CROSSING THE LINE:
FEMINIST INTERNATIONAL LAW THEORY, RAPE AND THE WAR IN
BOSNIA-HERZEGOVINA

by

DORIS ELISABETH BUSS

B.A., Carleton University, 1987
LL.B., Dalhousie University, 1990

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Department of GRADUATE STUDIES (LAW)

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ABSTRACT

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Doris Elisabeth Buss

In recent years, feminist theory has turned its critical gaze to international law. By challenging the objectivity, neutrality and universality of international law, feminist international law theory offers a new way of thinking about the discipline.

Feminist international law theory raises numerous questions not only about the male-centered discipline of international law, but also the scope and nature of its own feminist method. In this thesis, I situate feminist international legal theory in the context of developments within feminist theory generally, which demonstrate the need to ground feminist analysis in the particular experiences of different women. I consider the ways in which feminist international law theory employs theoretical constructs which generalize and essentialize women's experience of oppression along Western lines. By exploring the emphasis in this literature on the public/private divide and sovereignty, I demonstrate the ways in which gender is constructed as the principal site of oppression, missing the complex systems of oppression with which women interact including race/ethnicity, patriarchy, and nationalism.

The mass rape of Muslim women in Bosnia-Herzegovina is presented as a case-study for understanding women's complex experiences of oppression and the implications this has for feminist international law theory. During war, different discourses, including law, converge to define particular gender identities, national character and dominant values. International humanitarian law defines how the international community views wartime rape and violence against women. Incorporating dominant ideologies about women, war and rape, international
humanitarian law regulates, rather than prohibits, rape. In the context of mass rape in Bosnia-Herzegovina, the applicable international law framework is limited in application to rapes defined as an attack on a community rather than an act of violence against women. Violence against women is constructed as unfortunate but unavoidable.

The example of wartime rape demonstrates international law's role in defining and reinforcing gender ideologies. While I conclude that feminist international law theory must continue the project of challenging international law, it must do so from an informed position about international law's complicity in women's global oppression.
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To my parents, Betty Buss and Roy Buss
CHAPTER 1
INTRODUCTORY COMMENTS

On a daily basis, women throughout the world cross lines, transgress boundaries and redefine their world. Sometimes the line women cross is a legal border between countries. Making up the vast majority of refugees, many women are part of a daily movement of peoples across territories. Sometimes the line is a cultural or social construction of women's proper roles and activities. Subject to conflicting social and economic constructions, many women cross the line of acceptable conduct to pursue personal goals or basic sustenance. Sometimes, the line is more theoretical. Within the academy, some women cross the line of scholarship, applying a feminist analysis to previously male bastions of thought. One such example is the recent development of feminist international law theory.

Until recently, international law remained immune from feminist, and to a lesser extent, critical review. In the past decade, international law has come under increasing scrutiny of feminist

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2 See Susan Boyd, "Child Custody, Ideologies, and Employment" (1989) 3 CJWL 111 for her discussion of how ideologies of motherhood are used to penalize women who work outside of the home and are seeking custody of their children.
3 For a long time, the principal critical legal scholars working in the area of international legal scholarship were David Kennedy and Anthony Carty. Their texts form the backbone of an important but still limited critical legal scholarship: Anthony Carty: The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (Great Britain: Manchester University Press, 1986) and David Kennedy, International Legal Structures (Baden-Baden: Nomos, 1987). See infra for a list of more recent critical international works.

Hilary Charlesworth suggests that international law was impervious to feminism for several reasons: there are very few women scholars and practitioners of international law and the discipline operates as a "men's club"; international law can be quite abstract without an immediately apparent connection to women's lives; and the emphasis in international law on
scholars who have challenged its claim to objectivity and neutrality. Looking behind apparently neutral international law principles, feminist international law scholars have shown the uneven and gendered impact of international law on the lives of men and women.

Initially, most of the feminist scholarship in international law was concentrated in the human rights area. Recognizing the limitations of international human rights, the focus of this scholarship has been on rethinking human rights to increase their utility in addressing women's inequality.

In 1991, Charlesworth, Chinkin and Wright published their award winning article, "Feminist Approaches to International Law" and expanded the project of feminist international law theory to an examination of international legal doctrine as well as human rights. Charlesworth, Chinkin and Wright's focus was on the apparent resistence of international law


"Feminist Approaches to International Law", ibid. at 614-5.


The article won the Francis Deak award: Fernando Teson, "Feminism and International Law: A Reply" (1993) 33 Virginia J of Int'l L 647.

Supra note 4.
to feminist analysis and the "possibilities of feminist scholarship in international law." The authors' aim was to apply feminist theory to international law not only to address women's inequality, but also to inform the development of international law.

I first started looking at feminist international law theory because I was enthralled at the prospect of using feminist theory to explore various aspects of international law. Charlesworth, Chinkin and Wright's initial article promised a new way of looking and thinking about international law. To me, the union of international law and feminist theory seemed an "ideal marriage". Not only did it represent the joinder of the two academic areas that interested me the most, but it suggested a new vision of the emerging and much heralded "new world order". In other words, I was looking for the ideal theory that would sweep me off my intellectual feet. The reality, of course, falls short of the ideal. Like many graduate students, I realized there is no one theory to explain everything. What is important was not so much my intellectual disappointment, but the journey that began with the expectation of epiphany. My focus shifted from not only looking at international law through feminist lenses, but also considering the prospects and limitations of feminist theory which sought to explore women's different experiences of oppression across national and cultural boundaries. That exploration ultimately brought me full circle to questioning the role of international law in women's oppression and its potential as an instrument of social reform. This thesis therefore, is not just an exploration of international feminist theory, but it is also a map of my own thought processes and how I encountered and worked through questions and concerns about feminist theory, international law, and ultimately feminist international law theory.

In a recent article, "Women and Poverty in India: Law and Social Change", Brenda Cossman and Ratna Kapur consider the difficulty of "speaking of women" and "speaking of law". To

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9 Ibid. at 614.
10 (1993) 6 CJWL 283 at 286.
speak of women -- in their case "Indian women" -- implies that Indian women form a coherent, homogenous group without diversity. To speak of law, specifically the legal regulation of women, suggests a monolithic entity with a uniform impact on the lives of all women. Thus, when one "speaks of women and law" there is the difficulty of also speaking of women's diverse experiences and the multiple and contradictory ways in which they interact with law.

In this thesis, I explore how international feminist legal theory speaks of women and how it speaks of law. Perhaps because international law has so long remained immune from critical comment, the prospect of feminist analysis of international law raises questions about the scope and application of international law: how do some things get defined as international and others do not? Who are the real and ostensible constituents of international law? What role do women play in international law? And what role does international law play in the lives of women?

The prospect of feminist international law theory suggests several theoretical problems. Given the complex and different ways women interact with law, can feminist theory speak for some or all women? How does feminist international law theory consider the intersection of different sites of oppression? Is feminist theory irreconcilably a Western movement? Can feminist international law theory account for the different and multiple ways women engage with international law?

In this thesis, I try to think through, and raise questions about, the complex experiences of different women and the implication this has for feminist international law theory. Influenced

11 Cossman and Kapur, supra note 10 at 285.
by the work of socialist feminists, I take as my starting point the need to consider law as only one of several systems with which women interact. In my examination of feminist international law theory, I consider how the impact of different systems of oppression -- colonialism, nationalism, international law and patriarchy, are theorized.

In order to understand the context within which feminist international law theory is developing, in Chapter 2 I discuss some of the current debates ongoing within feminist theory. In particular, the challenge to feminist theory by women of colour, Third World women, women with disabilities, lesbians and other groups, has resulted in a paradigm shift within feminist theory. Working from a recognition of the need to theorize women's differences, many feminists are refocusing their approach to make it more sensitive to the complexity of women's lives. The need to theorize women's different experiences has particular implications for feminist theory which examines the impact of international law on women throughout the globe.

12 Generally, I find the categorization of feminist theory into socialist, marxist and liberal camps to be unhelpful and misleading. However, in this context I use the term socialist feminist to refer to feminist theoretical work which examines issues of gender oppression in the context of a stratified society where women are differently located based on their class. Recently, this analysis has been expanded to consider the effects that race, sexuality and physical ability have on women's position within the social hierarchy. See Chapter 2 for further discussion and references.

13 This notion of different systems is derived in part from Dorothy Smith's conception of relations of ruling, as discussed in Chandra Talpade Mohanty, "Introduction: Cartographies of Struggle: Third World Women and the Politics of Feminism" in Chandra Talpade Mohanty, Ann Russo, Lourdes Torres, eds., Third World Women and the Politics of Feminism (Bloomington and Indianapolis: Indiana University Press, 1991). For a discussion of my conception of ideology, see Chapter 2, note 86, and accompanying text.


15 Susan Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Cdn J. of Family L. 79 at 103 refers to her own efforts to incorporate insights from post-modernist theory to "develop a mode of inquiry and analysis sensitive to all implications which emerge."
Recognizing the importance of diversity requires more than simply "adding" different women to feminist theory. It means using the insights from women's different experiences to question categories and assumptions central to one's theory. In Chapter 3, I examine the centrality of the public/private divide within feminist international law theory. Within the domestic realm, feminist theory has demonstrated that the divide between public and private spheres is premised on a belief structure about the appropriate roles of men and women. The public/private divide is both a material and ideological division that prescribes how life should be led. Feminist international law theorists have drawn upon this analysis of the public/private divide to explore the ways in which international law incorporates a gendered division between public and private spheres. The focus of this inquiry has been on women's exclusion from international law through separate sphere ideology. The distinction between international and state matters means that issues central to women's lives are generally categorized as internal to a state and therefore beyond the ambit of international law. In particular, state sovereignty is critiqued by feminist international law theorists as justifying the immunity of states from international law. In this chapter, I consider how this analysis of the public/private divide may be premised on reductive and essentialist notions of women's different experiences of oppression. In addition, I consider if the public/private divide, as a concept derived from Western, liberal theory has application to non-Western women. My purpose in exploring the limitations of the public/private divide within feminist international law theory is to raise questions about the complex ways women engage with law, and the implications this has for a theory which is sensitive to women's differences.

Having outlined the context within which feminist international law theory has emerged, I then consider the case study of mass rape in Bosnia-Herzegovina. The rape of Muslim and Croatian women as a policy of war has particular implications for feminist theory. First, it represents an area where feminist international law scholars and activists have worked to
redress violence against women through international law. Second, it raises difficult theoretical questions about intersectionality and theorizing women's differences. In the Bosnian war, rape is used as a policy of war directed at women of a certain ethnic/religious background. Therefore, the rapes are as much an act of ethnic/religious violence as gender violence. Feminist international law theory needs to consider how the intersection of gender, religion and ethnicity defines the very nature, and experience, of these violent acts.

In Chapter 4, I provide a brief description of the events in the former Yugoslavia and the steps taken by the international legal community in the ongoing conflict. I then examine the feminist international law scholarship on the war crimes in Bosnia. Drawing on my discussions in Chapters 2 and 3, I explore how this work theorizes issues of intersectionality, difference and the public/private divide in the context of mass rape.

In Chapter 5, I move away from the specific events in Bosnia to consider different ideological structures, such as militarism, nationalism, patriarchy and law, that impact upon how war and violence are conceived. In this chapter, I explore some of the ideologies of war, women and violence that are incorporated within, and reinforced by, international humanitarian law. By placing wartime rape in the context of various systems of oppression, I show how women's identities are constructed and reconstructed through war. As part of this analysis, I consider how international humanitarian law incorporates and reinforces certain gender ideologies, raising questions about international humanitarian law as an instrument of reform.
CHAPTER 2
DEBATES WITHIN FEMINIST (LEGAL) THEORY

I. INTRODUCTION

Feminist approaches to international law raise important issues not only about the discipline of international law, but also the state of feminist theory. Feminist international legal theory, with its transnational focus, crystallizes many of the theoretical debates ongoing in feminist scholarship and practice concerning: (1) the focus on "women" as an analytical category, (2) the dominance of white women in Western feminism, and (3) the interrelationship between gender, race, class and ethnicity as systems of oppression. First, because of its focus on women in a global context, feminist international law theory raises in a very pointed way the difficulty of talking about 'women' as a central category of analysis while still accounting for the diversity of women's experiences. Second, feminist international legal theory means more than just looking at international law; it invariably requires an examination of the laws, custom and religious practices of individual states. This raises concerns about the position of white, Western feminists in this literature. Do we have the authority to speak for women globally? Should we begin the task of examining other cultures, other religions? How do we go about this project without doing irreparable damage to Third World women through distorting their experience and silencing their voices? Third, with its focus on gender, can feminist international legal theory account for the complex of structures and actors which affect the lives of women -- Third World and Western women -- and their different experience of oppression?¹

¹ By "Western women" I am referring to white, middle and upper class women from Europe and North America. I use the term "Third World" to refer to women who are from countries of the South: Asia, Africa and the Middle East. My use of the terms "Third World" and "Western" are not just geographic designations but are references to the asymmetric relationship between Northern and Southern countries resulting from colonialism and continuing economic and technological imbalances. By Third World women, I am also
In this chapter, I explore these questions as they have been posed in the context of domestic, feminist theory as well as their particular salience at the level of international law. I first discuss the current debates in feminist theory concerning essentialism, difference and the intersection of race, gender, class and ethnicity. Second, I discuss how these debates are both similar and different when applied at the international level. Finally, I discuss how these debates shape my understanding and concerns about feminist approaches to international law.

referring to women who, for reasons of race, ethnicity, class, and history are constructed, by international legal and some feminist discourse, as "other". I have many misgivings about employing terminology like "Third World" and "Western" by which women are named as cohesive groups: Chandra Talpade Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Chandra Talpade Mohanty, Ann Russo, Lourdes Torres, eds., Third World Women and the Politics of Feminism (Bloomington and Indianapolis: Indiana University Press, 1991) [hereinafter "Under Western Eyes"]. In addition, the boundaries of the categories Third World and Western are not clear. With the decline of the Soviet Union, many countries in Eastern Europe are facing economic, technological and political marginalization within the international arena that places them in asymmetric relationships similar to some countries in the Third World. Recognizing the limitations of terms like Third World and Western, I employ them in this thesis to convey the economic, social and political imbalance between women in different parts of the globe. Recognizing and incorporating a sensitivity to that imbalance is part of the challenge to feminist international law theory that I wish to explore in this thesis.

2 The term intersection, and the concept of intersectionality between race, gender, class and ethnicity is taken from Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) University of Chic. Legal Forum 139. I will be discussing this work more fully later in this chapter.
II. DOMESTIC FEMINIST THEORY\(^\text{3}\)

In discussing current debates within feminist theory, I do not mean to suggest that they, or feminist theory, are developing in a linear fashion; that these debates are somehow one step in a feminist progression towards Truth. Rather, I hope to draw a picture of feminist theory as a complex of different projects and perspectives: a sort of theoretical web. The different debates which I discuss are web-sites within that complex of theory and practice. Rather than a linear progression, I see feminist theory as an interaction of different perspectives, pointing in different directions but ultimately hung together by a series of continuous threads.\(^\text{4}\) I hope to place feminist approaches to international law in the centre of the feminist theoretical web to show how different theoretical debates touch on and complicate this project.\(^\text{5}\)

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\(^{3}\) Within international law, distinctions are drawn between those matters which are international in nature (i.e. between states) and those that are internal to a state, said to be within its domestic domain. For the purposes of this thesis, I have drawn a similar distinction between feminist theory which is written specifically in the context of international issues and feminist theory that is written with mainly local or domestic issues in mind. While I think feminist theory, whether categorized as domestic or international, speaks across national and international boundaries, the distinction is important because not all insights gleaned in the context of, for example, local laws, are applicable at the international level. In addition, part of the critique of white, Western feminist theory is that it tends to have a singular domestic focus excluding Third World Women from its purview. See: Vasuki Nesiah, "Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship" (1993) 16 Harv Women's L J 189. Throughout this thesis, my reference to 'domestic' -- whether in the context of feminist theory or law -- refers to matters of a local interest as opposed to an international one, and is not meant to refer to the "family".

\(^{4}\) Nitya Duclos structures her discussion of difference within feminist theory as a circle where the point of entry is arbitrary; "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38(2) Buffalo L Rev. 325 at 350. It is this same notion of fluidity that I am trying to capture in my description of feminist theory as a web.

\(^{5}\) In this chapter, I look at feminist theory generally, not just that emerging within the discipline of law. Feminist legal theory has drawn from various streams within feminist theory generally to explore the ways in which law incorporates and facilitates a gender hierarchy that privileges men over women. Feminist legal theory challenges law's claim to objectivity, universality and neutrality: Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 The Yale L. J. 40. Many of the critiques of feminist theory by women of colour discussed below, apply to feminist legal theory. Some feminist legal theorists have incorporated and built on the work of women of colour and other theorists challenging
1. Challenges to Feminist Theory by Women of Colour

At the centre of feminist international legal theory is a fundamental tension between the universalizing tendency of a theory which speaks of "women" and the need to theorize the cultural diversity of women. Perhaps the most pronounced difficulty facing feminist international legal theory is how to talk about women's different experiences, different cultures, different histories and different views of their oppression while maintaining both theoretical continuity and a radical political edge. International feminist theory, therefore, crystallizes a central debate within feminist theory: universalism versus particularism. The context of this debate lies in the challenge to feminist theory by women of colour.

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6 In trying to synthesize and organize feminist literature into understandable categories, I have chosen to "label" this particular area of literature as emanating from women of colour. By this term I am referring to the work by Black American, First Nations, and some Third World women which has critiqued feminist theory for its essentialist and narrow focus on white, middle-class, Western women. In referring to these authors as "women of colour" I am trying to emphasise that for reasons of race, class and ethnicity they find themselves at the margins of feminist theory. Included in this category is work not necessarily by women of colour but which builds on their critique. I have also made a distinction between the work of women of colour and work of Third World theorists by which I mean the work of women from Africa, Asia and Latin America. Throughout my description of feminist scholarship by women of colour and Third World women, I also refer to "white feminism" and "Western feminism". These terms refer to feminist scholarship by white and Western feminists that is the subject of review by women of colour and Third World women and which focuses on white women's experience as representative of all women.

7 The volume of work in this area is quite large. Some of the key works that I have found useful in my research, and to which I will be referring include: Crenshaw, supra note 2; Duclos, supra note 4; Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stanford L Rev 581; bell hooks, Feminist Theory: From Margin to Center, (Boston: South End Press, 1984) [hereinafter Feminist Theory]; Marlee Kline, "Race, Racism, and Feminist Legal Theory" (1990) 12 Harv. Women's L J 115; Patricia Monture, "Ka-nin-geh-heh-gah-e-sa-nonh-yah-gah" (1986) 2 CJWL 159; Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought (Boston: Beacon Press, 1988).
World women,\(^8\) lesbians\(^9\) and women with disabilities,\(^{10}\) who argue that some feminist theory suffers from the same universalizing and essentializing tendencies that it has challenged in male-centered, mainstream theory.

Feminist theorists have argued that mainstream society and thinking has generalized about humanity based on the experiences of men in a way that ignores the different experiences of women in a gender stratified society.\(^{11}\) This same criticism, however, has been applied to feminist theory for its tendency to generalize about the experience of gender oppression based on the reality of white, middle class, heterosexual and able-bodied women.\(^{12}\) For the

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\(^12\) Spelman, *supra* note 7; *Feminist Theory* *supra* note 7; Duclos, *ibid.* at 355.
purposes of this Chapter, I am focusing on the challenge to feminist theory by women of
colour and Third World feminists,\textsuperscript{13} whose critique of the racial and ethnic dimensions of
white feminist theory provides an important context for understanding some of the theoretical
difficulties facing international feminist legal theory.

Women of colour have argued that by generalizing about gender oppression based on the lives
of white, middle-class women, white women are ultimately placed in the centre of feminist
analysis and stand in as the model for what a 'woman' is. Marlee Kline has identified three
tendencies in white feminist legal scholarship that contribute to the positioning of white
women's experience as the norm: (1) asserting that all women share a common oppression; (2)
overlooking the relevance of ethnicity, class and other differentials when considering how an
issue effects women; and (3) focusing on issues that tend to be of principal importance to
white women.\textsuperscript{14}

A central criticism of white feminism is that it starts from the assertion that all women share a
common experience of gender oppression. This assertion postulates not only a commonality
among women based on their biological and social construction, but a uniform experience of
gender oppression. Universalizing the experience of all women erases the differences between
women who, because of race, ethnicity, and class, may be subject to multiple and different
kinds of oppression.\textsuperscript{15} As Kline notes, women do not share a social position: "We are
divided from each other by class, race and other factors that affect our relative positions in the
social hierarchy of our present society."\textsuperscript{16}

\textsuperscript{13} \textit{Supra} note 7 and 8 for a list of the theorists in these two areas on whose work I will
be relying. I will be specifically addressing the Third World feminist literature in the next
section of this Chapter.

