of the Yugoslav Tribunal, in Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993), confines crimes against humanity to those committed in international or internal armed conflict.

⁷³ CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* 118–20 (1993).

⁷⁴ *Id.*

the hands of United Nations peacekeepers in Mozambique, Cambodia and Bosnia⁷⁵ is another example of the unreality of the conflict/peace dichotomy: in this context the "peacekeepers" are the source of conflict and violence. Yet another example is the particularly harmful effects on women of economic sanctions imposed as a result of armed conflict.⁷⁶ The negotiation of the Dayton Peace Accords shows how the achievement of "peace" may be at the expense of the recognition of, and compensation for, harm suffered by the most vulnerable groups.⁷⁷ The failure of the Dayton Accords to acknowledge the treatment of, or provide any assistance to, the Bosnian women who were raped and sexually abused during the conflict has perpetuated their suffering.⁷⁸

Individual Accountability

The notion of "individual" accountability raised by the editors' "concrete situation" implies a contrast with (civil) state responsibility. Individual criminal accountability is regarded by most international lawyers as a higher, and more effective, deterrent to human rights abuses than state responsibility, because of the risk that the responsible state may choose not to impose any punishment on the actual perpetrator.⁷⁹ In this sense, it might be argued that at the international level individual accountability for human rights abuses affecting women would be a valuable method to reduce these wrongs. In many countries, the international sphere is regarded as more hospitable to women's claims than national legal systems. What criterion, if any, should be used to distinguish those violations of human rights that generate individual accountability from those that do not? While we may not wish to allocate criminal responsibility for every breach of human rights, it is critical that the principle of accountability not effectively reinforce gendered differences. The criterion of official conduct, discussed above, may well have this effect.

Feminists have had mixed views on the appropriate reaction to crimes against women in national legal systems. Although they have often been skeptical of systems of criminal justice, many feminists have supported strict application of existing law and called for strong penalties in the case of violence against women.⁸⁰ At the same time, they have pointed to the need to compensate and support victims of violence.⁸¹ Involvement in criminal legal processes, whether national or international, may bring about further trauma in the person who was the object of violence.⁸² Moreover, pursuing individual criminal accountability alone can distract us from investigating the causes of a problem. Focus on individual acts of violence against women may obscure the structural relations of power and domination that make them possible and the continuity between the ways women are treated in "peacetime" and in times of "conflict": rape in armed conflict is

⁷⁵ See Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373 (1996).

⁷⁶ See *supra* note 67.

⁷⁷ See Ustunia Dolgopol, *A Feminist Appraisal of the Dayton Peace Accords*, 19 ADELAIDE L. REV. 59 (1997).

⁷⁸ *Id.* at 66-68.

⁷⁹ E.g., Ratner, *supra* note 45, at 240.

⁸⁰ See Susan Edwards, *Violence against women: feminism and the law*, in FEMINIST PERSPECTIVES IN CRIMINOLOGY 145, 146-48 (Loraine Gelsthorpe & Allison Morris eds., 1990).

⁸¹ See Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 337 (1994); Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171 (1994).

⁸² For a debate over the appropriate treatment of victims of rape as witnesses before the Yugoslav Tribunal, see Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AJIL 75 (1997); Monroe Leigh, *Witness Anonymity Is Inconsistent with Due Process*, 91 AJIL at 80. See also Kate Fitzgerald, *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law*, 8 EUR. J. INT'L L. 638 (1997).

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made possible by the prevalence of rape in times of peace. Such a focus will not necessarily provide an incentive to remedy human rights abuses that are the product of a systematic failure to create the conditions necessary to guarantee the security of women.⁸³ International trials of individuals for human rights abuses during armed conflict serve a range of social functions, including retribution, deterrence and absolution through catharsis.⁸⁴ The ideal of justice animating them is closely connected, as Simon Chesterman has shown, to a particular understanding of peace and order obtained through military means.⁸⁵ The trials allow a return to the "order" of the status quo, but this public order is dependent both on the acceptability of violence and on the domination of women in the private domain.

Schemes of accountability for human rights violations are not confined to criminal responsibility. For example, the "truth commissions" established in a number of states, including Uganda, Chile, El Salvador and South Africa, were designed to establish the facts about patterns of human rights violations, without necessarily leading to individual criminal prosecutions. The rationale of these investigatory mechanisms was that knowledge of the truth would itself promote social healing and reconciliation.⁸⁶ The nonadversarial nature of these proceedings might appear to be consistent with some feminist scholars' reservations about criminal proceedings and support for alternative forms of dispute resolution. The experience of the commissions, however, is mixed. Their effectiveness in promoting reconciliation has been dependent on political support and broad terms of reference.⁸⁷ Issues of gender have thus far not been seen as relevant to their mandates.