\textsuperscript{14} Kline, \textit{supra} note 7 at 121; Duclos, \textit{supra} note 4.

\textsuperscript{15} Mohanty, "Under Western Eyes", \textit{supra} note 1 at 71; Nesiah, \textit{supra} note 3 at 200.

\textsuperscript{16} Kline, \textit{supra} note 7 at 141.
Occupying different positions in the social hierarchy means that women are subject to different experiences of oppression whether based on race, class, ethnicity or, in the case of Third World women, colonial history. Importantly, however, women's different positions in the social hierarchy also means that their experience of gender oppression may be different. As bell hooks notes, factors such as class, race and religion are not simply other axes of oppression, they also "determine the extent to which sexism will be an oppressive force in the lives of individual women."¹⁷

Thus, by focusing on gender as the principal axis of oppression, white feminism distorts the experience of women who define themselves in terms of race, ethnicity or some other factor, or whose experience of gender oppression does not mirror that depicted in white feminist theory. In this way, white feminism creates an "essence of woman" that is applied across cultural, racial and class boundaries. The essential woman, however, is constructed on the basis of a white feminism which ignores the privilege of its own race, ethnic and class position.¹⁸ Thus, 'woman' is ostensibly devoid of race, ethnic or class characteristics. She is transhistorical, transcultural, and ahistoric. For women of colour, this has meant that the extent to which they do not -- or cannot -- conform to the dominant model of woman, they are "not-woman" in the same way that women who do not conform to the male standard are "not human".¹⁹

To the extent that feminist theory has recognized women's different positions in the social hierarchy, it has relegated these differences to the margins of women's experience. It has done

¹⁷ Feminist Theory, supra note 7 at 5. See below for my discussion of the work of Kimberle Crenshaw, supra note 2 and her theory of intersectionality.
¹⁸ Duclos, supra note 4 at 357; Spelman supra note 7 at 159; Harris, supra note 7 at 585.
¹⁹ Duclos, ibid; Spelman, ibid.
this by: (1) treating identity characteristics as discrete, severable categories; and (2) assuming a "non-different" position which fails to recognize white women's racial, ethnic and social privilege.

Spelman notes that when some feminists do acknowledge that women have different racial and social characteristics, there is still a tendency to see all women as being essentially the same as women. Different racial and social characteristics are treated as residual and belonging to "some non-woman part" of our identity. This approach has meant that feminists have not had to change their thinking about oppression in order to accommodate the different perspectives of women of colour. It also points to a tendency to see different aspects of women's identity as being discrete, severable and ultimately of secondary importance to gender. By focusing on gender as the principal site of oppression, irrespective of women's other experiences, issues of race, class or ethnicity are "Bracketed as belonging to a separate and distinct discourse". This process of categorizing and then setting aside different aspects of women's identity "fragments the identities of women of color", treating them as an amalgam of different building blocks which can be rearranged to fit the particular experience at hand. Ultimately, however, this process of categorization fails to capture women's experience of oppression which may defy simple classification.

...Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination - the combined effects of practices which discriminate on the basis of sex. And sometimes, they experience discrimination as Black women - not the sum of race and sex discrimination but as Black women.

20 Ibid. at 166.
21 Harris, supra note 7 at 592.
22 Duclos, supra note 4 at 356; Harris, ibid.
23 Crenshaw, supra note 2 at 149.
Women of colour, whose experience of oppression does not fit neatly into any of the categories assigned to them, drop out of an analysis which focuses solely on gender oppression. Their experience is either too much like racism, or too different from sex discrimination to be "absorbed into the collective experience of either group".24 Instead, women's difference is relegated to "the margin of the feminist and Black liberationist agendas".25

This process of sorting women's experiences into different categories is not only a distorting process, but underscores the discrepancy in power between those who define the categories and those who are defined by them. Spelman notes that the process of defining people through representational categories like race and ethnicity will vary depending on the categories used and how they are arranged.26 It is important therefore, to question who is deciding on the categories and what is at stake in the selection of some categories over others.27

Implicit in defining categories of identity is the power to define oneself as the norm against which the categories are described.28 Feminist theory, which relegates issues of race, ethnicity or cultural identity to the margins, reinforces a conception of the 'normal' woman as raceless, classless and without history. This approach fails to account for the position of power some women may enjoy by virtue of their race and class.29 By defining race and class as something only some women experience, feminist theory equates difference with additional

24 Ibid. at 150.
25 Ibid.
26 Spelman, supra note 7 at 146.
27 Ibid. at 142.
29 Kline, supra note 7 at 123.
subjugation. In this analysis, women of colour are different from white women, not the other way around.30

A feminist theory which seeks to be relevant to a wide variety of women, needs to incorporate the insights of women of colour in a meaningful way. As Spelman notes, this means going beyond simply "taking difference into consideration" or "recognizing difference" which implies only that race or ethnicity will be "added to" feminist theory without really altering it.31 Rather, feminist theory must work from the recognition that "what it means to be a 'woman' depends on what else is true about oneself".32 Our experience of gender oppression is very much defined by our place in the social hierarchy: "The various intersections between gender, race, class, sexual orientation and other differentiating characteristics affect how and when all women experience sexism."33

The work of women of colour, therefore, challenges feminist theory not only to consider the experiences of other women, but to examine critically what had previously been understood as gender oppression. Rather than seeing gender as a separate identifying feature, women of colour have demonstrated that it is intimately connected to other aspects of a woman's identity. Understanding women's oppression, therefore, means understanding that different parts of our identity intersect at different junctures, yielding an experience that is neither gender oppression nor racism but "greater than the sum" of both.34 Understanding intersectionality requires asking questions about how women's different positions in the social hierarchy converge and intersect in a way that affects their experience of gender oppression:

30 Spelman, supra note 7 at 162.
31 Ibid. at 162, 166.
32 Ibid. at 102.
33 Kline, supra note 7 at 123.
34 Crenshaw, supra note 2 at 140.
"How does racism divide gender identity and experience? How is gender experienced through racism? How is class shaped by gender and 'race'?"  

Because terms like race, ethnicity and class are not fixed or stable, recognizing women's different experiences of oppression also means recognizing the fluid and variable nature of our analytic categories. Asking questions about women's intersectionality means grounding feminist analysis in an understanding of women's particular and contingent experiences and how they change over time. In this way, the critique of feminist scholarship by women of colour has challenged the universalizing aspects of feminist theory with its focus on the essential woman and has encouraged instead an emphasis on the particular, the contingent and the specific lives of women.

2. **Challenges to Feminist Theory by Third World Women**

Separating out the theoretical work of Third World feminists from that of women of colour is misleading. Many of the insights from women of colour discussed above are also found in the work of Third World feminist scholars and, in fact, the two groups of scholarship blend together, building on each other. By discussing the work of Third World feminists separately, I want to show how the challenge to feminist theory resonates at the international level. While many of the insights gleaned from domestic feminist scholarship apply at the

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37 Harris, *supra* note 7 at 586.
international level, there are some differences and we need to be careful not to generalize from the local to the international.

Third World feminist scholars, like women of colour, have challenged the universalizing tendency in white feminist work to speak for all women by defining the essential woman. The attempt to construct a universal feminist theory is problematic because, as in the domestic context, it raises the specter of a hegemonic theory that would, in effect, recolonize Third World women. To the extent that it generalizes about women's common experience of gender oppression, Third World feminists have argued that feminist international theory erases


the significant differences between women and obscures global contradictions that define women's place in the global social hierarchy.\footnote{40}

Many Third World feminist scholars have challenged the focus on gender as the principal site of women's oppression. That focus, it is argued, constructs an artificial binary opposition between men and women, power and powerlessness.\footnote{41} Mohanty argues that "women", as an analytic category is equated with oppression/powerlessness. Rather than explore the historically specific reality of women's lives, the focus on the essential woman preconfigures women as already oppressed, exploited, powerless:

This focus is not on uncovering the material and ideological specificities that constitute a particular group of women as "powerless" in a particular context. It is, rather, on finding a variety of cases of "powerless" groups of women to prove the general point that women as a group are powerless.\footnote{42}

Marnia Lazreg makes a similar point in her analysis of the tendency in Western feminist scholarship to focus on religion and tradition as definitive of women's position in Middle Eastern and North African societies.\footnote{43} She criticizes this approach as reductive and ahistoric, suffused with an anti-Islam bias that sees religion generally, and Islam particularly, as antifeminist.\footnote{44} The overall effect is to depict women as pre-determined; "evolving in non historical time."\footnote{45} Religion, Lazreg argues, is only one structure of many that women -- in this case Muslim women -- negotiate in their daily lives and must therefore, be analyzed within its particular social and historical context:

\footnote{40} Nesiah, \textit{supra} note 3 at 192, 200. Mohanty, "Under Western Eyes", \textit{supra} note 1 at 54, 55, Trinh T. Minh-ha, \textit{supra} note 8.
\footnote{41} Mohanty, "Under Western Eyes", \textit{supra} note 1 at 64-66; Goetz, \textit{supra} note 38 at 483.
\footnote{42} \textit{Ibid.} at 57.
\footnote{43} Lazreg, "The Perils of Writing", \textit{supra} note 8 at 329-30.
\footnote{44} \textit{Ibid.} at 330.
\footnote{45} \textit{Ibid.} at 331.
To understand the role of religion in women's lives, we must identify the conditions under which it emerges as a significant factor, as well as those that limit its scope. In addition, we must address the ways in which religious symbols are manipulated by both women and men in everyday life, as well as in institutional settings.\(^4^6\)

Third World feminists have demonstrated that far from seeing gender in isolation, feminist theory must account for Third World women's histories and struggles "against racism, sexism, colonialism, imperialism, and monopoly capital".\(^4^7\) It is the intersection of those various networks that defines what it means to be a woman.\(^4^8\) Cheryl Johnson-Odim argues that a feminist politics which looks only at gender oppression would do little for Third World women whose lived experience of oppression is defined as much by global inequities as by sex-discrimination. It is not possible, therefore to look simply at women's position in society without also looking at the position of different societies in the global social hierarchy:

Thus, Third World women cannot afford to embrace the notion that feminism seeks to achieve equal treatment of men and women and equal access and opportunity for women, which often amounts to a formula for sharing poverty both in the Third World and in Third World communities in the west.\(^4^9\)

3. **Post-structural Critique**

The challenge to feminist theory posed by women of colour and Third World women has called into question many central themes in feminist theory.\(^5^0\) This critique has forced a rethinking of how feminists construct women, the experience of oppression, and the best means for addressing male dominance. At a fundamental level, it has called for a reevaluation of what it means to do feminist theory:

\(^4^6\) *Ibid.* at 337.
\(^4^7\) Mohanty, "Cartographies of Struggle", *supra* note 8 at 4.
\(^4^9\) *Supra* note 38 at 320.
\(^5^0\) Michele Barrett and Anne Phillips, "Introduction" in *Destabilizing Theory*, *supra* note 10 at 1.
The challenge is one of colossal proportions. It calls for searching scrutiny of the myriad of ways in which we all oppress each other, it raises doubts about whether there exists such a thing as cross cultural feminist or gender identity, and about whether anybody can say anything about anybody at all.\textsuperscript{51}

Post-structuralists have taken this challenge to feminist theory further, arguing that the very term "woman" (and man) is essentialist.\textsuperscript{52} Woman and man, it is argued, are not stable categories; they are social constructs.\textsuperscript{53} It is difficult, if not impossible, "to separate out 'gender' from the political and cultural intersections in which it is invariably produced and maintained."\textsuperscript{54} Employing the category woman to ground feminist theory or politics is problematic because it assumes there is an essential or core woman who exists prior to social and political construction.\textsuperscript{55} Determining what the essential woman is tends to result in generalizations about the common experience of womanhood and gender oppression.

In this context, essentialism is defined in opposition to difference: "the doctrine of essence is viewed as precisely that which seeks to deny or to annul the very radicality of difference."\textsuperscript{56}

\textsuperscript{51} Duclos, supra note 4 at 349.


\textsuperscript{53} Butler, supra note 52 at 1.

\textsuperscript{54} \textit{Ibid.} at 3.

\textsuperscript{55} \textit{Ibid.} at 2-3.

\textsuperscript{56} Fuss, supra note 52 at xii. Fuss challenges the notion that essentialism, in the way it is defined in post-structural and some feminist theory, is necessarily bad. She demonstrates that much of constructionism "operates as a more sophisticated form of essentialism." (xii) Fuss
Thus, the category woman or man, generalizes across cultural and racial lines about the essential experiences of gender. This approach not only negates important differences in the experience of gender, it also treats "man" and "woman" as if they have a historical continuity that defies temporal and social construction.57

Butler argues that feminism encounters additional problems by assuming that the subject "women" denotes a common identity. Even in the plural, woman is "a troublesome term, a site of contest, a cause of anxiety."58 Gender is constructed differently in varying historical contexts and intersects at different times and in different ways with "racial, class, ethnic and regional modalities of discursively constituted identities."59 Assuming a common gender identity, Butler argues, often leads to the view that there is a single, discernible form of patriarchy or male domination,60 and a common experience of gender oppression.61

Butler argues that "the premature insistence on a stable subject of feminism" has resulted in a "fragmentation within feminism".62 By trying to represent all women, or at least a large constituency of women, feminism has risked failure by refusing to take account of the ways in which the discourse of representational feminism also constructs the meaning of woman.63 Feminist theory, therefore, needs to consider its own reliance on gender categories:

Is the construction of the category of women as a coherent and stable subject an unwitting regulation and reification of gender relations? ... To what extent does the

ultimately argues that essence should be defined in terms of real versus nominal essence; the latter being merely a linguistic convenience that allows theorists to work with the category of woman. (4-5)

57 Fuss, ibid. at 3.
58 Butler, supra note 52 at 3.
59 Ibid.
60 Ibid.
61 Ibid. at 4.
62 Ibid.
63 Ibid. at 2 and 4.
category of women achieve stability and coherence only in the context of the heterosexual matrix? If a stable notion of gender no longer proves to be the foundational premise of feminist politics, perhaps a new sort of feminist politics is now desirable to contest the very reifications of gender and identity, one that will take the variable construction of identity as both a methodological and normative prerequisite, if not a political goal.64

The post-structural challenge to feminist theory has particular application to international feminism. Goetz notes that there is a "convergence" between post-structural challenges to the essentialism of "woman" and the Third World feminist questioning of the viability of Western "analytical categories and assumptions."65 Reliance on an essential notion of woman colonizes and appropriates non-Western cultures "to support highly Western notions of oppression" while depicting the lives of Third World women as bearing the burden of a "non-Western barbarism."66

The advantage of post-structural feminism is that it holds out the possibility of an analysis not based on a predetermined gender construction. Displacing the subject "woman" allows post-structuralists to explore the intersection, and social construction of, multiple differences and identities.67 The erasure of the subject woman, however, has also been the target of much criticism of post-structural feminism.

By disposing of gender identities, some feminists have argued that post-structuralism results in political paralysis.68 Without the subject "woman", there is no basis on which feminists can

64 Ibid. at 5.
65 Goetz, supra note 38 at 484.
66 Butler, supra note 52 at 3.
67 Sandra Whitworth, "Feminist Theories: From Women to Gender and World Politics" in Peter R. Beckman and Francine D'Amico, eds., Women, Gender and World Politics: Perspectives, Policies and Prospects (Westport, Conn: Bergin & Garvery, 1994) 75 at 82.
68 Ibid. at 82; Dawn H. Currie, "Feminist Encounters with Postmodernism: Exploring the Impasse of Debates on Patriarchy and Law" (1992) 5 CJWL 63; Goetz, supra note 38 at 146-9.
choose some "theoretical or political strategies over others." Feminism, in a sense, is rendered meaningless because there is no longer a position from which women can "refute the distortions of androcentrism" or "posit the rational availability of an alternative world order less oppressive to women (and men)." 

In the context of international feminism, the inability to derive meaning or context from the position and experience of women is particularly troubling. First, post-structuralism's focus on power as amorphous and ambiguous, obscures the profound global inequities that structure the lives of many women. Because post-structuralism treats power as highly dispersed, it tends to lose the sense of a larger power imbalance which manifests itself at the international level in the form of racial, national and regional inequities. In this way, post-structuralism makes it difficult to incorporate the effects of colonialism or imperialism into an analysis of Third World inequality.

Second, the highly abstract and indeterminant nature of post-structuralism has been criticized for failing to offer any alternative to the status quo. Goetz argues, for example, that post-structuralism's "infinite regression and backpedaling disclaimers" are "unacceptable, even irresponsible" for "feminists concerned with the political issues and imperatives for action". By constructing difference as misrepresentation, post-structuralism makes it difficult to "see and know from a different perspective" and to "analyze change or theorize difference."

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69 Currie, ibid. at 78.
70 Goetz, supra note 38 148.
71 Walby, supra note 52 at 35.
72 Spivak, for example, argues that much of post-structuralism is characterized by an ignorance and insensitivity to imperialism and the global integration of capitalism: "Can the Subaltern Speak?" in Cary Nelson and Lawrence Urbana, Penn: U. of Illinois, 1988) 271; Neil Lazarus, "Doubting the New World Order: Marxism, Realism, and the Claims of Postmodernist Social Theory" (1991) 3(3) Differences 94.
73 Goetz, supra note 38 at 148.
74 Ibid. at 148-9.
4. Where Do We Go From Here? The Way Forward.

The challenges to feminist theory posed by women of colour, Third World and post-structural feminism, have raised the possibility of either a reinvigorated feminism or a feminism crippled by theoretical indeterminacy. The concern is that without some kind of a unified, political focus -- namely, women and gender oppression -- feminism is robbed of its activist backbone. Phillips summarizes this view: "When people query the universalizing pretensions of previous traditions, do they thereby limit their radical potential, and blunt the edges of any critical attack?"75

The concerns raised by this question are generally grounded in a view that the movement away from universalizing categories and homogenizing tendencies entails a choice between "traditional categories or none at all."76 Phillips takes issue with this approach, arguing that the universal and homogenizing aspects of theory and the "specific, relational and engendered" aspects are not necessarily mutually exclusive options.77 Rather, the "best in contemporary feminism" negotiates a course somewhere between these theoretical extremes.78 This means, in effect, that feminist theory does not necessarily have to reject the general, the universal, the notion of commonality. What must be rejected, however, is a "unitary standard against which" women are judged.79 As Spelman notes, an approach which allows women to explore our differences ultimately leads to a more complete understanding of what women have in common.

75 Phillips, supra note 10 at 13.
76 Harris, supra note 7 at 607.
77 Phillips, supra note 10 at 13.
78 Ibid.
79 Ibid. at 20.
... if the meaning of what we apparently have in common (being women) depends in some ways on the meaning of what we don't have in common (for example, our different racial or class identities), then far from distracting us from issues of gender, attention to race and class in fact helps us to understand gender. 80

Thus, the challenges to feminist theory posed by women of colour and Third World feminists herald a reinvigorated feminism, one which operates from the historical, local and contingent nature of women's experiences. Recognizing the challenges facing a feminist theory that wishes to apply cross-culturally does not mean rejecting the enterprise outright, but rather insists on an analysis grounded in history and context. Feminism, and specifically Western feminism, should accept the challenge of moving outside of its local context to embrace the needs and concerns of Third World women. Ultimately, it is through this exploration of multiplicity and diversity that feminist understanding is made more complete.

... we must be able and willing to theorize and engage the feminist politics of third world women, for these are the very understandings we need to respond seriously to the challenges of race and our post colonial condition. 81

Having accepted the basic project of international feminism, the next question becomes how to ground feminist analysis in the "local, historical and contingent." Many Third World feminists, like Mohanty and Lazreg, emphasize the need to look at the lives of Third World women in their social, cultural and historical setting. Mohanty draws on the work of Canadian sociologist Dorothy Smith and specifically her use of "relations of ruling" 82 to theorize about the multiplicity of women's experience of oppression:

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80 Spelman, supra note 7 at 113.
81 Mohanty, "Cartographies of Struggle", supra note 8 at 39-40.; Walby, supra note 52 at 33, 43.
82 By "ruling", Smith is referring to a complex of practices, including government, law, business and financial management, professional organization, and educational institutions as well as discourses in texts that interpenetrate the multiple sites of power.
...the concept "relations of ruling" posits multiple intersections of structures of power and emphasizes the *process or form* of ruling, not the frozen embodiment of it ... By emphasizing the practices of ruling (or domination) it makes possible an analysis which examines, for instance, the very forms of colonialism and racism, rather than one which assumes or posits unifying definitions of them.\textsuperscript{83}

By exploring systems of oppression, rather than oppressive systems, feminists are able to move away from depicting women solely as victims and can give an account of their "dynamic oppositional agency".\textsuperscript{84} Importantly, such an approach allows for an understanding of the particular and nuanced experience of women and their engagement with structures of domination.

Mohanty notes that Smith's notion of relations of ruling "foregrounds (1) forms of knowledge and (2) organized practices and institutions, as well as (3) questions of consciousness, experience, and agency."\textsuperscript{85} Understanding relations of ruling requires an examination of the ideological systems -- "questions of consciousness" -- which buttress different relations of ruling, and are incorporated in and reinforced by those relations.\textsuperscript{86} Nicos Poulantzas has argued that ideology "slides into every level of the social structure and has the particular

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\textsuperscript{83} \textit{Ibid.} 8 at 14.

\textsuperscript{84} \textit{Ibid.}

\textsuperscript{85} \textit{Ibid.} at 14.

\textsuperscript{86} My use of ideology in this context is based on the work of scholars who have employed the Marxist conception of ideology to explain the development of collective social consciousness that encourages the reproduction of the status quo and deters meaningful reform. R. Cotterell defines ideologies as:

systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, morality, religion and politics and numerous other matters [which] provide certainty and security, the basis of beliefs and guides for conduct.

function of cohesion". Ideology therefore, can act to draw together and synthesize the effect of different relations of ruling.

In this thesis, I hope to draw on Smith and Mohanty's conception of relations of ruling to explore the complex of structures, practices, discourses, and ideas that define and enable the phenomena of wartime rape. In the context of the mass rape of Bosnian Muslim women, the different relations of ruling that intersect and converge include humanitarian law, militarism, nationalism, patriarchy and ideologies of war and rape.

By looking at the relations of ruling that construct the phenomena and experience of wartime rape, I explore the practice and form of relations of domination and oppression rather than just assuming their unitary existence. In this way, a better understanding of the complexity of wartime rape is possible. Although my objective is to examine the gendered nature of the various systems and structures which define and construct wartime rape, my focus is not limited to gender. Rather, gender is viewed in terms of its context in different relations of ruling, meaning that its importance will shift and vary to reflect the different nature and impact of systems of domination. In this way, relations of ruling avoids many of the essentializing tendencies women of colour have critiqued in white feminism. Viewed in the context of dynamic relations of ruling, gender oppression is seen as evolving over time in specific historical and cultural contexts. In addition, patriarchy is viewed as only one of several forces with which women engage, and women are seen as dynamic actors who are defined by, and engage with, multiple forces.

III. FEMINIST THEORY AT THE INTERNATIONAL LEVEL


88 Mohanty, "Cartographies of Struggle", supra note 8 at 14.
The terms "international" and "national", though bandied about a great deal in this thesis and many other works, lack a certain determined meaning. When "national" and "international" are used in opposition to one another, the suggested meaning is of a local or country specific reference versus a more global, transnational implication. Of course, this is a bit of a heuristic device in that it is difficult to conceive of a national issue that does not, at some level, have international implications and vice versa.

In the context of feminist theory, the distinction between national and international also has an imprecise meaning. International can refer to women's interactions with transnational entities such as the United Nations, multinational corporations, feminist or other nongovernmental organizations. Second, international can refer to national activities which have international implications, like self-determination movements. Third, international may refer to an attempt to theorize women's oppression over cultural, national and class boundaries. Finally, international is sometimes a veiled reference to Third World women. In feminist legal theory there is a tendency to see international issues as being more relevant to the lives of Third World women than Western women, who seem comparatively insulated from the effects of global contradictions. In some respects, the lives of Third World women have a more obvious international dimension. Third World women have a history of involvement in nationalist movements and the construction of national ideologies; they work in multinational corporations and interact with international development and financial institutions like the World Bank. To suggest that Western women's lives do not have an equal international element, however, is to miss the position of relative advantage enjoyed by Western women because of the imperialist and post-colonial world order. Western women, though not
necessarily actively involved in nationalist movements,89 also stand in as symbols of national identity.90 They enjoy a standard of living that relies on the labour of Third World women.91 They do not have to deal with international financial institutions and well-meaning but paternalistic development agencies precisely because of unequal exchange relations between First and Third Worlds.

The difficulty in characterizing a discourse on "international" feminism underscores the different meanings and structures that come into play when theory moves beyond the local to the global. Talking about women across national and state boundaries introduces different structures, tensions, and social hierarchies than are found at the level of specific national or local communities. In this section, I briefly outline some of the structural considerations that circumscribe a discussion of international feminism. At the international level, socioeconomic and political configurations include colonialism, class, gender, the state, citizenship and racial formation.92 The intersection of these different formations produces a particularly configured, but not unchanging, global social hierarchy. While I do not intend to diagram that social hierarchy -- to do so would certainly duplicate the very essentializing and universalizing tendencies I earlier rejected -- I will draw out some of the larger tensions that structures like nation, state, nationalism, ethnicity, and gender. The intersection of these structures provides

89 Some Western women, however, are involved in nationalist movements, for example Quebecois women in Canada. For a discussion of women's political involvement in the Canadian constitutional negotiations, see Duclos, supra note 4 at 363-380.
90 For example, la patrie was depicted as a woman giving birth to the French Nation during the French Revolution (Anthias and Yuval-Davis, Racialized Boundaries, supra note 36 at 28). Throughout the first and second world war, the protection of women and children was upheld as justification for the war: Ruth Harris, "The 'Child of the Barbarian': Rape, Race and Nationalism in France during the First World War" February, 1994 141 Past and Present 170. Harris makes the argument that French women's experiences of rape were appropriated and transformed by men into a representation of France as an innocent female nation assaulted by a barbaric and brutishly male Germany.
91 Walby, supra note 52 at 43.
92 Mohanty, "Cartographies of Struggle", supra note 8 at 14.
the dynamic -- and relations of ruling -- within which Third World feminism has operated, and in the context of which feminist international theory must situate itself.

Colonialism, and its fallout, has been a defining feature of much of international relations in the nineteenth and twentieth centuries. Its impact is felt not only in a global community characterized by deep economic, political and technological inequities, but also in the social make-up of the states that emerged from colonial rule. Mohanty argues, with reference to India, that there are three symptomatic aspects of imperial rule that are relevant to gender relations:

(1) the ideological construction and consolidation of white masculinity as normative and the corresponding racialization and sexualization of colonized peoples; (2) the effects of colonial institutions and policies in transforming indigenous patriarchies and consolidating hegemonic middle-class cultures in metropolitan and colonized areas; and (3) the rise of feminist politics and consciousness in this historical context within and against the framework of national liberation movements.93

Mohanty argues, for example, that colonialism racialized and sexualized the right to govern by constructing white men as "naturally born to rule" while childlike, colonized peoples were incapable of self-government.94 Racism and patriarchy, in the context of colonialism and imperialism, were structured around racially and sexually differentiated classes necessary for economic surplus extraction.95 This colonial history, Mohanty argues, provides the backdrop for feminist critiques and may provide an "understanding of the contradictory sex, race, class, and caste positioning of third world women in relation to the state..."96

93 Ibid. at 15.
94 Ibid. at 17.
95 Ibid. at 18-19.
96 Ibid. at 21.
Mohanty's analysis of colonialism's effect on racial and sexual formations, points to the complex intersection between gender, nation, class and race. While the exact nature and impact of the intersection between different formulations will vary depending on their particular context, some of the tensions between gender, class, and race are played out in the political and discursive arena created by the rise of twentieth century nationalism.

Nationalism, and nationalist movements, are the expression of a claim to ethnic representation. Usually that expression of ethnic identity takes the form of a demand for self-determination and statehood. Embodied in the term nation, therefore, is the notion of a homogenous community based on cultural, and sometimes racial, attributes. Anthias and Yuval-Davis note that part of the powerful symbolism of nationalism is the depiction of an "ideal" nation state "in which all citizens will be members of the same national collectivity." In reality, however, the overlap between the nation and state means there are no "ideal" nations in which all people belong to the same national collectivity. Nationalism, therefore often entails a process of manipulating difference to define who is and is not a member of the community. This process of sorting out non-members of a community is often linked to xenophobia, ethnocentrism, and racism, which results in hardship for those people who are constructed as different and therefore outside of the community. Historical examples of this sorting process can be found in Nazi Germany, the treatment of Japanese-Canadians during World War II,

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97 Roxana Ng, supra note 36 at197, argues that the various intersections between gender, ethnicity and class must be viewed in their specific social formations. Because gender, race, ethnicity and class are not fixed entities, but are socially constructed over time, what amounts to sexism, racism or class oppression will vary in time and context.

98 Anthias and Yuval-Davis, Racialized Boundaries, supra note 36 at 22.

99 Ibid.


and, as I will discuss in Chapter 4, more recently, "ethnic-cleansing" in the former Yugoslavia. 102

The powerful symbolism of "nation" is tied to the international community's recognition of the right to self-determination. 103 The recognition that former colonies should have the right to determine their own governance not only gave birth to a multitude of new states; it also gave expression to a belief that "communities" of people, usually defined in ethnic, racial or religious terms, should be free from external rule and free to determine their own governance. 104 New states which emerged from colonial rule were recognized and incorporated into the international community on the basis that all recognized states should have equal status in the global community. 105

Issues of class and race are also tied into the symbolism of nation. The recognition of self-determination is linked to the view that all states are equal, sovereign entities, free to negotiate their own economic and social position in the world order. 106 The profound imbalance between Western countries and post-colonial states undermines this notion of equality, giving testament to the persistent legacy of colonialism. Nationalism's shiny armor carries the blemishes of rampant poverty, corruption and civil war in many post-colonial states. The disparity between Western and Eastern states is now defined through the dichotomy between

102 See infra note 28 and accompanying text.
103 I am not suggesting that self-determination and nationalism arose in the post-colonial context. In fact, both doctrines arguably developed to meet particular needs of the European community. See: Anthias and Yuval-Davis, supra note 100 at 24; Robert H. Jackson, Quasi-states: Sovereignty, International Relations and the Third World (Cambridge: Cambridge University Press, 1990) at 75-6. However, it is arguable that much of the symbolic and ideological content of nationalism can best be understood by seeing its evolution in the post-colonial world.
105 Jackson, supra note 101 at 15-17.
106 Jackson, ibid.
North and South countries. North and South refers not to geographic regions but the asymmetric relationship between "developed" or Western countries, who hold the balance of economic, technological and military power, and Southern -- "developing", Eastern or post-colonial countries -- who continue to struggle against the legacy of colonial and imperial rule.107

Nationalism is particularly important for feminist theory. First, the contours of a nation are almost never defined in terms of gender. Its historical evolution has meant that it is confined to recognized ethnic, religious, racial or class groups. Nationalism, therefore, raises the issue of intersectionality because it is based on racial, ethnic or regional groupings of which gender does not officially play a part. Women are often placed in contradictory positions with respect to nationalism. As members of a specific ethnic community, women may support the movement toward independent nation status, but as women may feel that they are mistreated by patriarchal or male dominance within that community. Understanding the role of gender in the definition of nation means theorizing the intersection of gender and nation in a way which does not undermine the importance of either. Anthias and Yuval-Davis note that women play a multitude of roles in the production of nationalist ideologies:

(a) as biological reproducers of members of ethnic collectives;
(b) as reproducers of the boundaries of ethnic/national groups;
(c) as participating centrally in the ideological reproduction of the collectivity and as transmitters of its culture;

(d) as signifiers of ethnic/national differences - as a focus and symbol in ideological discourses used in the construction, reproduction and transformation of ethnic/national categories,

(e) as participants in national and economic political and military struggles.108

The different roles played by women in nationalist movements can sometimes be at odds with interests women may have as individuals -- they do not wish to be, or define themselves solely as mothers -- or, as feminists -- they may wish to redefine women's roles within cultural practices. The contradictory position of women within nationist movements and discourse is particularly salient for Third World women. Both the ideological production and political manifestation of nationalism (nationalist movements), are significant features in the development of Third World feminism. Mohanty and others have argued there are "complex interrelationships between feminist, antiracist, and nationalist struggles."109 While all feminism is linked to a struggle against oppression, this struggle is more marked in the case of Third World women and women of colour whose inheritance of Euro-American hegemony includes "slavery, enforced migration, plantation and indentured labor, colonialism, imperial conquest, and genocide."110 This has meant that Third World feminism has a notable international dimension by virtue of its collaboration in the struggle against colonizing powers. Third World feminists, therefore, must pursue their struggle at two, sometimes incongruous levels: the national and the international.111

108 Woman-Nation-State, supra note 100 at 7.
109 Mohanty, "Cartographies of Struggle", supra note 8 at 10; Sedghi, supra note 38 at 93; Lazreg, "The Perils of Writing", supra note 8.
110 Mohanty, ibid.
111 Sedghi, supra note 38 at 93.
At the national level, Third world feminism is closely tied to nationalist movements.\textsuperscript{112} Feminist consciousness, for the many women who participate in resistance movements, is defined in part by the struggle against colonial class, race and ethnic structures.\textsuperscript{113} In the post colonial world, feminist attempts to reform existing patriarchal structures tap into the emotional undercurrents of nationalism, cultural identity and ethnic solidarity. As discussed above, communities seeking independence often define themselves in terms of cultural and traditional practices that are different from other communities and therefore justify independent recognition. Women's different roles in the definition of nation, as outlined by Anthias and Yuval-Davis, often mean that women become the markers of the community's cultural and symbolic borders. In this context, it is often difficulty to argue for a reformulation of women's roles within that community. Feminist agitation for reform may be seen as a betrayal of "the nation during the onslaught of foreign powers".\textsuperscript{114}

At the international level, Third World feminists oppose "international patriarchy, manifested by foreign interferences, intervention and domination."\textsuperscript{115} Decisions to side with national solidarity against external interference may seem at odds with women's attempts to resist internal patriarchy.\textsuperscript{116} Third World feminists, therefore, often have to balance the interests of women's roles in national liberation movements is voluminous. Some notable references are: Angela Gilliam, "Women's Equality and National Liberation" in \textit{Third World Feminism and the Politics of Feminism}, supra note 1 at 215; Marnia Lazreg, \textit{The Eloquence of Silence: Algerian Women in Question} (New York and London: Routledge, 1994); Valentine M. Moghadam, ed., \textit{Gender and National Identity: Women in Politics in Muslim Societies} (London and New Jersey: Zed Books Ltd., 1994); Nayereh Tohidi, "Gender and Islamic Fundamentalism" \textit{ibid}, 251.


\textsuperscript{113} Sedghi, \textit{supra} note 38 at 93, argues that while there is a diversity of Third World feminists, there are two major propositions that are common to Third World women: "women have expressed an oppositional voice and have participated in resistance movements" and "women's interests are often subordinated to the interests of states, statesmen, or male revolutionaries".

\textsuperscript{114} Sedghi, \textit{ibid}.

\textsuperscript{115} \textit{Ibid}.

\textsuperscript{116} \textit{Ibid}.
maintaining community solidarity against the desire to pursue more equitable racial, sexual and class relations. Catherine Harries argues that recognizing the different interests that Third World women negotiate means accepting the notion of a "multiple consciousness" and "competing claims about what constitutes the self and the community..."\textsuperscript{117}

Part of the difficulty facing Third World feminists, in addition to the potential conflict between politics and community, is the very notion of feminism. Feminism, as a discourse and as a politics, may be problematic for Third World women because: (1) it is often perceived as a Western movement whose values are inconsistent with the dominant culture,\textsuperscript{118} and (2) it may be in fact a Western movement which, despite its best intentions, cannot help but discursively oppress Third World women.\textsuperscript{119}

As discussed earlier, nationalist movements often place an ideological burden on women as the producers and maintainers of the national culture. The role of women as the crucible of national identity is sharpened by the perceived or real threat to the native culture by external, often Western, forces. This ideological climate, not surprisingly, is often hostile to feminist politics which are characterized as part of the Western threat to national identity.\textsuperscript{120}

Perhaps the greater challenge to international feminism, however, comes from the possibility that some aspects of feminism are inescapably Western. Lazreg argues that in the context of feminist discourse on women in Algeria, we need to ask the question:

\textsuperscript{118} Charlesworth, Chinkin and Wright, "Feminist Approaches to International Law" (1991) 85 AJIL 613 at 620-21.
\textsuperscript{119} Lazreg, "The Perils of Writing", supra note 8 at 337.
\textsuperscript{120} Charlesworth, Chinkin and Wright, supra note 118 at 620-21.
What is the nature of the feminist project? What is its relation to women in other places? Is there something at the heart of academic feminism that is inescapably Western gynocentric; that is, must it inevitably lead to the exercise of discursive power by some women over others?\footnote{Lazreg, "The Perils of Writing", \textit{supra} note 8 at 337.}

Lazreg's answer to this question in effect, brings us full circle to the critique of feminist theory by women of colour and Third World women. While apparently accepting the necessity of a feminist project, Lazreg emphasizes the need to make feminism relevant to the lives of all women in a way that does not discursively oppress or limit the voice of other women.\footnote{\textit{Ibid.} at 338-342.}

The challenge to feminist approaches to international law is clear: understanding the tensions and contradictions Third World feminists must negotiate requires that Western feminists expand their analysis from issues of gender to the global contradictions that shape the lives of all women. It also requires that feminists keep their analytic categories "explicitly tentative, relational, and unstable"\footnote{Harris, \textit{supra} note 7 at 586.} in order to reflect the complicated and dynamic lives of women who move among multiple structures of oppression. In pursuing this work, Western feminists must be extremely careful about how we construct, both overtly and unintentionally, Third World women, Western women and law. According to Annie Bunting, critical cultural examinations require that we understand our own "constructs, assumptions, and preoccupations before we venture to understand those of others."\footnote{\textit{Supra} note 38 at 16.} This understanding, I argue, must come about through a constant dialogue between women about the nature of feminist analysis of international law, the theoretical constructs used, the assumptions made, and the conclusions reached. In other words, by accepting the challenge to feminist theory by women of colour and Third World feminists, we must work towards reinvigorated, dynamic feminist scholarship and politics.
In the following chapter -- and as part of an ongoing dialogue -- I explore several different
texts by feminist international law scholars and demonstrate how these works incorporate a
limited notion of gender oppression that excludes the experiences of Third World women. By
relying on theoretical assumptions and constructs derived from a particularly Western context,
some feminist international legal theory has constructed a view of gender oppression that
mirrors that in the West, often obscuring women's different experiences of oppression. In
addition, by relying on theoretical assumptions and constructs without considering their
different impact on Third World women, feminist international legal theory fails to challenge
the dominant discourse on international law and the structure of the global community. My
objective in this analysis is to challenge feminist international law theory to move beyond
theoretical limitations inherent in relying on an essentialist and simplistic understanding of
women's different experiences of oppression. As feminist international legal literature
develops there is a corresponding growth in the comfort that we, as feminist scholars, take in
our means and objectives. In the next chapter, I hope to explore the "constructs, assumptions
and preoccupations"\(^\text{125}\) inherent in the international feminist literature so that we can
continue the process of critical examination.

\(^{125}\) *Ibid.* at 16.
CHAPTER 3
GOING GLOBAL: FEMINIST INTERNATIONAL LAW THEORY, THE
PUBLIC/PRIVATE DIVIDE AND STATE SOVEREIGNTY

I. INTRODUCTION

As I discussed in Chapter 1, international law, for a variety of reasons, was subject to feminist analysis only very recently. The prospect of feminist international law theory therefore, is promising not only because of what it can bring to international law, but also because it is a relatively new area of feminist inquiry. Feminist international law theory is developing with the benefit of theoretical insights by such diverse groups as women of colour, lesbians, poor women, women with physical disabilities and perhaps most significantly, Third World women. One of the initial questions raised by feminist international law theory, therefore, is to what extent it has incorporated the theoretical insights of these different voices.

In this chapter, I examine feminist international law theory within the context of some of the feminist debates outlined in the previous chapter. In particular, I consider how feminist international law theory speaks of women and how it speaks of law. Although feminist theorists working in the area of international law are sensitive to issues of diversity and the intersection of race, class, ethnicity and gender, their focus on the public/private divide and state sovereignty tends to employ restricted and reductive notions of different women's oppression. This has the effect of constructing "other" women, principally Third World women, and their relationship with international law, in a narrow and problematic way.