The notion of state responsibility has recently been developed in ways that encompass gendered harm. For example, in *Mejía Egocheaga v. Peru* the Inter-American Commission on Human Rights held Peru accountable for the rape of a woman, Raquel Mejía, by Peruvian security forces as an aspect of the campaign against civilians suspected of having connections with insurgents. The Commission observed that there were no effective remedies within Peru to pursue claims against the security forces. It stated:

Current international law establishes that sexual assault committed by members of security forces, whether as a result of the deliberate practice promoted by the state or as a result of failure by the state to prevent the occurrence of this crime, constitutes a violation of the victim's human rights, especially the right to physical and mental integrity.⁸⁸

The value of this principle is its recognition of international responsibility for an inadequate national structure to respond to crimes against women. When is a national legal system considered deficient in this context? International law appears able to recognize the Peruvian system as inadequate because it allowed no action against the security forces. It is less ready to respond to the significant structural problems in most legal systems, which may offer formal legal remedies for gendered harms but in practice fail to deliver justice to women.⁸⁹

⁸³ See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 50, at 85, 85-86.

⁸⁴ See Chesterman, *supra* note 62, at 311-17.

⁸⁵ *Id.* at 319.

⁸⁶ See Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994).

⁸⁷ *Id.* at 635-50.

⁸⁸ Case 10,970, Report 5/96 (Mar. 1, 1996), reprinted in 1 BUTTERWORTHS HUM. RTS. CASES 229 (1996).

⁸⁹ See, e.g., AUSTRALIAN LAW REFORM COMMISSION, EQUALITY BEFORE THE LAW (1994).

III. CONCLUSIONS

How do feminist methods compare to the other methodologies presented in this symposium? In principle, all the methods are capable of some response to the situation of women worldwide and, indeed, feminist international lawyers have drawn on each of these methods, from positivism to critical legal studies, in their attempts to make international law more useful to women. However, unlike these other methods, my account of feminism asserts the importance of gender as an issue in international law: it argues that ideas about "femininity" and "masculinity" are incorporated into international legal rules and structures, silencing women's voices and reinforcing the globally observed domination of women by men. None of the other methodologies represented here displays any concern with gender or, indeed, with the position of women as an international issue. The situation of over half the world's population is not seen as relevant to attempts to define universally applicable principles.

Another distinction between feminist methods and many of the other contributions is in the way they view the idea of objectivity in international law. For example, Bruno Simma and Andreas Paulus, writing for the enlightened positivists, emphasize the need for the international lawyer to put aside his or her subjective preferences and to strive for impartiality. They insist that the very "professional ethics of a lawyer requires the impartial mediation of attitudes, ideologies or conflicts."⁹⁰ Mary Ellen O'Connell's account of international legal process and Jeffrey Dunoff and Joel Trachtman's statement of the law and economics approach similarly stress the centrality of objectivity to the international legal system. Feminist methods question the possibility of objectivity in a system that effectively excludes women's voices. They are skeptical about the construction of the neutral and impartial standards, seeing them as synonyms for male perspectives. Skepticism about the hunt for the objective is, of course, shared by many critical thinkers, but they have remained curiously aloof from examining the implications for gender politics, or indeed for the situation of other marginalized groups. Like Martti Koskenniemi, feminists pay attention to the binary structures of international law, but they argue that these structures also have a gendered dimension, reflecting and solidifying systems of subordination based on sex.

Some feminist methods overlap with those described in other contributions. For example, the New Haven approach described by Siegfried Wiessner and Andrew Willard gives prominence to the clarification of the observer's standpoint, at first sight similar to the feminist concern with the politics of identity. However, from a feminist perspective, the New Haven School is interested in only a very narrow understanding of standpoint, failing to attribute any significance to the sex of the observer and the gendered world of international law. If law is a "human artifact," is it not relevant that its makers are almost invariably men? The New Haven commitment to a world public order of human dignity also fails to consider the gendered dimensions of the notions of order and human dignity. What are the underpinnings of the order promoted and what model of humanity is being relied on? Another set of methods that have had some resonance for feminist international lawyers are those of international relations. It is striking that none of the literature discussing the potential bridges between international law and international relations, including Kenneth Abbott's contribution to this symposium, has paid any attention to the significant influence of the rich feminist IR literature on international

⁹⁰ Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 316 (1999).