Feminist international law theory not only looks at the ways in which Western women are affected by international law or policy, but also at the marginalized position of Third World women. Placing Third World women at the centre of the analysis is both the principal strength and weakness of feminist approaches to international law. By discussing the application of international law to Third World women, Western feminists are able to move beyond their own limited experience to explore the experiences of other women who, being differently positioned, are exposed to international law in different ways.\(^2\) As Brenda Cossman and Ratna Kapur note, however, a Western discourse that theorizes Third World women's subordination carries the danger of reinforcing Western "positional superiority", that is, "the colonialist idea of the superiority of West over East, and in turn, of the superiority of the conditions of Western women over Eastern women".\(^3\)

Implicit in feminist approaches to international law, therefore, is a construction of "the" Third World woman and, by extension, "the" Western woman. As Chandra Mohanty argues, gender is not just uncovered by feminist scholarship, it is also produced.\(^4\) In order to explore and mediate the way in which feminist international legal theory constructs Third World women, the feminist project, its impact and direction, must constantly be questioned. In the words of Gayatri Spivak, this vigilance requires that feminists have a "simultaneous other focus: not

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2 By referring to the "experience" of other women, I do not mean to suggest that Western women should be writing about the experiences of Third World women, which experiences we cannot necessarily share nor fully appreciate. Nor am I suggesting that women necessarily share certain essential experiences that bind them in a global sisterhood. The issue of women's common bond of gender oppression raises questions about the utility of the category "woman" as a universal common denominator, as well as the essentializing aspects of a discourse centered on experience. For a discussion of some of these issues, see Chapter 2.

3 Supra note 1 at 279-80.

merely who am I? but who is the other woman? How am I naming her? How does she name me? Is this part of the problematic I discuss?"5

In part II of this Chapter, I briefly outline some of the feminist international law theorizing on the public/private divide. In part III, I explore how that analysis of the public/private divide essentializes women's experience along Western lines, freezing women's oppression in time and space. Gender becomes the central category of oppression, and women's experiences are predetermined, ahistoric, and denuded of colonial or racial context. Ultimately, Third World women's experiences of oppression come to look like Western experiences, only more so. In addition, the public/private divide tends to be defined narrowly within feminist international theory, encompassing only the division between international and domestic spheres. The fluid nature of public/private ideology that expresses itself, for example, through the differently constructed private spheres of market and family is thereby overlooked. International law incorporates a social hierarchy which defines women's subordinated position also through racial and colonialist discourses which are not necessarily understandable in terms of separate sphere ideology.6

In part IV, I consider how feminist critiques of the public/private divide play out in the context of state sovereignty doctrine. In this section, I argue that the feminist critique of state sovereignty doctrine presumes an equality among states that does not account for the reality of inequality in the global community. By failing to address the complex relationships inherent in state sovereignty, feminist international legal theory does not account for women's different and sometimes contradictory relationships with international law generally and statehood in particular.

II. Feminist Approaches to International Law

The principal focus of international legal feminism has been on the exclusion of women from international law and legal structures. Frances Olsen notes that exclude in this context is "an active verb" meaning that women are not left out of international law through some oversight, but that international law is structured on and represents the interests of men as the "embodied subordinators of women". Feminist international law scholars thus challenge the objectivity and neutrality of international law, arguing that it reflects the concerns of men and ignores and undermines the concerns of women. By drawing "various dichotomies between the public and private", international law obscures the ways in which it may affect women differently than men.

1. Issues of Diversity and Inclusion

Recognizing the diversity of women affected by and involved with international law, feminist international law theory starts from the premise that "feminist analysis of international law must take account of the different perspectives of First and Third World feminists". This approach means incorporating the "issues raised by Third World Feminists" to reorient feminism "to deal with the problems of the most oppressed women, rather than those of the

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7 Charlesworth, Chinkin and Wright, "Feminist Approaches to International Law" (1991) 85 AJIL 613 at 621-2.
9 Charlesworth, Chinkin and Wright, supra note 7 at 625.
10 Ibid.
11 Ibid. at 618.
most privileged". 12 Charlesworth, Chinkin and Wright have noted that Third World Women have a complex and often conflictual relationship with both feminism and international law. Although feminists and Third World scholars occupy similar positions on the margins of international law, the authors argue that the Western voice of feminism is resisted both by the European/American establishment of international law as well as the "intensely patriarchal 'different voice' discourse of traditional non-European societies". 13 Third World feminists are placed in the difficult position of having to challenge not only the patriarchal voice of the Third World but also the "western rationalist language of law". 14

Hilary Charlesworth, in subsequent articles, addresses the problem of essentialism in the attempt to theorize women's oppression across national and cultural boundaries. 15 She argues that while women's oppression is universal, feminist analysis of the international legal system requires a "more nuanced perspective than is always necessary in a purely domestic context." 16 In addition, she emphasizes that feminist approaches to international law must acknowledge the range of cultural, national, religious concerns that affect women and make it impossible to present "one true story" of women's oppression. 17 Charlesworth concludes that

12 Ibid. at 621.
13 Ibid. at 619.
14 Ibid.
16 "Alienating Oscar", ibid. at 4. This is not a perspective with which I necessarily agree. Many of the debates within feminist legal theory, including the critiques by women of colour and Third World women, have demonstrated the need to theorize the complexity of women's lives and the different ways law affects them. While the need to theorize the complexity of women's different positions within the international social hierarchy is perhaps more evident on the face of international law, this does not mean that international law, and its effect on women is necessarily more complex.
17 Ibid.
it is both possible and necessary to proceed with feminist analysis of international law despite the many difficulties inherent in theorizing women's different experiences of subordination. For Charlesworth, it is "important not to become paralyzed to the point of total relativism" in pursuing this project. Rather than disintegrating "into a series of local or regional struggles", feminist approaches to international law should start by focusing on "areas common in women's experience."  

2. The Public/Private Distinction

Feminist international law theorists have argued that at a fundamental level, international law rests on and reproduces distinctions between public and private spheres, with the public sphere regarded as the "province of international law". International law makes a series of distinctions between public and private spheres. First, it distinguishes between international matters, matters involving state actors, and issues internal to an individual state, referred to as domestic issues. Second, it distinguishes between state actors, which are the recognized representatives in the international arena, and non-state actors which include non-governmental organizations (NGOs), individuals and corporations. Finally, international law is divided between "public" international law, which are matters between states, and private international law, which are principally commercial matters. The principal distinction identified by feminist international law scholars is between international and state matters. International law applies only to matters between recognized international actors, primarily nation states, and does not cover matters internal to a state. International law, therefore,

18 Ibid.
19 Ibid.
20 Charlesworth, Chinkin and Wright, supra note 7 at 625.
21 Ibid. at 625-630.
constructs a public world of intra-state activity which is said to be separate from the private world of domestic state affairs.\textsuperscript{22}

Feminist international law theory sets its public/private analysis in the context of Western feminist theory. That is, it tries to do at the international law level what feminist scholars have done at the domestic law level, which is to demonstrate the gendered nature of the public/private distinction inherent in liberal theory and liberal democracies.\textsuperscript{23} Feminist scholars have noted that the ideological division between public and private spheres provides the framework for state regulation of the "civic" and "home" arenas and consequently the lives of men and women.\textsuperscript{24} The public/private divide incorporates an ideological matrix which is prescriptive in nature, defining how life \textit{should} be. Feminist international law scholars have applied a similar analysis, demonstrating that the public/private divide within international law "privileges the male world view and supports male dominance in the international legal order".\textsuperscript{25} As an example, Charlesworth, Chinkin and Wright argue that the international prohibition against torture, by incorporating a division between public and private, denies women the same protection as men from torture.\textsuperscript{26} Torture is defined in terms of state sponsored or condoned activity. In order to come within the ambit of international law, "a public official or a person acting officially must be implicated in the pain and suffering".\textsuperscript{27} "Private" acts of torture, though not condoned, are thought to be the province of domestic rather than international law. For most women, however, the torture or cruel and inhuman

\textsuperscript{22} \textit{Ibid.} at 627; Olsen, "Feminist Critiques", \textit{supra} note 8 at 157-8; Charlesworth, "The Public/Private Distinction and the Right to Development in International Law." (1992) 12 Australian Yb. of Int'l L. 190 at 194 [hereinafter "Right to Development"]; Kristen Walker, "An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law" (1994) 26 Int'l L. and Politics 173 at 173-4.\textsuperscript{23} Charlesworth, Chinkin and Wright, \textit{supra} note 7 at 626.\textsuperscript{24} Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497 [hereinafter "Family and Market"].\textsuperscript{25} Charlesworth, Chinkin and Wright, \textit{supra} note 7 at 627.\textsuperscript{26} \textit{Ibid.}\textsuperscript{27} \textit{Ibid.} at 628.
treatment they experience occurs in the home or the "private" sphere. Not only does international law not apply, but in many cases, neither does domestic law. In this way, women are hidden under multiple layers of the private sphere.

Karen Engle characterizes the international feminist critique of the public/private spheres as taking two forms: either international law is shown to be not universal in scope because it excludes the private sphere and by extension women, or international law applies to the private sphere but the public and private division ideology is used as a "convenient screen to avoid addressing women's issues". Engle notes that feminist international law scholars often use both approaches, reflecting their difficult position in simultaneously critiquing women's exclusion from international law and exploring the possibilities for women's inclusion in those same international legal structures.

III. THE PUBLIC/PRIVATE DIVIDE IN FEMINIST INTERNATIONAL LAW

THEORY

Feminist analysis of the public/private divide in international law has been important in theorizing women's exclusion from international law and in trying to conceive of ways to bring

28 The authors' analysis raises some concerns about essentializing women's experiences of the private sphere and the violence they experience there. I explore these concerns more fully later in this chapter.
32 Ibid. at 145.
women within the ambit of international law. The difficulty is that the public/private divide is treated as having universal validity not only in explaining the gendered nature of international law, but also as a way to explain all women's oppression. Although women throughout the world experience oppression differently, it is argued that we are unified by a universal devaluation of things female. This universal oppression is manifested through a "pattern" of privileging the male, public sphere over the private, female sphere. The exclusion of women from the international sphere, it is argued, facilitates their oppression in the domestic sphere.

1. **Western Dimensions of the Public/Private Divide**

To the extent that international law draws from a Western, liberal tradition, it is useful to examine ideological assumptions, like the division between public and private spheres inherent in the legal and administrative system. That analysis becomes problematic when the public/private divide is seen as the axis upon which all women's oppression is hinged. As the public/private distinction clearly has its roots in a Western, liberal conception of the world, the categories are heavily imbued with a specific Western meaning and resonance. Using the public/private distinction thus means that "other" women's experiences will always be filtered through Western analytic categories and Western ways of knowing.

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33 Charlesworth, Chinkin and Wright, *supra* note 7 at 626.
Hilary Charlesworth argues that the public/private divide is a Western construct only to the extent the "content of each sphere is defined by Western experience". An analysis of international law premised on the public/private divide essentializes women's experience only if "women are regarded as always opposed to men in the same ways in all contexts and societies". According to Charlesworth, "it is not the activity which characterizes the public/private, but rather the actor: that is women's subordination to men is mediated through the public/private dichotomy".

The difficulty with this approach is that it starts from the premise that women's subordination, everywhere and for all time, can be understood through an analysis of a public/private dichotomy. This analysis therefore assumes that (1) all cultures construct public and private spheres that are recognizable as such, and (2) the private sphere/women will be devalued within that society. Implicit in this approach is an assumption about the structure of women's lives and the nature of their oppression. That is, women everywhere will inhabit a private sphere and their experience of oppression can be linked to a devaluation of that sphere. As Jennifer Koshan notes this analysis does not necessarily apply, for example, to First Nations Women living in Canada, whose lives traditionally were not ordered by a hierarchical division between public and private spheres.

The public/private divide used in feminist approaches to international law also identifies gender as the defining feature of all women's oppression. Although Charlesworth argues that public and private spheres are defined in terms of their particular context, this approach still

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36 "Human Rights", supra note 15 at 69.
37 Ibid.
38 Ibid. at 69-70.
insists on a dichotomous world view which sees women as always apart from and opposed to, men.\textsuperscript{40} In addition, it requires an "understanding of social forms as the creation of the lives and needs of men".\textsuperscript{41} Missing from this analysis is a way of exploring the "relationships of women and men as aspects of a wider social context"\textsuperscript{42} through which asymmetric gender relations are constituted.

In addition to homogenizing women's experiences along Western lines, the reliance on Western analytic categories without first accounting for their differential application to Third World women can be destructive for women whose lives do not conform to the Western model. Anne Marie Goetz argues, for example, that there has been "a tendency in Western feminism to employ oppositional categories in culturally disjunctive ways"\textsuperscript{43} which have impacted on Third World women through development policies which define problems in terms of gender rather than structural inadequacies.\textsuperscript{44}

2. Gender as the Principal Site of Oppression

By focusing on gender as determinative of oppression, feminist international legal theory makes it difficult to consider the multiple structures of oppression that women negotiate in their daily lives. The category "woman" becomes the central characteristic from which presumed incidences and structures of oppression necessarily flow. Thus we look for certain forms of oppression inherent in the subject 'woman' rather than looking for women defined

\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid. at 414-5.
\textsuperscript{43} "Feminism and the Claim to Know: Contradictions in Feminist Approaches to Women in Development." in Rebecca Grant and Kathleen Newland, eds., Gender and International Relations. (Bloomington and Indianapolis: Indiana University Press, 1991) 133 at 141.
\textsuperscript{44} Ibid. at 142.
through their interaction with various systems of oppression.45 Focusing on patriarchy as the cause of women's subordination misses the pernicious effect of colonialism and monopoly capital on the lives of Third World women and their privileging effect on the lives of Western women. For example, much of the literature explores the ways in which women have been left out of international legal regulation. The objective then becomes bringing women into the public realm of international law without considering if in is where they want to be.47

The lives of Third World women never have been immune from regulation or international interference. Starting with colonialism, Third World women's lives have been regulated by imperialist powers, foreign intervention, capital exploitation and, ironically, destructive development policies.48 For some Third World women, therefore, the prospect of further intervention through international law, which has arguably contributed to their continuing oppression, may not be seen as a progressive development.

To the extent that Third World women can be said to inhabit a private sphere, it may be that in some cases that private sphere is seen as a place of refuge or security. Koshan argues, for example, that for women of colour, the private world of the family, while sometimes a place of violence, may be a site of resistance against the dominant culture.49 Aida Hurtado50 and

45 Mohanty, "Feminist Encounters", supra note 4 at 84.
47 Engle, supra note 31 at 149.
49 Supra note 39.
Zillah Eisenstein\textsuperscript{51} have made related arguments in the context of some Black American women, who may see the family as a potential place of refuge from a racist society. In a similar way, some Third World women, reflecting their different and complex experiences of oppression, may not see the private world as always oppressive. For example, Lama Abu-Odeh argues that for some women, wearing the veil can be an "empowering and seductive" choice.\textsuperscript{52} The veil may offer Arab women security and social respectability. In contrast, feminism and the rejection of the veil offers these women "a discourse that will make them socially conspicuous, questionable, and suspect".\textsuperscript{53}

3. Constructing Third World Women as the Super-Oppressed

Because feminist international legal theory starts from an assertion of women's commonalities, there is a tendency to focus on women's shared experiences of oppression, rather than pursuing their differences. For example, Charlesworth argues that it is "possible to describe women as having a collective social history of disempowerment, exploitation and subordination extending to the present".\textsuperscript{54} By focusing on women's shared position of disempowerment, the important context of women's different cultural and historical experiences is lost. Stripped of colonial, historical, and cultural context, the category woman gets defined in the image of Western women.\textsuperscript{55}

\textsuperscript{51} Zillah, R. Eisenstein, Reimaging Democracy (Berkley: University of California Press, 1994) at 202-3.
\textsuperscript{52} "Post-Colonial Feminism and the Veil: Considering the Differences" (1992) 26 New England L. Rev. 1527.
\textsuperscript{53} Ibid. at 1532-3; Engle, supra note 31 at 148.
\textsuperscript{54} "Alienating Oscar", supra note 15 at 5.
Using analytic categories developed in the context of Western experience carries the risk of constructing the West as the norm; the standard against which all else is judged. Applying these analytic categories cross culturally means that all women's oppression is discussed in terms that mirror Western experiences. Constrained by bounded categories, it becomes difficult to talk about Third World women's different experiences of oppression. As Vasuki Nesiah argues, focusing on women's shared oppression "translates into the power to define and produce 'Third World' women -- typically as passive victims of male oppression".56

For example, the recent war in the former Yugoslavia has drawn the attention of many feminist international law theorists who have written about the tragedy of mass rapes committed in Bosnia-Herzegovina.57 One of the most vocal feminist scholars and activists in this area is Catharine MacKinnon who has written many articles and has been instrumental in bringing civil actions against Radovan Karadzic, leader of the Bosnian Serbs.59

56 Supra note 4 at 204.
59 Kadic v. Radovan Karadzic, Civil Action No. 43, CN 1163, United States District Court, Southern District of New York; Jane Doe I and Jane Doe II v. Radovan Karadzic, Civil
theoretical issues raised by MacKinnon is how to discuss the mass rape of women as a crime under international law while accounting for the fact that these rapes were used as a weapon of war directed at women of certain ethnic backgrounds, in most cases Muslim women. MacKinnon argues that women's ethnic, religious and class differences can be understood as layers of oppression. The fundamental oppression experienced by all women is based on gender. From that point, each additional characteristic of a woman — race, class, ethnicity — constitutes an additional, but distinct, layer of oppression. In the case of Muslim women, their religious and cultural identities mean that they have additional layers of oppressors:

... rape is a daily act by men against women and is always an act of domination by men over women. But the fact that these rapes are part of an ethnic war of extermination, ... means that Muslim and Croatian women are facing twice as many rapists, with twice as many excuses, two layers of men on top of them rather than one, and two layers of impunity serving to justify the rapes ...  

MacKinnon's graphic imagery of "layers of men" points to an understanding of oppression as layered. Muslim and Croatian women are rape victims first because of their gender, then because of their race or ethnicity. Grounds of oppression become hierarchical, with gender the most important, defining characteristic. Viewing the oppression of women as layered fails to account for the complex and interdependent relationships within which women interact. Women's different experiences of oppression become matters of degree; "we" all experience violence, "they" just experience more violence. We are all oppressed, they simply have more oppressors.

Action No. 93 Civ. 0878 PKL, United States District Court, Southern District of New York. For more information, see Chinkin, ibid.
60 See Chapter 5 for a more detailed discussion of MacKinnon's analysis of the mass rape of Muslim and Croatian women.
61 "Crimes of War", supra note 58 at 89.
MacKinnon's depiction of women's differences in terms of layers not only depicts, in this case Muslim women, as the super-oppressed, it also suggests that Western European and North American white women have no religious or cultural identification. White, Western women are represented as the norm of gender oppression. Muslim women are portrayed as exceptional because they also have a religious and cultural identification. This analysis obscures the position of relative advantage occupied by white, Western women and the difference this will have to our experience of gender oppression.

Thus, reducing questions of difference to mere issues of degree not only essentializes women's oppression along Western lines but it also exacerbates the problem of "positional superiority" discussed earlier. Coupled with an emphasis on women's "shared history" is a "reorientation" of international feminism to address "the problems of the most oppressed women rather than those of the most privileged". The "most oppressed women" are clearly Third World women who live within "intensely patriarchal ... traditional non-European societies". From the vantage point of Western women, Third World women are constructed as the super-oppressed. If women everywhere are equated with subordination, then Third World women are really subordinated.

64 Cossman and Kapur, supra note 1 at 279-80.
65 Charlesworth, "Alienating Oscar", supra note 15 at 5.
66 Charlesworth, Chinkin and Wright, supra note 7 at 621.
67 Ibid, at 619.
68 Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" in Third World Women and the Politics of Feminism, supra note 46 at 64.
2. **Narrow Construction of the Public/Private Divide**

Feminist analysis of the public/private divides, whether in domestic or international law, has looked not only at the physical dimensions of the public/private spheres, but also at the ideological matrix, or "shared vision of the social universe" that underlies and supports them. In feminist international law theory, for example, the division between public and private has been described as "an ideological construct rationalizing the exclusion of women from the sources of power" and as being "crucial to the extension of power from the state to other centers of authority". Despite this recognition of the ideological dimensions of a division between public and private worlds, much of the feminist international law theory tends to focus on actual spheres in which men and women are said to operate. In this way, feminist international law theory tends to reify the public and private spheres.

For example, violence against women and the international prohibition against torture are discussed almost exclusively in terms of the public male world of torture versus the private, female world of violence in the home. International law, and the law against torture specifically, are criticized for failing to address the sexual violence "which is a defining feature of women's lives". This analysis, however, does not take account of women who are violated in public ways either through torture as political prisoners or rape during wartime. Women are not always and only battered wives and raped civilians. Sometimes, they are soldiers, guerrillas and political activists. Similarly, not all violence experienced by men is

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69 Olsen, "Family and the Market", *supra* note 24 at 1497.
70 Charlesworth, Chinkin and Wright, *supra* note 7 at 629.
71 Wright, *supra* note 30 at 121.
72 Charlesworth, "Human Rights", *supra* note 15 at 73.
73 Stivens, *supra* note 35 at 10.
public. Some men are also abused, tortured or deprived of their rights in a way that is not subject to international law or public exposure.74

This reification of the public/private divide is partly a result of a narrow approach to understanding public/private ideology in international law and partly a result of the fact that feminist international law theory is still in its formative stage. To date, much of the focus of the work has been on the overt manifestations of public/private ideology in the international/domestic and state/non-state divisions. Little attention has been paid to how those divisions shift and change over time or how the divisions between public and private international law and state/market also affect women's experience of oppression. This narrow focus underscores the tendency to look at women's subordination solely in terms of male/female inequities without accounting for other unequal relationships which materially affect women's lives.75

At the level of domestic law, Frances Olsen has demonstrated how the ideology of public/private changes when used in the context of the private world of the market versus the private world of the family.76 Olsen argues that public/private ideology draws a number of dichotomies between the state, civil society, family and the market. The public and private dimensions of these spheres will vary depending on their juxtaposition with other spheres. For example, civil society is thought of as private in the context of state action but as public in contrast to the private world of the family. The market similarly is a private sphere compared to the public world of state action, a public arena when contrasted to the family.77 Thus, the

74 Gibson, "On Sex, Horror and Human Rights.", supra note 57; Gibson, "The Discourse of Sex/War", supra note 57.
75 Goodall supra note 6 at 451.
76 "Family and the Market", supra note 24.
77 Ibid. at 1501.
contours of public and private spheres will vary depending on the sphere from which they are distinguished.

Both Shelley Wright\textsuperscript{78} and Karen Engle\textsuperscript{79} have started the process of considering the relationship between the market and public international law, and the implications for feminist approaches to international law which place the public/private at the centre of their analysis. At this stage, no one has made a concerted effort to think through the issue, but the preliminary comments of both Wright and Engle raise interesting issues about power and inequality in international law.

Karen Engle offers a nuanced analysis of the position of market actors and women, two groups generally found on the margins of international law. Feminist international legal theory, Engle notes, argues that women are peripheral to public international law because international law does not apply to the private or domestic spheres in which women are said to lead their lives. As a consequence, many feminist scholars and activists work to bring women into the core of international law.\textsuperscript{80} Market actors, in contrast, wish to avoid application of public international law and argue strenuously, and successfully, for the separation of international trade from international law.\textsuperscript{81} The contrast between these two groups raises questions about the different views of international law and its possibilities for social change as well as the difference power makes. Market forces are wary of international law, reasoning that they have more power in the informal world of international trade than in the regulated world of international law. Some women, in contrast, "aim to be inside

\textsuperscript{78} Supra note 30.
\textsuperscript{79} "Views from the Margins: A Response to David Kennedy" (1994) 1 Utah L. Rev. 105 [hereinafter "View from the Margins"].
\textsuperscript{80} Ibid. at 107.
\textsuperscript{81} Ibid.
international law" believing that "it may offer them protection that is unavailable in the family or even in municipal law".82

Shelley Wright argues that the "glue which binds states" in the international arena is based on the notion of consent that underlies social contract theory.83 International law relies on contract theory of relationships among states to justify the normative quality of treaty and customary law. Adopting Olsen's conception of the public/private dichotomy between state/civil society and state/market, Wright argues that international law creates "layers of public and private". Some matters, are open to contractual arrangement between individuals or states, while other matters are deemed internal to states or part of private international law and, therefore should "remain unregulated or free from interference".84 The centrality of the state to international law, she argues, helps to maintain the "modern capitalist modes of production".85 By recognizing the state as the only legitimate actor, international law maintains a division between "mainstream" international structures and "marginal" economic ones.86 Economic actors operate unregulated by international law because they are viewed as marginal. Cultural and social effects of economic activity are "left to market forces on the assumption that individual state mechanisms are adequate to control these forces."87 The ideology of a free international, economic market and the sanctity of a state's domestic affairs works to "legitimate actual inequality" between individual states.88

Neither Wright nor Engle explores the role of the market in international law in detail, but by expanding their analysis of the public/private to take into account the market, they have raised

82 Ibid. at 108.
83 Supra note 30 at 128.
84 Ibid. at 128-9.
85 Ibid. at 135.
86 Ibid.
87 Ibid.
issues of power and inequality. In so doing, they both try to incorporate inequalities such as race and north/south tensions into their analytical framework in order to explore the ways in which public/private ideology interacts with asymmetrical relationships other than gender relations.

In the next section, I briefly consider feminist analysis of state sovereignty doctrine. In international feminist legal theory, state sovereignty has become the focus of the critique of international law. Equated with patriarchy, state sovereignty becomes the cause of women's exclusion from international law. This analysis presumes a definition of state sovereignty which is ahistoric and fails to account for the power imbalances inherent in the state system. In addition, by focusing on state sovereignty as the cause of women's marginalized position in international law, feminist theory fails to account for women's different and sometimes contradictory relationships with international law.
IV. STATE SOVEREIGNTY

For many feminist international law scholars the principal embodiment of the gendered public/private distinction is state sovereignty doctrine, which mandates against external interference in the internal affairs of individual states. The formal notion of state sovereignty doctrine with which international feminist scholars take issue is described by David Kennedy:

... sovereignty establishes states as public subjects, concentrating public will in a single voice, absolute within its delimited sphere and formally equal in its relations with other sovereigns. This is the sovereignty which divides international from national competence and public from private action ... 89

State sovereignty doctrine, therefore, is the principal arbiter between the public world of international activity and the private world of state/domestic affairs. Some international feminists have argued that by upholding the sanctity of domestic state affairs, state sovereignty doctrine supports structural relationships of power and domination of men over women;90 it reinforces "oppression against women through its complicity in systemic male oppression and violence".91

Shelley Wright has developed perhaps the most sustained and penetrating analysis, arguing that state sovereignty in international law is analogous to the patriarchal nuclear family.92 The state as the legitimate actor in international law is based on the same problematic notion of individual consent to social relations that is found in liberal theory.93 State sovereignty presumes that all states are independent, autonomous bodies equally consenting to treaties and

90 Charlesworth, "Human Rights", supra note 15 at 73.
91 Ibid. at 76.
92 Supra note 30 at 128.
customary international law. This notion of consent, Wright argues is based on the paternalistic nuclear family model in which the man is the only legitimate person capable of giving consent on behalf of his wife, children and slaves. In both instances, men are positioned as the relevant political actors, operating in the public sphere on behalf of (their) women who remain hidden in the private sphere. In addition, the principle of non-intervention in the domestic affairs of states is analogous to the arguments about the "sanctity" of the home, justifying its immunity from external regulation. According to Wright, a "radical transformation of the meaning of "statehood" is required which allows a more direct engagement with "economic, social, cultural, and communal interests".

Ongoing engagement with state sovereignty doctrine is central to much of the feminist international legal theory. Because state sovereignty doctrine is pivotal to the ideological division between public and private, its deconstruction is essential to an international feminism that seeks to make the private more public. As such, the treatment of state sovereignty forms a case study of feminist theorizing on international law and specifically the public/private divide. By focusing on the public/private divide as a manifestation of male privilege and female oppression, feminist international law theory fails to account for other unequal relations, such as the legacy of colonialism and North/South tensions, that underlie state sovereignty doctrine. In this section, I show how many of the difficulties raised earlier in this chapter concerning the public/private divide applies to the analysis of state sovereignty.

In their arguments against state sovereignty doctrine, many feminist international law theorists position the patriarchal state as a principal actor in women's marginalization in international law. The implication of this argument is that but for the intractable state sovereignty doctrine,

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94 Wright, supra note 30 at 128.
95 Ibid. at 128-9.
96 Ibid. at 134.
the international community would address women's ongoing subordination. This argument presumes a political commitment to women's equality that is perhaps not demonstrable at an international level. As well, it constructs patriarchy -- and the nation state -- as a monolithic entity equally benefitting all men at the expense of all women; a sort of international male conspiracy.

The argument that sovereignty is the manifestation of patriarchal authority overlooks the unequal power structures among states. While the positivist notion of sovereignty may in fact justify its characterization as patriarchal, the actual experience of sovereignty suggests something altogether different. For many states, sovereignty defined as the freedom to govern without external interference is significantly attenuated. World Bank/IMF loans and repayment plans, the influence of foreign capital, and the conduct of superpowers often have more effect on domestic policy than the exercise of sovereign authority. For many Third World countries, sovereignty, in the sense it is used in feminist literature, has been an unattainable ideal.

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97 Charlesworth, Chinkin and Wright, supra note 7 at 615.
98 Engle, "After the Collapse" supra note 31 at 150-1.
99 Wright does address state inequality in the context of her state sovereignty analysis, supra note 31 at 131-2. She argues that international law incorporates abstract or metaphysical concepts of the state that obscure the historical and cultural specificity of states and consequently their relative inequality, ibid at 135. However, she does not give a similar accounting for state sovereignty doctrine. By rejecting state sovereignty doctrine without first considering its historical and cultural specificity, Wright does not follow her own edict to "incorporate considerations of a political, economic, or cultural nature into the definition of a state"; to begin looking "not at the State, but at states", ibid at 133.
In addition, the rejection of state sovereignty doctrine by many feminist scholars assumes not only that all men benefit equally from its continuation, but also that all women will rejoice in its demise. Charlesworth argues for example, that while state sovereignty embodies complex relationships, it is "simply irrelevant to most women's experience". This perspective ignores the legal and symbolic importance that state sovereignty may have for different people, including women, at different times. Perry Dane notes that because sovereignty is "tied to power, cohesion, culture, faith, community and ethnicity", it embodies a complex of ideas that can have, at the very least, metaphoric significance for some people. Similarly, Stephen Toope argues that sovereignty is an important rallying cry because it has come to include "concepts of culture, peoplehood and nation".

For some Third World women, who as colonized peoples have experienced marginalization in the power politics of global affairs, the notion of state sovereignty and the legitimating power of that doctrine may be extremely important. The argument that state sovereignty needs to be renegotiated in the name of politicizing women's lives will have little purchase with women who have developed their feminist consciousness in the context of national liberation movements and may see the state as an embodiment of their ethnic representation in the global arena. The Western feminist focus on limiting state sovereignty places Third World women's identity as women in conflict with their national or ethnic identities. By seeing state sovereignty as necessarily bad for women, it misses the way different women's experiences of

gender oppression may be defined through the intersection of racial, ethnic and colonial oppression.

In addition, the sweeping rejection of state sovereignty as "simply irrelevant to most women's experience"\textsuperscript{106} fails to account for the complex and sometimes contradictory positions women occupy with respect to both law and the state.\textsuperscript{107} Women's engagement with law and the state will vary over time and in different contexts, reflecting the fact that while the state may be an oppressive force in women's lives they "are also often actively engaged in countering state processes".\textsuperscript{108}

V. CONCLUSIONS

In this chapter, I have attempted to question how feminist international legal theory constructs both women and law. My objective has been to participate in a continuing conversation about the norms and assumptions inherent in a theoretical focus on women. If international feminist theory is going to truly embrace cultural diversity -- a central requirement of a theory which seeks to be relevant to all women -- then we must "be careful in our assumptions, critical of our paradigms of analysis, and aware of our position in the debate."\textsuperscript{109}

The focus in international feminist legal theory on the public/private divide is problematic not simply because it relies on a primarily Western model, but because it is being used as a central paradigm for understanding women's gender oppression. As I have argued in this chapter, this

\begin{itemize}
\item \textsuperscript{106} Charlesworth, "Alienating Oscar", \textit{supra} note 15 at 8-9.
\item \textsuperscript{107} Nira Yuval-Davis and Floya Anthias, eds., \textit{Woman-Nation-State}. (New York: St. Martin's Press, 1989) at 6.
\item \textsuperscript{108} \textit{Ibid.} at 11.
\item \textsuperscript{109} Annie Bunting, "Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies." (1993) 20 J. of L. and Soc. 6 at 18.
\end{itemize}
approach tends toward universalizing assumptions about women and their oppression rather than engaging in local, contingent and historically specific analysis. Feminist international legal theory must move beyond simply recognizing difference to "living" it. This means incorporating insights gleaned from women's diversity to challenge dominant assumptions about our essential characteristics and social norms.

Because women occupy different positions within the international social hierarchy, they will have different relationships with law. Speaking about law requires examining women's variable and complex relationships with law. In the context of state sovereignty doctrine, the intersection of gender, race and class may affect how sovereignty is perceived. In the context of the public/private divide, women may be differently constructed by and engage with public and private spheres at different junctures.

In the following chapters, I consider the example of mass rape in the former Yugoslavia. As a topic of feminist international law activism and theorizing, wartime rape in the former Yugoslavia provides a case study through which to examine how feminist international law theory speaks of women and how it speaks of law. In the next two chapters, I examine the mass rape of Muslim women and attempts by feminist theory to address women's suffering through various international law remedies. Drawing on some of the discussion in Chapters 2 and 3, I explore how this theoretical work addresses issues of difference and intersectionality. Examining the international law framework at the centre of feminist international legal theory, I explore how this literature theorizes law and its role in social reform.

CHAPTER 4
TOWARDS A FEMINIST THEORY OF VIOLENCE: WAR AND RAPE IN BOSNIA-HERZEGOVINA

I. INTRODUCTION

Violence against women is increasingly put forth as an issue that is common to the largest constituency of women. It is seen as an international issue which links women throughout the globe. In the preceding chapter, I discussed the public/private divide which is central to much feminist international law theory. Violence against women is most often given as the example of the gendered impact of the public/private divide. International law, some feminist scholars argue, distinguishes between international (public) and state (private) matters

1 Julie Mertus and Pamela Goldberg, "A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct" (1994) 26 Int'l L. and Politics 201; Rhonda Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1994) 25 Columbia Human Rights L. Rev. 291 [hereinafter "Domestic Violence"]; Celina Romany, "Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" (1993) 6 Harv. Human Rights J. 87. Mertus and Goldberg describe the developments toward defining women's human rights at the United Nations World Conference on Human Rights in June 1993. Different feminist and women's groups organized a concerted effort to focus on violence against women as a central human rights violation commonly experienced by many women. The Vienna Conference was successful (207) because: (1) for the first time, the United Nations specifically recognized violations of women's rights (201, 203), and (2) international attention was focused on violence against women. Despite its success, the authors note that the strategy of focusing solely on violence against women was problematic because it gave the impression that violence against women was the only human rights violation of note (211).

2 Mertus and Goldberg, ibid at 208-209 describe the widespread incidences of violence against women that cross national and cultural boundaries.

in a way which fails to address, and in fact contributes to violence against women. Within international law, violence, and particularly torture, is defined in terms of what men think will likely happen to them. Consequently, violence and torture are defined in terms of state actions (direct or indirect) which physically harm men or result in the loss of their civil liberties. The requirement of state involvement in violence or torture means that the violence that most women suffer -- domestic or sexual violence -- is not subject to international law sanction. In this way, the public and private divide operates to extend protection to men, but ignores the suffering of many women.

The issue of violence against women is important not only because of its link to feminist international legal analysis of the public/private divide, but also because it engages some of the feminist theoretical debates I discussed in Chapter 2: the need to theorize women's differences, and the intersection between different sites of oppression. Because violence against women is seen as an issue that links the most women, it offers promising theoretical and political territory for building international feminist alliances. The difficulty, however, is that while violence may be common to a large number of women, the experience of violence is not necessarily common to all women. How, where and why women experience violence will vary depending on the nature of the violence, the individuals involved and the legal and social apparatus available for dealing with violence.

Therefore, feminist theories of violence against women must take account of not only the general pattern of violence against women, but the particular experiences of women who are abused.

4 Jus Cogens, supra note 3 at 69.
5 "Human Rights", supra note 3 at 73.
6 Copelon, "Domestic Violence", supra note 1 at 299.
Recently, violence against women has received increasing international attention because of the mass rape of women in the war in Bosnia-Herzegovina (Bosnia). In particular, reports of mass rape against Muslim women as a method of cultural extermination has received widespread and sensational international attention. In light of reports of atrocities committed in the former Yugoslavia, the United Nations has taken several remarkable steps including the establishment of a war crimes tribunal (the "Tribunal") to prosecute violations of international law, and a Commission of Experts to gather information on violations of international humanitarian law. Feminist international law scholars and practitioners have also become quite active, producing numerous articles calling for a reconsideration of rape as a crime against humanity or even genocide. In addition, feminists have been actively involved in

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7 Helsinki Watch, War Crimes in Bosnia-Hercegovina, vol I (New York, Washington, Los Angeles and London: Helsinki Watch - A Division of Human Rights Watch, 1992) 19. The reports of numerous investigatory bodies, including Helsinki Watch conclude that all women are targeted for rape and murder by all sides in the conflict. However, the overwhelming incidences of rape and other atrocities committed as part of a policy of ethnic cleansing occurs at the hands of Serbian soldiers against Muslims and particularly Muslim women. (See generally: Helsinki Watch, ibid.; Report of the Commission of Experts, infra; Amnesty International, Yugoslavia: Women Under the Gun, Amnesty Action, Spring 1993.


investigating reports of mass rapes,\textsuperscript{11} assisting with the Tribunal, and pursuing domestic legal remedies against the alleged perpetrators.\textsuperscript{12}

The response to the mass rape of Muslim women provides a good case study through which to assess the prospects and limitations of feminist engagement with international law.\textsuperscript{13} First, as an act of violence directed at women of a certain religious background, the mass rapes raise the issue of intersectionality;\textsuperscript{14} in this case the intersection of gender, religion and culture. As I discussed in Chapter 1, understanding the importance of factors other than gender means accounting for the way women's experience of gender oppression may be shaped by their experiences of racial, ethnic or religious oppression. Kimberle Crenshaw argues that theorizing intersectionality means asking: "How does racism divide gender identity and experience? How is gender experienced through racism? How is class shaped by gender and 'race'?"\textsuperscript{15} In the case of the mass rape of Muslim women, we need to question how the focus on ethnic cleansing obscures the gendered nature of the rapes. It also means questioning how


\textsuperscript{13} By suggesting that the suffering of Muslim women is appropriate for an assessment of international feminist theory, I do not mean to obscure or marginalize the very real experience of these women. My analysis is not meant as an antiseptic alternative to discussing the tragic reality of wartime rape. Rather, I hope to analyze this example in terms of feminist theory so that we may work toward more meaningful legal and feminist response to wartime rape.

\textsuperscript{14} Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) University of Chic. Legal Forum 139. For a discussion of intersectionality see Chapter 1, note 19 and accompanying text.

\textsuperscript{15} \textit{Ibid.} at 140.
feminist analysis of wartime rape and international law places women's identities as women at odds with their ethnic/religious/national identities.

A second issue for feminist international law theorists is the construction and manipulation of "difference", primarily religious and national difference. In Chapter 1, I discussed the criticism of white, Western feminism for assuming a uniform experience of gender oppression based on the experience of white, Western, middle-class women. Feminists were challenged to recognize and incorporate women's different experiences of oppression stemming from their different positions in the social hierarchy. That insight resonates in the case of mass rape, as women's experiences of rape will vary depending on their racial, ethnic, religious backgrounds. Theorizing wartime rape therefore, requires situating the specific experiences of women in the larger context of violence against women without missing the particular ethnic/religious dimensions of some women's experiences. However, the issue of "difference" is complicated by the construction and manipulation of difference by varying hegemonic interests represented in the Bosnian war: patriarchy, militarism, nationalism. Part of theorizing the intersectionality of wartime rape is accounting for the way in which gender identities are constructed and undermined during war, and during this war in particular. On the one hand, much of the propaganda that fuels war in the former Yugoslavia is based on a construction of difference between Muslims, Croats and Serbs that is dressed up as "ethnic" but which some would argue is largely manufactured.16 On the other hand, war, especially in

16 Although the war in Bosnia, and in greater Yugoslavia, is characterized as a battle between rival ethnic groups, this reference to ethnicity is probably inaccurate. Diana Kapidzic, a founding member of "Biser" a feminist human rights organization established by Bosnian women in response to the war, argues that ethnicity "has little genuine meaning in Bosnia." While Bosnia is composed of people from many different religions, they share a common ancestry, history, language and dialect. For the most part, Bosnians fall within the ethnic category of "South Slavs." To speak of "a Bosnian Serb is redundant and artificial. One is either a Serbian Orthodox or a Bosnian Orthodox, not a Bosnian Serb": "Biser: A Conversation with Bosnian Women Living in Exile" (1994) 5(1) Hastings Women's Law Journal 53 at 56; Julie Mertus, ""Woman" in the Service of National Identity" (1994) 5(1) Hastings Women's Law Journal 5 at 20 ["National Identity"]; Vesna Kesic, "A Response to
the former Yugoslavia, relies on a nationalist discourse that must, to sustain itself, essentialize differences among people. Women, who are central to this nationalist discourse, are subject to competing interests. First, their ethnic or religious identities are constructed as distinct and definitive: they are Muslim or Serbian, but not both. Second, their individual differences -- of sexuality, heritage, politics etc -- are subsumed under the larger umbrella of their ethnic or religious identity. While it is important to account for the different ethnic and religious identities of women, it is also important to distinguish between those identities which are constructed as part of war propaganda and those which have been adopted by women as an expression of their individual or communal self. Feminist theory which tries to situate itself in the diversity and difference of women risks employing the progressive discourse of diversity to the regressive ends of warmongering.