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legal scholars, and vice versa. The lack of interest in this connection underlines how eccentric and marginal feminists appear in the two disciplines.⁹¹

The editors of this symposium asked us to consider how "our" method's analysis of international law would assist a decision maker in appraising the lawfulness of conduct and constructing law-based options for the future. The feminist methods that I have outlined indicate the need for a radical shift in perspective in international law. My version of a feminist analysis suggests that international law rules on accountability for human rights abuses in internal conflicts tend to privilege a certain set of experiences and filter out many issues that touch women's lives in particular. Is there any point in changing the law? Some feminist theorists might dismiss reform of the law as a worthwhile strategy, arguing that this may give undue prominence to law as a site of social change. They may point out that some women will gain more from international law than others. In any event, it may be argued, even if we get the principles right, there is no guarantee that the practice will change. Feminists might point to the greater value of political campaigns or media coverage in reducing the oppression of women.⁹² These arguments, while powerful, do not acknowledge that international law has a symbolic, as well as a regulative, function. Claims based on international law can carry an emotional and moral legitimacy that can have considerable political force.⁹³

Is the reconception of international law for which I have argued a practical and efficacious strategy? In a review of a collection of papers on feminism in international law,⁹⁴ Koskenniemi has cautioned against the enthusiasm for radical change in our discipline:

We can reconceive international law every now and then, but not all the time. Our immediate fears and hopes do not necessarily match to produce the good society At some point, we need distance from those fears and hopes—if not objective distance, then at least a partial, consensual, formal distance. That law makes this distance possible (if always only for a moment) is not a defect of law, but its most immediate benefit.⁹⁵

Koskenniemi seems to be advocating acceptance of the framework of international law because, flawed as it is, it is some protection from untrammelled subjectivity and politics. My argument here, by contrast, is that international law does not provide even a "partial, consensual, formal distance" from subjectivity. It is intertwined with a gendered subjectivity and reinforces a system of male symbols.

Feminist methods help us understand women's subordination in ways that are much deeper than those offered by the legal concept of discrimination. How can the two goals of feminism, activism and theorizing, come together in the context of accountability for human rights violations in internal armed conflict? Ensuring equal participation of women in the institutions of international criminal law is an important first step.⁹⁶ But this alone will not ensure a change of perspective. As Cohn has pointed out:

[I]t is not simply the presence of women that would make a difference. Instead, it is the commitment and ability to develop, explore, rethink and revalue those ways of

⁹¹ See Tickner, *supra* note 1.

⁹² E.g., CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989).

⁹³ See Richard Bilder, *Rethinking Human Rights Law: Some Basic Questions*, 1969 WIS. L. REV. 171.

⁹⁴ RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda Dallmeyer ed., 1993).

⁹⁵ Martti Koskenniemi, Book Review, 89 AJIL 227, 230 (1995).

⁹⁶ In a significant move, the ICC statute, *supra* note 60, Art. 36(8)(a)(iii), calls on states parties to take into account the need for "[a] fair representation of female and male judges." It also requires states parties to consider the inclusion of judges with legal expertise in violence against women. *Id.*, Art. 36(8)(b).

thinking that get silenced and devalued that would make a difference. For that to happen, men, too, would have to be central participants.⁹⁷

International lawyers require a much richer understanding of gender than the definition provided in the ICC statute, which elides the notion of gender and sex.⁹⁸ It does not recognize that gender is a constructed and contingent set of assumptions about female and male roles and that many of the defining dichotomies of international criminal law, such as order/disorder, public/private, international/internal, have a gendered dimension. They should appreciate the way that notions of femininity and masculinity are used in conflict and how such constructions validate "normal" roles for women and men. Rape and sexual assault should be analyzed in international law as crimes against women, rather than offenses against their communities. International legal recognition of persecution based on gender as a crime against humanity offers the possibility of challenging the narrow conception of the social order protected by international criminal law.⁹⁹ Most fundamentally, international lawyers need to understand the way that our discipline has legitimated the use of violence by accepting it as an inevitable aspect of international relations and the implications that this has for our daily lives.

HILARY CHARLESWORTH*

THE LAW AND ECONOMICS OF HUMANITARIAN LAW VIOLATIONS IN INTERNAL CONFLICT

INTRODUCTION

The problem of criminal responsibility for human rights atrocities committed in internal conflict provides an appropriate vehicle for examining various theoretical and methodological approaches to international law. The issues raised include the following: Does international law provide for individual criminal responsibility for such acts? How best can these atrocities be prevented? Should international law address these matters or are they better left to domestic law? Why does international legal doctrine distinguish between human rights violations committed in international conflict and the identical acts committed in internal conflict?

International lawmakers, judges, practitioners and scholars have had trouble answering questions like these because of a shortage of useful theory. Law and economics (L&E) is rich in useful theory: it has constructed and refined a body of rationalist theory that can generate refutable hypotheses, and it suggests methodologies by which those hypotheses may be tested. While law and economics is rich in theory, it exalts empiricism (in which it is surprisingly poor). In fact, we are critical of a law and economics that has immodestly been willing to prescribe solely on the basis of theory. In this necessarily brief essay, we do not reach positive conclusions or normative prescriptions because our

⁹⁷ Cohn, *supra* note 11, at 239.

⁹⁸ ICC statute, *supra* note 60, Art. 7(3).

⁹⁹ *Id.*, Art. 7(1). See Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 261-64 (1994).

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