Wartime rape, as an example of violence against women, also raises the issue of the public/private divide and the way it has been used in some feminist international law theory. As I argued in Chapter 3, much of the feminist international law theorizing on the

Catharine MacKinnon's Article "Turning Rape into Pornography: Postmodern Genocide" (1994) 5(2) Hastings Women's Law Journal 267. Although I recognize that naming the parties may perpetuate certain myths about their ethnic differences, I use the terms Bosnian Serb, Muslim and Croat to distinguish the parties in the Bosnian conflict from those involved in the other battles relating to the dissolution of the former Yugoslavia.

Distinctions between ethnicity and religion also point to the difficulty of "naming" women's differences. Marnia Lazreg argues there is a tendency in feminist international theory to focus on religion as the defining characteristic of some women: "Feminism and Difference: The Perils of Writing as a Woman on Women in Algeria" in Marianne Hirsch and Evelyn Fox Keller, eds., Conflicts in Feminism (New York and London: Routledge, 1990). In the context of Bosnia, I have focused on Muslim women because their religious identification is central to their construction by other parties as a distinct ethnic community. It is this use of ethnicity as synonymous with religion, that I am hoping to explore in the following sections. In my usage, religion is confined to a system of beliefs involved in the worshipping of one or several deities. By culture, I am referring to the system of rules and practices governing behaviour in a specific community, and ethnicity refers to the physical and cultural traits of a community of people who share a common ancestry.

See Chapter 2, notes 97-114 and accompanying text.
public/private divide has tended to see the divide as static, rigid and ahistoric, thereby missing the way in which the public and private spheres are fluid, shifting over time and in different contexts. Wartime rape is an example of violence against women which does not fit the model of the public/private divide relied on by some feminist international law scholars. Wartime rape is a state-sanctioned act which moves in and out of the public realm depending on its characterization as a war crime, the perceived sexual or racial purity of the victim, and the nationality of the perpetrator.  

In the next two chapters, I focus on the mass rape of Muslim women in Bosnia and the attempt by some feminist scholars to address those rapes through international law. In part II of this chapter and by way of background, I provide a brief history of the dissolution of Yugoslavia and the resulting wars. In part III, I discuss the international law mechanisms that have been initiated to address the gross violations of international humanitarian law in the former Yugoslavia. Feminist international law scholars have been active in pursuing and writing about various international and domestic legal actions available to address the atrocities committed in Bosnia. In part IV, I discuss feminist international law literature in this area and look at how it theorizes issues of intersectionality and difference, and the role of international law in addressing those rapes. Missing from this literature, I argue, is a clear sense of the role of law in addressing wartime rape. Wartime rape generally, and the particular experience of Muslim women in the Bosnian war, needs to be seen in the context of different systems of oppression including patriarchy, militarism, nationalism, religion, and law. These different systems converge during war and define our understanding of wartime rape and its place in international law. In Chapter 5, I explore the different systems of oppression -

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18 I merely introduce these arguments now and pursue them in more detail, with references, later.
- or, relations of ruling\(^{19}\) -- that impact upon the mass rape of Muslim women, and consequently, the role of international law in addressing those rapes.

II. DISSOLUTION OF THE FORMER YUGOSLAVIA

Yugoslavia has had a long, troubled history. Often positioned as the geographic and cultural divide between the West and the East, the Balkans have been divided along religious, ethnic and cultural lines. As the buffer between West and East, the Balkans have been contested terrain for the Catholic church, the Russian Orthodox Church, and practice of Islam. In the nineteenth century, the Balkans were divided between the sphere of influence of the Austro-Hungarian Empire in the West and the Ottoman Empire in the East, and, in the twentieth-century, capitalism of the West and communism of the East.\(^{20}\) The peoples grouped under the state umbrella of Yugoslavia have been similarly divided along lines defined by these various West/East tensions. Historically, the Croatian people have aligned themselves with the Austro-Hungarian empire, practicing Roman Catholicism and during World War II, aligning themselves with Nazi Germany. The Serbians have tended historically to align themselves more with Eastern influences, practicing orthodox religion. The Muslims historically aligned themselves with the Ottoman empire and, today, with other Islamic countries.\(^{21}\) In recent years, the tensions that have characterized Yugoslavian history were muted by authoritarian rule. The demise of the Soviet Union changed the balance of power in the region, resulting in a resurgence of different interests, including nationalism.

\(^{21}\) Ibid.
Between June and October 1991, four of the six republics of the Social Federal Republic of Yugoslavia declared independence: Croatia, Serbia, Slovenia, Montenegro, Macedonia and Bosnia-Herzegovina. Croatia and Slovenia were the first to declare independence which resulted in armed conflict with the Yugoslavian Federal Army and Serbian paramilitaries. In January, 1992, Croatia and Serbia signed a cease-fire agreement which provided for the deployment of a United Nations Protection Force (UNPROFOR) to monitor the cease fire. In 1992, Bosnia moved toward independence and was formally recognized as an independent state on April 6 and 7, 1992. Since that time, Bosnia has been ripped apart by war between three factions: Bosnian Serbs, Bosnian Muslims, and Bosnian Croats. The conflict has been particularly violent and protracted. At the time of writing this, the war in Bosnia shows no sign of a resolution in the near future and in fact threatens to spill over into Croatia.

Prior to the collapse of the Soviet Union, the majority of the people in Bosnia characterized themselves first as Yugoslavs, and only secondly as members of a specific ethnic or religious community. The vacuum created by the demise of central communist authority in Yugoslavia was filled by nationalist and separatist sentiment leading to a reawakening of ethnic and religious identity which had been suppressed during communist rule. This rise of

22 Amy Lou King, Notes, "Bosnia-Herzegovina - Vance-Owen Agenda for a Peaceful Settlement: Did the U.N. Do Too Little, Too Late, to Support this Endeavor?" (1993) 23 Georgia J Int'l & Comp. L 347 at 349.
24 Ibid.
25 Helsinki Watch, supra note 7 at 19.
28 O'Ballance, ibid.
nationalism was particularly troubling in Yugoslavia where approximately 30-40% of the population are of mixed (Serbian-Croatian-Muslim) parentage. In Bosnia, the different religious and ethnic communities are intermixed, with no one region identifiable by its ethnic or religious make up.

Perhaps due in part to the mixed demographics, the war in Bosnia was characterized at the outset by particularly egregious violations of international human rights and humanitarian law. According to Helsinki Watch, the civilian population has been particularly targeted in this war:

"Ethnic cleansing", according to Helsinki Watch, is a policy of forced removal of non-Serbs from areas under Serbian control. It is directed against Muslims and Croats on the basis of their religion and ethnicity and involves the forced expulsion of Muslims and Croats from their homes and villages though detention, deportation, killing and summary executions.

29 Ibid.
30 O'Ballance notes, *ibid* at 3, that when the former leader of Yugoslavia, Tito, drew the boundaries of the six Yugoslav republics, he "deliberately cut through ethnic blocks to bring about a balance between them". See also: Stjepko Golubic, Susan Campbell and Thomas Golubic, "How not to Divide the Indivisible" in Rabia Ali & Lawrence Lifschultz, eds., *Why Bosnia? Writings on the Balkan War* (Stony Creek, Conn: The Pamphleteer's Press, Inc., 1993) 209.
31 Helsinki Watch, *supra* note 7.
32 Helsinki Watch, *ibid*. at 1.
33 *Ibid*. at 1-2. The reference to an "ethnic" dimension to this policy of forced removal and extermination is a misnomer. As I discussed above, *supra* note 16, the parties to the
Related to this policy of ethnic cleansing is the mass rape of women, principally Muslim women, as part of an officially condoned policy. Although all parties to the war in Bosnia are implicated in the rape of women as a policy of war, it appears that rape is primarily directed at Muslim women by Bosnian Serbs. Rape in this conflict has occurred on a massive scale as part of a policy to intimidate, humiliate and degrade. "The effect of rape is often to ensure that women and their families will flee and never return." Rape is also being used as a means to force women to bear Serbian babies. Forcible impregnation in this context is used as further tool of ethnic cleansing and as "an intensification of the trauma" of rape. Helsinki Watch has also determined that the rape of Muslim women occurred in a highly organized, public fashion:

In some villages and towns, women and girls have been gathered together and taken to holding centers - often schools or community sports halls - where they are raped, gang-raped and abused repeatedly, sometimes for days or even weeks at a time.

At other times, women and girls have been raped "in their homes, in front of family members and in the village square."

Bosnian war are arguably ethnically similar but are divided primarily along religious lines. "Ethnic cleansing" therefore is more accurately a policy based on religion. That it is called ethnic cleansing points to the centrality of difference, both real and constructed, to the propaganda machine that fuels this war.

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34 Helsinki Watch notes supra note 7 at 22, that it found no hard evidence that rape was meant as "a means of tactical warfare" but they also did not find any evidence that any soldier or paramilitary group "had been punished or held to account for raping women and girls."
36 Helsinki Watch, supra note 7 at 21.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
The targeting of Muslim women for mass rape is significant to the definition of this particular act of violence. Muslim women are constructed by Serbians as being more virtuous than other women and therefore their rape is seen as additionally destructive for Bosnian Muslim communities. Because of the particular geographic and historical evolution of religious communities within the former Yugoslavia, Muslim women do not practice all aspects of Islamic religion in the same way as, for example, Middle Eastern Muslim, women who are often held out in the West as definitive of Islamic women. For example, under communist rule, Muslim women were no longer veiled and gave up wearing the traditional long, baggy trousers, or dimije. Azra Zalihic-Kaurin argues that while Muslim women have the outward appearances of other Yugoslavian women, they have retained some of the dictates of Islam including the commandment of virginity and marriage.

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41 Mertus, supra note 16 at 19. 
43 Azra Zalihic-Kaurin, "The Muslim Women" in Mass Rape, supra note 10, 170 at 170. 
44 Ibid. at 172-3.
III. INTERNATIONAL LAW FRAMEWORK

The massive scale of the rapes in Bosnia, and their apparent use as a tool for "ethnic cleansing" has resulted in efforts by various groups and bodies to seek legal redress through different domestic and international fora. The United Nations, through the Security Council, has established a tribunal to prosecute violations of international law in the former Yugoslavia. The Statute of the Tribunal authorizes the Tribunal to prosecute crimes against the Geneva Conventions, the Genocide Convention, and crimes against humanity. In addition, the Bosnian Government has brought an action before the International Court of Justice against Yugoslavia (Serbia-Montenegro). As indicated above, civil actions against individual members of the Serb forces responsible for committing rape have also been commenced in the United States, Germany, France, and in Sarajevo by a Bosnian military tribunal.

The current international law framework for dealing with harm done to individuals during wartime was established in its current form after World War II. It is broadly composed of three streams of law:

45 Supra note 8.
47 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro); Christine Chinkin, "Rape and Sexual Abuse of Women in International Law" (1994) 5 EJIL 326 at 334-5.
48 Ibid. at 335.
(1) the Geneva Conventions which hold states liable for the harm to civilians, property and individual soldiers, injured or held prisoner, by troops under their command and authority;

(2) the body of law arising from the judgment of the Nuremberg Tribunal and the Military Tribunal for the Far East which is sometimes referred to "crimes against humanity"; and

(3) violations of human rights, including genocide and torture.

1. **Geneva Conventions**

The cornerstone of the international framework applicable to the war in Bosnia are the laws of war and international humanitarian law, primarily as codified in the Geneva Conventions. The Geneva Conventions are the culmination of centuries of laws of war governing conduct during battle. Humanitarian law builds on customary laws of war and embodies some of the norms and customs of military behaviour.

(a) General Framework

The laws governing behaviour during armed conflict are generally subsumed under two categories: the *jus ad bellum*, the authority to resort to force, and *jus in bello*, the rules applicable in an armed conflict. In the twentieth century, the *jus in bello* (laws of war)


50 Chinkin, supra note 47 at 330-31. These three streams of law have been incorporated into the Statute for War Crimes Committed in the Former Yugoslavia which will be discussed in more detail *infra*. Doreen Marguerite Koenig, "Women and Rape in Ethnic Conflict and War" (a speech given at the University of Melbourne, Australia and Michigan State University), (1994) 5(2) Hastings Women's Law Journal 129 at 137.
adopted the title "humanitarian law" and encompassed not only rules of military engagement (codified under the Hague Conventions) but also protection of civilians.

In its twentieth century formulation, international humanitarian law generally refers to the protections granted to civilians and wounded or imprisoned soldiers through the Geneva Conventions and subsequent protocols. Geneva Conventions I through III contain provisions relating to the protection of soldiers: Convention I - wounded and sick soldiers fighting a land war; Convention II - wounded, sick or shipwrecked soldiers at sea, and Convention III - prisoners of war. Geneva Convention IV contains provisions for the protection of civilians, but only against arbitrary actions of the enemy, not against actual military operations. It is composed of 159 articles divided into four parts with parts II and III containing the bulk of the substantive protections. Part II defines the scope of the Convention broadly to cover the "general protection of populations against certain consequences of war" and applies to the entire citizenry of warring countries without distinction on the basis of "race, nationality, religion or political opinion." Part II provisions, however, are restricted in application to the "wounded, sick and aged persons, children under fifteen, expectant

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51 The Hague Conventions were a series of peace conferences held at the turn of the century and culminating in the 1970 Conference for Peace and Disarmament. See Chapter 5 for more discussion of the significance of the Hague Conventions to humanitarian law.
53 Ibid.
54 Article 13.
mothers and mothers of children under seven". The protections are primarily concentrated on establishing hospital and safety zones and removing protected persons from areas of combat. Part III pertains to the "status and treatment of protected persons" and includes civilians and wounded in occupied territories. The provisions range from prohibitions against rape, physical or moral coercion, pillaging and using protected persons as a shield against military operations. A substantial number of provisions in Part III relate to the treatment of internees and contain regulations about place of internment, food and clothing, hygiene and medical treatment, and religious, intellectual and physical activities.

Protocols I and II were passed in 1979, well after the Geneva Conventions, and were designed to address the changing nature of warfare resulting from the recognition of self-determination and rise of nationalist revolutions in the post-colonial world order.

(b) Provisions Concerning Rape

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55 Article 14.
56 Article 27 will be discussed in more detail later.
57 Article 31.
58 Article 33.
59 Article 28.
60 Chapter II.
61 Chapter III.
62 Chapter IV.
63 Chapter V.
64 Protocol I pertains to the protection of victims in international armed conflicts and Protocol II pertains to non-international conflicts supra note 52.
Article 27, Part III, Section 1 of Geneva Convention IV prohibits rape or other attacks on a woman's honour:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practice, and their manners and customs. They shall at all times be humanely treated, and shall be protected against all acts of violence or threats thereof and against insults and public curiosity.

**Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.** (emphasis added)

The characterization of rape as an attack on a woman's honour, and the positioning of the prohibition against rape in the context of "family rights", "religious convictions" and "customs" points to a limited understanding of rape as an act of cultural rather than gender violence.

The prohibition against rape contained in Protocol I (which relates to international armed conflict) is a slight improvement on Article 27. Under Chapter II, entitled "Measure in Favour of Women and Children", Article 76 (1) - (3) defines "Protection for women"

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.66

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66 *Supra* note 52.
While Article 76 does not specifically refer to the honour of women, it still extends protection to women on the basis that they deserve "special respect". One wonders if women would still be covered by Article 76 if they were not the sort of woman who conforms to societal expectations of the respectable woman? 

(c) Grave Breaches of International Law

In addition to characterizing the protection of women as matters of honour and respectability, humanitarian law further marginalizes wartime rape by classifying it as a simple crime rather than a grave breach of international law. Under Geneva Convention IV, the commission of some offenses are deemed to be a grave breach of international law. Article 147 defines grave breach as:

...willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. 

The classification of an offense as a grave breach of international law is important because it allows the international community to take additional steps to prosecute the offense. Where an offense is a grave breach:

(a) it is not necessary to prove the offense is systematic. One breach is sufficient; and

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68 Supra note 52.
(b) the offense is one of universal jurisdiction, which means that every nation "has an obligation to bring the perpetrators to justice through investigating, arresting, and prosecuting offenders in its own courts". 69

Significantly, the definition of grave breach includes specific reference to the right to fair trial and the destruction of property but it does not refer to rape.

2. **Crimes Against Humanity/Genocide Convention**

International law relating to crimes against humanity and genocide evolved out of World War II and the actions of the German state in torturing and murdering its own civilians, the civilians of its allies and civilians in captured territory. Specifically, the German policy of targeting certain communities -- trade union members, social-democrats, communists, Jews, gypsies, members of the church -- for "heinous acts and acts of barbarity" prompted the international community to set up the International Military Tribunal to prosecute, among other things, crimes against humanity. 70 A similar tribunal was established in the Far East to prosecute crimes against humanity committed by the Japanese. 71 The Charter of the Nuremberg Tribunal defined crimes against humanity as follows:

(c) Crimes Against Humanity: namely, 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 ... 72

69 Article 146, *ibid*; Copelon, "Surfacing Gender", *supra* note 12 at 201.
71 *Supra* note 49.
72 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, vol. XXII, IMT Secretariat, Nuremberg, 1948, pp. 413-14 and 497 as reprinted in Roberts and Guelff, *supra* note 46 at 155.
Although rape was documented throughout World War II, it was not prosecuted at Nuremberg as a war crime.73

The Genocide Convention74 also evolved out of the events of World War II and particularly, the German policy to exterminate the Jewish people. It was drafted to address any acts, whether in war or peace, designed to partially or completely destroy a particular group. Article II of the Convention defines genocide as:

... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.75

3. International Law Applicable to Bosnia-Herzegovina

(a) General International Law Provisions

Initially, the question of the application of international law to the atrocities committed in Bosnia was primarily focused on two issues: the characterization of the Bosnian war as an international versus a national conflict, and rape as a grave breach versus a simple violation of international law.76 As discussed above, the Geneva Conventions extend more protection to

73 Meron, supra note 10 at 425-6. Meron goes on to note that rape was prosecuted to a limited degree at Tokyo.
74 Supra note 46.
75 Ibid.
76 See for example, Meron supra note 10.
civilians during an international war than a national war. The Protocols, to which the warring factions in Bosnia are party, rectify this imbalance somewhat. The debate over the international dimensions of the Bosnian war was quickly resolved by Security Council Resolutions 808 and 827 which characterized the fighting in the former Yugoslavia as constituting a threat to international peace. This meant the conflicts in the former Yugoslavia, including the war within Bosnia, were international wars and subject to the bulk of Geneva Convention IV provisions.

Of the different international law instruments applicable to the war in Bosnia, only Geneva Convention IV specifically mentions rape and even then it is not included in the definition of grave breach. When reports of the mass rape of Muslim women first surfaced, international law scholars canvassed existing international instruments for legal remedies to address what appeared to be a crime against humanity or even genocide. Perhaps because the only specific reference to rape is found in Geneva Convention IV, the initial focus of some international scholarship was on redefining grave breaches of international law to include rape. Many scholars concluded that though not specifically mentioned in the definition of grave breach,

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77 The Genocide Convention and crimes against humanity apply equally to an international or national conflict: paragraphs 72 and 91, Report of the Commission of Experts, supra note 9.
78 Although many Western states have not ratified either of the two Protocols, the former Yugoslavia has. For the most part, the parties to the war in the former Yugoslavia have accepted application of the Geneva Conventions and Protocols. See: Memorandum of Understanding November 27, 1991 and Addendum May 23, 1992 and Agreement May 22, 1992; Chinkin, supra note 47. However, because neither the United Nations Statute for War Crimes Committed in the Former Yugoslavia nor Security Council resolutions concerning rape include reference to the Protocols, it is likely the Tribunal will refer to the terms of the Geneva Conventions IV without reference to the subsequent Protocols: Koenig, supra note 50 at 138-9.
79 Supra note 8; Meron, supra note 10 at 424.
80 As the wars in the former Yugoslavia and Rwanda demonstrate, any war involving the stability of a country will impact upon international security and will thus, at some level, be an international rather than a purely national matter.
the events in the former Yugoslavia, including various steps taken by the United Nations, have now extended the definition of grave breach to include rape.\(^{81}\)

(b) Statute of the Tribunal

The Tribunal's statute lists four bases for prosecution: (1) genocide; (2) grave breaches of the 1949 Geneva Conventions; (3) violations of the laws or customs of war; and (4) crimes against humanity.\(^{82}\) Significantly, the Tribunal is not empowered to prosecute offences of the Geneva Conventions unless they amount to grave breaches. Rape is not listed specifically as a grave breach but is listed as a crime against humanity. While it may be that rape is included in the definition of grave breach, it is important that it was not included as a specific breach within the context of the Statute. Including rape within the context of crimes against humanity suggests that rape will be prosecuted only to the extent that it constitutes a systematic policy of ethnic cleansing.

\(^{81}\) Copelon, "Surfacing Gender", supra note 12 at 201-203, argues that even with international concern over the rapes in the former Yugoslavia, the UN has indicated it does not consider rape to be a grave breach. However, Theodor Meron, supra note 10 and Laurel Fletcher et al, supra note 11, argue that rape is probably a grave breach in light of the way reports of rape in the former Yugoslavia are being treated by the United Nations. Fletcher et al, for example, argue that rape is a grave breach because the Security Council, in its resolutions concerning Bosnia, has repeatedly referred to the relevant provisions of the Geneva Conventions defining grave breaches. See also: International Committee of the Red Cross, Aide - Memoire (Dec. 3, 1992) as cited in Elizabeth A. Kohn, "Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia", (1994) 24 Golden Gate University L. Rev. 199 at 210. In addition, the Commission of Experts appointed to examine the grave violations of humanitarian law committed in the Rwanda, note at paragraph 145 that it endorses the view that rape is both a "breach of international humanitarian law and a crime against humanity." Commission of Experts, supra note 9. The significance of this redefinition of rape as a grave breach is explored in more detail infra.

\(^{82}\) Koenig, supra note 50 at 137.
To be a crime against humanity, rape must be "a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." Thus rape as an attack on a woman as a woman is not an international crime, it is merely an unfortunate "side-effect" of war. In its report to the Secretary-General, the Commission of Experts distinguishes between crimes against humanity and simple violations:

Crimes against humanity are, however, serious international violations directed against the protected persons, in contradistinction to a fate befalling them merely as a side-effect, for example, of a military operation directed by military necessity. (emphasis added)

Thus, in the case of Bosnia, a distinction is made between "real" rape -- that which happens on a large scale and is directed against an ethnic or religious community -- and ordinary rape -- anything falling short of a widespread or systematic attack on an ethnic or religious community. Defining rape in terms of genocide reinforces the view that rape is a crime only when it is an attack on a woman's honour, and even then it must be a systematic and widespread attack to be worthy of legal censure. Rape falling short of a crime against humanity is not defined as a war crime.

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84 Supra note 9, paragraph 83.
85 In another context, Susan Estrich has made a distinction between "real" rape -- an attack by a stranger -- and simple rape -- an assault by a man whom the woman knows: Real Rape (Cambridge, Mass.: Harvard University Press, 1987) 4. That distinction is paralleled at the international level, I argue, by the distinction between genocidal rape and ordinary (non-genocidal) rape.
86 The Report of the Commission of Experts, supra note 9, states that under the terms of the Geneva Conventions and customary international law, "a single act of rape or sexual assault constitutes a war crime" (paragraph 105). However, the general thrust of international law efforts to date have justified prosecution of rapes on the basis that they amount to a policy of ethnic cleansing. In the context of Bosnia this means that rape is defined only as a systematic and wide scale act against a religious, national or ethnic group.
humanity may be regarded as *incidental* to military operations and therefore not punishable under international law.87

IV. FEMINIST THEORIZING ON WARTIME RAPE IN BOSNIA

The international law response to the mass rape of Muslim women has focused on the systematic and genocidal aspects of rape. In a similar way, general international interest in the mass rape of Muslim women has tended to focus on the use of rape as a systematic and planned policy of genocide or ethnic cleansing.88 It is difficult to know what it is about ethnic cleansing in Bosnia that causes the rest of the Western world to take notice.89 Is it the sheer size of the event -- "mass" rape -- or is it the overt expression of ethnic and religious hatred in a white and relatively Western country? Perhaps the experience of ethnic cleansing in Bosnia comes too close to shattering the myth of a freedom seeking, peace loving, egalitarian Western world. Whatever the reason, the international community has seized on the conduct of Serbian soldiers -- mass rapes, forced removal and terrorizing civilian populations -- as a "new age" example of genocide.90

In this section, I consider feminist theorizing of wartime rape. For the most part, feminist legal theorists have worked from the premise that the events in Bosnia, while constituting

87 This distinction between violations of international humanitarian law and actions incidental to military operations is pursued more fully in Chapter 5 in my discussion of the laws of war and military necessity doctrine.
88 Copelon, "Surfacing Gender", *supra* note 12 at 198.
89 The publicity and international attention directed to the mass rapes in Bosnia should be contrasted to other examples of mass rape and ethnic genocide in East Timor, Liberia, Equador, Bangladesh, and most recently, Rwanda. (For a further discussion of these other examples of mass rape, see note 95, *infra*).
90 Genocide in this context is different from, for example, the extermination of Jews in World War II Europe. Although there are many civilian casualties in the Bosnian war, the Serbian policy seems directed at removing Muslims and Croats from territory viewed as "Serbian".
extreme acts of violence, need to be considered within a larger context of violence against women. The use of mass rapes to further a policy of ethnic cleansing must be understood not only in the context of this particular war but as part of a larger trend of violence against women, whether in war or peace. Seizing on the international attention to the atrocities in Bosnia, feminist international legal theorists have considered ways to keep wartime rape and violence on the international agenda once the situation in Bosnia recedes from the front pages. Feminist international law theorists have primarily looked to possible changes in international law to reflect women's particular vulnerability to violence. In addition to redefining the laws of war - including crimes against humanity and genocide - feminist theorists have also called for an expansion of international human rights and the prohibition against torture to grant women protection from violence.

Where feminist legal theorizing on mass rape diverges is on how it balances the particular facts of the war in the former Yugoslavia against the more general experience of violence against women. The tragedy in Bosnia has highlighted the issue of wartime rape -- and by extension violence against women -- but it has done so in the context of a very specific set of facts which, while not historically unusual, are capturing international attention in a unique way. The concern expressed by some feminist theorists is that the mass rapes in Bosnia will

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91 An exception to this is Suzanne Gibson who argues that wartime rape should be considered only as a form of violence generally, without a necessary gender or ethnic context. Gibson's approach is discussed more thoroughly infra.

92 Chinkin, supra note 47 at 328; Copelon, "Surfacing Gender" supra note 12 at 206-7; Stephens, "Women and Atrocity", supra note 10 at 13.

93 MacKinnon, "Crimes of War", supra note 10, Chinkin, supra note 47 at 340; Kohn, supra note 81 at 221.

94 Copelon, "Surfacing Gender", supra note 12 at 208.

95 It is unique in that there are other examples of mass rape during wartime, sometimes also with the goal of "ethnic cleansing" which have not garnered the same international attention nor redefinition of the laws of war. For example, Copelon: "Surfacing Gender", supra note 12 at 199, refers to the rape of 50 percent of indigenous Yuracruz women in Ecuador as part of an agribusiness company seeking to "cleanse" the area. Other examples include repeated rape during Peru's extended civil war, the rape of Liberian women in that
be seen as "something exceptional, peculiar to this conflict", and thus not part of the discourse of war or violence. International law reform in the context of the extreme example of Bosnia may result in narrow legal principles. Feminist theorists who ground their analysis in the particular and extreme facts of Bosnia run the risk of catering to a narrow construction of international law which defines rape as a grave breach or crime against humanity only when it reaches "genocidal" proportions or mirrors the situation in Bosnia. A feminist theory, therefore, which situates itself too specifically in the context of Bosnia will not be relevant to "women brutalized in lesser-known theaters of war or in the byways of daily life". Significantly, "lesser known theatres of war" tend to be those that do not involve Europeans or North Americans.

The situation in the former Yugoslavia, therefore, raises in a very pointed way the debate within feminist theory discussed in Chapter 2 between the particular experiences of women and the tendency to generalize about women's common experiences. This case, however, raises that debate in a new way: a feminist theory which focuses on the particular experiences of some women runs the risk of seriously marginalizing the position of other women in international law -- in this case international humanitarian law. A feminist theory which does not situate itself in the particular facts of Bosnia, however, misses the very important dimension that mass rape in this case is used as a tool of "ethnic cleansing". The rapes of Muslim women are as much about ethnic violence as gender violence. Thus, feminist theorizing on mass rape must draw from both the particular and the general in order to

country's ethnic conflicts, and rape of Kuwaiti women and foreign workers during the Gulf war: Chinkin, *supra* note 47 at 327.
96 Chinkin, *ibid*.
97 Copelon, "Surfacing Gender", *supra* note 12 at 204; Chinkin, *ibid* at 340.
98 Copelon, "Surfacing Gender", *ibid* at 199.
capture the intersectional harms as well as the long-term implications of systems of oppression which permit on-going violence against women. 99

1. Theorizing Difference and Intersectionality

In reviewing the feminist legal literature on mass rape, a distinction can be made between literature which focuses primarily on the specific facts of the war in Bosnia, and that which focuses more on wartime rape as part of a general pattern of violence against women. The most prominent and prolific writer of the former approach is Catharine MacKinnon. 100 At the other end of the spectrum are feminists, principally Suzanne Gibson, 101 who look at wartime rape only as an example of violence generally, without a necessary gender or ethnic dimension. Between these two extremes are feminist theorists who recognize the need to move away from grounding their analysis in the specific facts of Bosnia and try to strike a more even balance between mass rape as ethnic cleansing and violence against women generally. 102 In the next section, I discuss the work of MacKinnon and Gibson as demonstrating opposite approaches to locating the specific experience of women in Bosnia in the context of general violence. I then briefly consider the work of Chinkin and Copelon and their insights on the need to ground international law reform in the complexity and intersectionality of women's experience of violence.

99 Ibid.
100 "Crimes of War", supra note 10; "Postmodern Genocide" supra note 10; "Theory is not a Luxury", supra note 10. At this end of the spectrum, I would also add Wing and Merchan, supra note 10 and Meron supra note 10.
102 To this middle group, I would add Chinkin, supra note 47; Copelon "Surfacing Gender", supra note 12, Kohn supra note 81; Stephens, "Women and Atrocity" supra note 10. It should be emphasized that these different works are not identical and provide a range of analysis both on the nature of international law reform and violence against women.
It is always difficult to talk critically about Catharine MacKinnon's work. MacKinnon is a dynamic writer whose powerful writing style and insights into gender oppression have attracted much comment, both favourable and critical. In recent years, MacKinnon's work has been the subject of critical review by numerous feminist scholars who have critiqued the essentialist aspects of her work.\textsuperscript{103} Angela Harris argues, for example, that MacKinnon assumes there is an essential experience common to all women. While she recognizes that some women have different experiences from other women, these "differences are a matter of 'context' or magnitude".\textsuperscript{104} Black women's experience of oppression, Harris argues, is like white women's "only more so."\textsuperscript{105} Marlee Kline offers a similar critique, arguing that while MacKinnon tries to recognize the different experiences of Black women, she renders black women invisible in her work through her continued emphasis on women's shared experiences.\textsuperscript{106} MacKinnon's work, Kline argues, is characterized by a tension between her emphasis on the commonalities of women's oppression, and the recognition that race, gender and class are interconnected.\textsuperscript{107} By failing to consider the "differences in interest and priority that exist between white women and women of color" and "the unequal power relationship between the two groups" MacKinnon fails to theorize the complex nature of different women's experiences of oppression.\textsuperscript{108}

\textsuperscript{103} See for example, Angela P. Harris, "Race and Essentialism in Feminist Legal Theory", (1990) 42 Stanford L. Rev. 581; Marlee Kline, "Race, Racism, and Feminist Legal Theory", (1989) 12 Harv. Women's L. J. 115.
\textsuperscript{104} Ibid. at 595.
\textsuperscript{105} Ibid. at 592.
\textsuperscript{106} Kline, supra note 103 at 135.
\textsuperscript{107} Ibid. at 140-1.
\textsuperscript{108} Ibid. at 141.
The critiques of MacKinnon's work outlined above, provide an important backdrop to understanding MacKinnon's analysis of mass rape of Muslim women in the Bosnian war. Like most feminist international law scholars writing on the mass rapes in Bosnia, MacKinnon makes explicit the need to theorize the specific experience of Muslim women in the larger context of violence against women. Although MacKinnon starts from the premise that the specificity of rape is important, she fails to use this insight to consider how the intersection of various sites of oppression requires a reconsideration of gender as the central explanation of women's oppression.109 As I discussed in Chapter 3, MacKinnon's analysis of the mass rape of Muslim women constructs Muslim women as the super-oppressed.110 Muslim women are oppressed like Western European or North American women, only more so.111 In MacKinnon's words, Muslim and Croatian women "are facing twice as many rapists with twice as many excuses, two layers of men on top of them".112 As discussed in Chapter 3 and in the context of feminist debates in Chapter 2,113 this analysis employs an additive approach to women's oppression, which fragments women's identities into categories like race, religion, and gender. This approach fails to consider how Muslim women's experience of rape is not just more extreme, it is also different. As Kline and Harris have argued, by failing to consider the implications of intersectionality, MacKinnon simplifies the experience of gender oppression. In the context of the mass rape of Muslim women, MacKinnon also simplifies the role of law as an instrument of oppression and social change. By missing the complexity of

110 In Chapter 3, I made this argument in the context of Third World women as the "super-oppressed". While Bosnian Muslim women are not Third World women in the way that I have used that term, they are similarly constructed as "other". Although Bosnian Muslim women may have the outward appearance of other Yugoslavian women, they are, I think, seen as "different" both by the international public at large and in feminist international law literature. Their difference, both real and constructed, is seen as an extension of their Muslim religious identity and their national identity as residents of the Balkan region whose history and geography places it slightly outside of Western culture.
111 Harris, *supra* note 103.
112 "Crimes of War", *supra* note 10 at 89.
113 *Supra* note 20 and accompanying text.
wartime rape, MacKinnon also misses the complex ways in which law reinforces women's oppression.

In "Crimes of War," MacKinnon situates her discussion of the mass rape of Muslim women in the context of international human rights.\(^{114}\) International human rights, she argues, are directed at the needs and concerns of men, relegating the needs and concerns of women to the domestic world of state law. MacKinnon appears to be incorporating the work of Charlesworth, Chinkin and Wright and others who have argued that the distinction between public international matters and private state issues works to define international law principles in terms of the interests of men.\(^{115}\) MacKinnon argues that the distinction between "international" and "state" matters operates to position men's (human) rights in the realm of the international and women's rights in the ungovernable state realm: "What happens to women is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human."\(^{116}\) The mass rape of Muslim women in Bosnia is offered as a "compressed" example of the way in which international law ignores or denies the reality of many women's lives.

\(^{114}\) Although titled "Crimes of war, Crimes of Peace," MacKinnon's work does not deal with the laws of war. Her work is focused solely on international human rights law. In addition, she uses the term humanitarian law but by her usage, defines it as synonymous with human rights rather than as part of a system for regulating conduct in war. Perhaps because of the nature of the Amnesty Lectures and MacKinnon's own scholarly background, MacKinnon's engagement with international law is narrow and is limited to a partial engagement with human rights.


\(^{116}\) "Crimes of War", supra note 10 at 85.
In her analysis of the mass rape of Muslim women, MacKinnon tries to weave together several different strands: the particular experience of Muslim women and the more common experience of sexual violence, the intersection of gender and ethnicity/religion, and the relationship between wartime rape and pornography. For my purposes the first two strands of MacKinnon's analysis are the most interesting because they represent an attempt to theorize the complexity of the situation of Muslim women in Bosnia. MacKinnon's analysis, I argue, fails to consider the historical and ideological position of wartime rape within military and international law discourse. By not recognizing the ideological context of the discourse within which she is working, MacKinnon's analysis reinforces rather than challenges the marginalization of wartime rape and violence against women.

(i) Theorizing the particular and the general

MacKinnon argues that international law does not address, and perhaps implicitly condones, the everyday violence and oppression suffered by women. It is this "everyday" suffering that ultimately enables wholesale and systematic violence against women during war.

The rapes in the Serbian war of aggression against Bosnia-Herzegovina and Croatia are to everyday rape what the Holocaust was to everyday anti-Semitism: both like it and not like it at all, both continuous with it and a whole new departure, a unique

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117 In "Theory is not a Luxury", supra note 10 at 87, MacKinnon notes:

What is happening to Bosnian and Croatian women at the hands of the Serbian forces is continuous both with this ethnic war of aggression and with the gendered war of aggression of everyday life. For most women, this war is to everyday rape what the Holocaust was to everyday anti-Semitism: without the everyday, you could not have the conflagration, but do not mistake one for the other.

118 MacKinnon pursues this theme in "Postmodern Genocide", supra note 10 and in other work. Some feminists have taken issue with MacKinnon's arguments about the relationship between pornography and mass rape arguing that depicting pornography as "the sole, or even major cause of the abuse of women" is "simplistic and misleading": Chinkin, supra note 47 at 328-9; Kesic, supra note 16.
atrocities yet also a pinnacle moment in something that goes on all the time. As it does in this war, ethnic rape happens everyday. As it is in this war, prostitution is forced on women every day: What is a brothel but a captive setting for organized serial rape? ... Women are abused by men in these ways every day in every country in the world.119

While MacKinnon's analysis draws parallels between the specific experience of Muslim women and the everyday experience of violence, her analysis is in fact almost exclusively focused on the unique example of mass rape in Bosnia. MacKinnon, with her typical rhetorical flourish, characterizes the mass rape of Muslim women as the ultimate expression of misogyny. The mass rape of Muslim women may be seen in the context of violence against women generally, but it is, in MacKinnon's analysis, unique, historically unparalleled, and the most extreme example of violence against women.

This is ethnic rape as an official policy of war: not only a policy of the pleasure of male power unleashed; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side; not only a policy of men posturing to gain advantage and ground over other men. It is rape under order ... rape unto death, rape as massacre, rape to kill or make the victims wish they were dead. It is rape as an instrument of forced exile, ... It is rape to be seen and heard by others, rape as spectacle ... It is the rape of misogyny liberated by xenophobia and unleashed by official command.120

I have quoted at length from MacKinnon's work because I want to demonstrate the compelling but perhaps exaggerated tenor of her writing. One of MacKinnon's strengths, and weaknesses, is her persistent and unflinching depiction of gender oppression and sexual violence. In the case of Bosnia, MacKinnon's style underscores the thrust of her analysis which is to construct The Experience of Sexual Violence. By characterizing the mass rape of Muslim women as unique and unparalleled, MacKinnon effectively erases the experience of other women who have been raped as a policy of war, but whose experience, for geopolitical or other reasons, fails to make it onto the international agenda.

120 "Crimes of War", ibid. at 89.
(ii) Intersectionality

MacKinnon's focus on the particular experience of Muslim women in Bosnia leads her to conclude that this example of wartime rape can only be seen as genocidal rape. It is neither just rape nor just genocide, but "rape as genocide, rape directed toward women because they are Muslim or Croatian." Focusing on genocide, in MacKinnon's analysis, is the only way to ensure that the experience of Muslim women is understood as violence against women and violence against a community. Recognizing the intersection of gender and religion, for MacKinnon, requires openly condemning Serbia as the proponent of genocidal rape.

Paradoxically, MacKinnon is arguing for the need to see the mass rapes of Muslim women in their complexity (as rape against women and against Muslim women) while decrying any attempt to situate the war, or rape, in its specific historical and cultural context. Any attempts to understand wartime rape as having a particularly long history is seen as a part of a "feminist whitewash". In Chapter 2, I argued that feminist theory, building on the theoretical contribution of women of colour, must situate itself in the historical, local and contingent nature of women's experiences in order to avoid essentializing all women's experiences based

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121 "Rape, Genocide, and Women's Human Rights", supra note 10 at 187-8.
122 Throughout the several pieces MacKinnon has written on mass rape she seems to suggest that the international community is avoiding action in the Balkans by arguing that all sides, rather than just Serbia, are committing atrocities. MacKinnon makes several references to "the feminist whitewash": "Rape, Genocide, and Women's Human Rights", ibid. at 187-8. It is not clear what MacKinnon means by "the feminist whitewash", which she also refers to as "the feminist version of the cover-up": ibid. at 188-189. She appears to be objecting to the characterization of the atrocities in Bosnia "as just another instance of aggression by all men against all women all the time." However it is not clear which feminists, if any, have made this argument or in what context. MacKinnon footnotes her references to the "feminist whitewash" only once with a reference to Susan Brownmiller's three page article also in Mass Rape at 180. MacKinnon's failure to justify her reference to the feminist whitewash is troubling because she also claims that feminists (again, no specific reference) "deny" that atrocities are committed in Bosnia and "exonerate the rapists" and "deflect intervention": Ibid. at 189.
on the reality of white, Western women. MacKinnon specifically rejects that approach, arguing it leads to chaos rather than good theory:

... the analysis I have offered is not "indeterminate." It is not "tentative." It is not characterized by "ephemerality," "discontinuity," or "fragmentation." How much "constant rethinking" does the fact of genocide need? The theory I have presented has not exemplified the luxury of withholding commitment, a refusal to be pinned down, nor can it rest on the margin of anything. Is this a problem? Do we want "chaotic" war crimes trials? 123

In answer to MacKinnon, I would say that yes, this is a problem. First, MacKinnon's analysis treats Muslim women as though their experience of rape can be assigned relational categories: Muslim and Croatian women who are raped, are victims first because of their gender, then because of their race or ethnicity. Grounds of oppression become hierarchical, with gender becoming the most important defining characteristic. 124 There is no room in this analysis for a Muslim woman who may feel her attack was motivated principally by ethnic hatred rather than sexual violence. In addition, there is no room for Muslim men who are raped or Muslim women who are tortured in a non-sexual way because of their political activity. 125 Finally, there is no room to understand Muslim women as individual agents who are more than just victims. 126

Second, I would argue that genocide needs to be constantly rethought. By continually focusing on the extreme, unique, genocidal nature of the rapes in Bosnia, MacKinnon in effect plays to the narrow view that wartime rape is a crime only when it reaches genocidal proportions. Her analysis does not challenge the dominant view that rape and wartime rape

123 "Comment: "Theory is not a Luxury", supra note 10 at 91.
125 Gibson, "On Sex, Horror and Human Rights" supra note 101 at 253.
126 Mertus, "National Identity", supra note 16 at 5-6.
are unfortunate, but isolated incidences which are not prohibited by international law except to the extent they can be classified as an offense against honour and dignity.\(^{127}\) MacKinnon's approach in effect constructs a hierarchy of suffering. The upper-most region of that hierarchy is mass rape as genocide which becomes, in effect, the "ideal" of wartime rape. Anything less than genocidal rape surely will fail to capture the public -- and legal -- imaginations which have already witnessed The Experience of Sexual Violence. MacKinnon's analysis, albeit unintentionally, reinforces the distinction made within international between "real" wartime rape -- which is genocidal -- and ordinary rape, which is inconsequential.

(b) Suzanne Gibson

In "The Discourse of Sex/War"\(^{128}\) and then in "On Sex, Horror and Human Rights",\(^{129}\) Gibson takes issue with MacKinnon's analysis of the atrocities in Bosnia-Herzegovina. Her critique is two-fold: (1) MacKinnon's rhetorical condemnation of the mass rapes in Bosnia plays to, rather than challenges, the role of wartime rape as propaganda and (2) MacKinnon's over reliance on rhetoric further objectifies Muslim women's experiences of rape.

Gibson argues that MacKinnon fails to appreciate the role of wartime rape as a public spectacle, meant to demoralize the enemy by demonstrating their inability to protect the home front. When MacKinnon argues that complacency surrounding "peacetime" rape extends to wartime rape, she fails to appreciate the symbolic difference between the two acts.\(^{130}\) Gibson suggests that MacKinnon's failure to recognize the propaganda element of her own work,

\(^{127}\) In Chapter 5, I argue that wartime rape is normalized through militarist and patriarchal systems of oppression. Wartime rape is constructed as a significant violation of international humanitarian law and military law only to the extent that it is a crime against a nation or a people. Anything less than that will be constructed as unfortunate but understandable.

\(^{128}\) Supra note 101.

\(^{129}\) Ibid.

\(^{130}\) Ibid. at 252.
combined with MacKinnon's graphic description of sexual violence may contribute to the exploitation of Muslim women:

My fear is that the pain of women victims of the war in Bosnia will be expropriated as the 'warnography' of this fin-de-siecle decade. Stark against the iconography of bureaucratized, impersonal, technologically advanced warfare, the evil of war rape is not so much banal as carnal. Pain, especially women's pain, is capable of excitement, of titillation; we know that pain is part of the stock in trade of pornography, of the sexual imaginary ... the horror-discourse of rape is a complex phenomenon, and one which feminists must now, it seems to me confront.\footnote{Ibid, ISA.}

Before feminists begin to theorize wartime rape, it is important that they become "fully aware of the ways that rape has been, and becomes, conceptualized" in a male hegemonic society.\footnote{Ibid at 255.} Wartime rape, Gibson argues, has not been historically characterized as a crime against women. To the extent it has been recognized at all, it is as a "heinous crime against men"; not as a violent act, but as a "humiliation inflicted upon a nation, an affront to a man's pride".\footnote{Ibid, at 257.} Gibson argues that feminist theorizing on wartime rape needs to oppose the characterization of war as involving "the integrity of the nation-state, the chastity of Muslim women, the sanctity of the Islamic family". Wartime rape should not be seen as any more heinous or offensive than any other "violation of a basic human right of bodily integrity".\footnote{Ibid, at 258.}

Gibson, therefore, advocates a depiction of wartime rape as consonant with any other human rights violation. It is not always necessary, therefore, to theorize wartime rape in its particular ethnic or gender context:

I am myself unable to make any meaningful and yet humane distinction between the sexual violence (rape and other forms of sexual abuse) used against such women, and the perverse and sexual violence inflicted upon men in the same circumstances. Of
course differences may be found; men will not, for example, endure pregnancy as a consequence of sexual torture. But there is, I think, a point on the scale of human cruelty below which all manners and consequences of wounding and degradation are equally to be condemned. 135

The difficulty with Gibson's analysis is that the gender and ethnic dimensions of wartime rape do matter. That women get pregnant as a result of rape is not a minor difference between them and men. It is, to use Gibson's terminology, part of the "logic" of wartime rape. 136 In the case of Muslim women in Bosnia, there is evidence that wartime rape is intended to result in the birth of Serbian children. 137 The sexual violence inflicted on women is thus critically different from that inflicted on men. Additionally, wartime rape is directed not just at women, but at women of a certain ethnic background. That these women are Muslim, and constructed as virtuous, is important to the motivation for, and possibly experiences of, these rapes. While Gibson makes a persuasive argument that wartime rape needs to be seen as violence against women, this does not exclude also seeing that violence as part of a campaign against Muslim people.

In Gibson's analysis, therefore, Muslim women are missing. By ignoring the important cultural and religious aspects of mass rape, Gibson erases the difference and complexity of Muslim women's experience of wartime rape. Although Gibson tries to move away from MacKinnon's depiction of Muslim women as victims, Gibson ends up removing Muslim women from her analysis.

(c) Christine Chinkin/Rhonda Copelon

135 Ibid at 253-4.
136 Ibid at 252.
137 Supra note 34 and accompanying text.
I have linked Chinkin and Copelon together not because their analyses are the same but because they both try to balance the particular facts of Bosnia against the need to place wartime rape in the context of violence against women generally. Chinkin, like MacKinnon, tends to see wartime rape as existing in a conspiracy of silence without recognizing its tremendous symbolic and propaganda function in war. However, Chinkin warns of the risk of constructing violence against women against the backdrop of the conflagration in Bosnia. It is important, she argues, that wartime rape not be seen as "the end of the spectrum" but as continuous with "the constant attacks and sexual abuse of women in 'normal' peacetime conditions". While Chinkin sees the striking of the Tribunal as having "normative and educative" importance, she is concerned because its jurisdiction is limited to the situation in the former Yugoslavia and "will not assist women who have been raped or will in the future be raped in other conflicts all around the world". Despite these reservations, Chinkin emphasises the need to pursue international law remedies under the laws of war and crimes against humanity. She argues that the United Nations must now recognize that like "apartheid and racial discrimination policies, the global denial of basic rights to women" is a threat to international peace and that rape must be "regarded as a weapon of war".

Chinkin's analysis is primarily directed at reviewing the international law remedies that are or could be pursued in the case of Bosnia. She does not include any discussion of the intersectional nature of women's experience of wartime rape. By overlooking the importance of ethnicity to the atrocities in Bosnia, Chinkin also overlooks the way her own analysis assumes that gender is severable from race, which she characterizes as having international

138 Chinkin, supra note 47 at 334.
139 Ibid. at 341.
140 Ibid. at 340.
141 Ibid.
142 Ibid at 336.
law protection where gender has none. Like Gibson, Chinkin effectively removes Muslim women from her analysis by failing to consider the different dynamic that is produced through the intersection of religion, culture and gender in the context of wartime rape. Chinkin's analysis of international law and wartime rape, therefore, is made without any reference to how culture and religion may affect the viability of some international remedies.

In addition, Chinkin's call for the characterization of rape as a weapon of war is problematic because it normalizes rape as part of war. Laws of war regulate the conduct of war, limiting or outlawing certain weapons. By arguing that rape should be seen as an instrument of war, Chinkin is effectively legitimating -- through regulation -- rape as an normal incidence of war.

Copelon's analysis of rape in the Bosnian war is quite insightful and I have relied on her analysis at various points in my own work. In particular, Copelon's analysis of the intersectional harms implicit in genocidal rape is particularly helpful in understanding some of the complex issues involved in this case. Copelon's central thesis is that caution should be exercised in advocating international law reform to address the particular situation in Bosnia. The danger, she argues, "is that extreme examples produce narrow principles." Much of the interest driving international law action in this case is focused on the use of rape as a tool of ethnic cleansing. The mass rape of Muslim women is not being condemned because it is rape but because it is mass rape, genocidal rape or rape as ethnic cleansing. The difficulty with focusing on the ethnic cleansing aspect of the rapes in Bosnia is that it constructs these

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143 Ibid. at 340.
144 Ibid.
145 See discussion of af Jochnick and Normand in Chapter 5 and their analysis of the legitimation of war through its legal regulation.
146 "Surfacing Gender", supra note 12.
147 Ibid. at 204.
rapes as unique and "not comparable to other forms of rape in war or in peace".148 Rape becomes important only to the extent that it is part of a campaign of ethnic cleansing. Once the ethnic cleansing dimension is contained or removed, wartime rape is once again invisible.149

Copelon also criticizes humanitarian law for defining rape as a crime against dignity and honour.150 The current international prohibitions against rape, Copelon argues, are premised on a view of wartime rape as a crime against the men of a nation, not as a gender crime.151 The solution for Copelon is to elevate rape to the level of a grave breach of international law and a separate protected ground within the definition of crimes against humanity: "The expansion of the concept of crimes against humanity to include gender is thus part of the broader movement to end the historical invisibility of gender violence..."152 In addition, the intersection of gender and religion is possible by defining these rapes as genocidal:

... the particular goals and defining aspects of genocidal rape do not detract from, but rather elucidate the nature of rape as a crime of gender as well as ethnicity. Women are targets not simply because they "belong to" the enemy ... They are targets because they too are the enemy ...153

The strength of Copelon's analysis is her account of the complexity of international law reform in the case of Bosnia and, specifically, her argument that "the particular and the general"154 must be combined to fully appreciate the nature of the issues presented in this case. Where Copelon's analysis becomes more difficult is in her acceptance of crimes against humanity and genocide as fora for addressing violence against women. Given her own caution about linking

148 Ibid. at 199.
149 Ibid. at 198.
150 Ibid. at 200.
151 Ibid. at 200-201.
152 Ibid. at 207.
153 Ibid. at 207.
154 Ibid. at 199.
ethnic cleansing and rape, how can she be sure that recognizing genocidal rape will effectively account for the intersection of ethnic and gender harms? I am not suggesting by this that Copelon accepts genocide and crimes against humanity as unproblematic, only that she fails to account for how genocidal rape will be treated differently than rape as ethnic cleansing.

2. Theorizing the Public/Private Divide

At the beginning of this chapter, I noted that violence is often used as an example of the gendered effect of the public/private divide. The failure of international law to prohibit, and provide remedies for, sexual and domestic abuse suffered by women, demonstrates that international law is defined in terms of male interests. The example of mass rape, however, does not conform to this analysis of the public/private divide because it is an act of violence against women which falls within the ambit of public international law. Chinkin, Copelon and MacKinnon all note that wartime rape is different from other acts of violence against women in that it is a state-sanctioned act covered by international law. None of these theorists, however, question what implication this has for their understanding of the public/private divide and the role of law in perpetuating women's subordination. Chinkin concludes, for example, that while wartime rape is generally committed by agents of the State, it has still been ignored in the way other acts of violence against women have been ignored.155 Copelon argues that the understanding of wartime rape as a public act of violence against women and the "recognition of rape as a war crime" are important steps toward shifting the public/private divide to recognize "everyday" rape as an act of violence.156 MacKinnon argues that the distinction between international and national wars operates to keep violence against women in the private sphere: "And the more a conflict can be framed as within a state,

155 Supra note 47 at 334.
156 Supra note 12 at 213.
as a civil war, as social, as domestic, the less human rights are recognized as being violated."

Wartime rape, because it is a public act of violence against women, highlights the way the boundaries of the public and private divides shift and change over time. Violence against women is never entirely within the private domain and wartime rape is never entirely in the public realm. International humanitarian law makes several distinctions between different types of violence, rendering some acts more public than others. Within Article 27 of Geneva Convention IV, for example, the prohibition against rape is defined as a crime of honour. Arguably, therefore, only honourable women are capable of being raped and therefore subject to international law. Sexual violence against women who do not meet the requirement of virtue, is arguably a private matter between the woman and her attacker. Second, the distinction between simple violations and grave breaches of international law operates to minimize the violence suffered by women during war. By defining violence against women as simple violations, women and their suffering are removed from the public world of international prosecutions, like the Nuremberg Tribunal. Finally, in the context of the war crimes Tribunal for the Former Yugoslavia, a distinction is made between "real" rape -- rape as genocide -- and ordinary rape. It is arguable that only genocidal rape will be prosecuted, thereby rendering invisible wartime rape that does not meet the definition of genocide as defined in the context of Bosnia.

Chinkin, Copelon and MacKinnon's analyses of wartime rape fails to account for the slippery quality of public/private ideology. Chinkin's argument that wartime rape is effectively privatized through international oblivion to women's suffering misses the way in which

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157 "Crimes of War", supra note 10 at 94.
wartime rape is and is not silent. As Gibson noted wartime rape is given more publicity when it can be characterized as a crime against a nation.\textsuperscript{158}

MacKinnon's analysis of the distinction between international and national conflicts, while technically accurate,\textsuperscript{159} also fails to address the reality of international relations and destructive warfare which has made that distinction irrelevant. As the war in Bosnia demonstrates, civil wars will no longer be a purely domestic affair. They will inevitably have international repercussions. The real issue is not the separate protections granted to international versus national conflicts, but how existing international legal protection fails to address the reality of wartime rape. Missing from the feminist work on mass rape I have discussed above, is a thorough evaluation of international law's role in addressing violence against women. While many of the theorists I discuss point to some difficulties in the current structure to prosecute war crimes committed in the former Yugoslavia, none of them consider why these difficulties are present and what this means for feminist engagement with international law. I am not saying that international law remedies should not be pursued in the case of mass rape in Bosnia, only that we have not fully explored what is involved in working with international humanitarian law as a prospective agent of social reform.

IV. CONCLUSION

The static portrayal of the public/private divide in Chinkin, Copelon and MacKinnon's work, I argue, points to a general tendency in this work to miss the ideologies of gender and rape

\textsuperscript{158} Supra note 101. I will be pursuing this point in more detail in Chapter 5. The way in which wartime rape moves in and out of the public agenda, is very important for understanding the ideological construction of war and women through the discourse on wartime rape.

\textsuperscript{159} It is important to note that while the Geneva Conventions make a distinction between national and international conflicts, the Genocide Convention and crimes against humanity apply regardless of the nature of the conflict: \textit{supra} note 77.
implicit in international humanitarian law. Feminist international law theorising on the mass rape of Muslim women has skirted the issue of international law as an instrument for addressing wartime rape. By not considering how the discourses of war, rape and law incorporate assumptions about gender identity, such as the honourable and virtuous woman, there is a tendency to miss the complex manner in which law reinforces and enables gender subordination.

In addition, feminist international law theorising on the mass rape of Muslim women has tended to oversimplify Muslim women's experience of wartime rape. Although most of the feminist international law scholars discussed in this Chapter recognize the need to work from an understanding of women's complex experiences of oppression, many of the theorists have not used this insight to reconsider the assumptions and constructs central to their approach. For example, by treating gender as the principal site of oppression, the significance of culture and religion to both the motivation for, and experience of, wartime rape is minimized. Failing to consider the complexity of wartime rape, Chinkin, Copelon, Gibson and MacKinnon miss the way in which women and wartime rape move in and out of the public/private spheres. The shifting nature of the public/private divide points to the ideological nature of international law which affects not only the operation of international law but also the prospects for addressing violence against women through law reform.

The complexity of wartime rape, and the experience of Muslim women in particular, I argue, needs to be considered in the context of different systems of oppression which converge

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160 I do not mean to suggest by this that none of these theorists have considered the implications of the Tribunal prosecuting rape as a crime of war in the context of the wars in the former Yugoslavia. All of them, with perhaps the exception of MacKinnon, have considered some of the difficulties associated with the Tribunal and its mandate. My point is that they have not taken this analysis far enough to think through the implications of international law as an ideological instrument and the impact this will have on law reform.

161 This point is explored more fully in Chapter 5.
during wartime: patriarchy, militarism, nationalism and international humanitarian law. By considering the different and sometimes conflicting ideologies of gender identity, war and violence incorporated within international law, we can better evaluate the implications of using law as an agent of reform and redress. In the next chapter, I outline some of the different systems of oppression that women, and in this case Muslim women, negotiate during war. Understanding how these different systems converge to define women and the violence they experience, provides insight into some of the assumptions incorporated within international law and attempts to reform international humanitarian law.
CHAPTER 5

MASS RAPE IN CONTEXT: IDEOLOGIES OF WAR, WOMEN AND RAPE

I. INTRODUCTION

In the preceding chapter, I argued that feminist theorizing on the mass rape of Muslim women failed to account for the way international law incorporated different ideologies of women, war and violence. In this chapter, I explore how wartime rape, and the particular nature of the mass rape of Muslim women, is made possible by, and interpreted through, the convergence of different systems of oppression including international law. The situation of formal war represents a unique convergence of multiple systems of oppression. It is a time of national consensus, real or constructed, in which all national resources are focused on the attainment of one objective: military victory. Alan Hunt argues that "[c]apitalist systems employ a wide range of ideological justifications" including "'freedom', 'democracy', and 'national interest'." In a time of war, all of these systems come into play and through their convergence construct lasting views about gender identities. Understanding the significance of humanitarian law to our conception of war and women, requires exploring how humanitarian law interacts with these "other non legal ideological basis of legitimation".

War, I argue, is depicted as an unfortunate but necessary act in the maintenance of peace and civilization. Seen as a bulwark against possible cultural annihilation, war is justifiable and legitimate. It represents the ultimate convergence of interests and consensus. The military, in

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2 I do not mean to suggest by this that ideologies remain constant overtime. My point is that the construction of gender identities during war, employs assumptions about men and women that carry over into "peace" time.
3 Hunt supra note 1 at 31.
this context, is the sane actor in an insane situation. As such, its decisions are unassailable. Humanitarian law, with its privileging of military necessity, reflects and reinforces some of these assumptions. Within the context of humanitarian law and the discourse of war, rape plays two important functions. First, it is an act of barbarism that justifies recourse to war. It is condemned by international humanitarian law but only as a crime against a nation. Second, once the offence of rape has been answered through armed attack, rape no longer matters. There is no place for violence against women in the highly specialized and abstract discourse of war. It is not that wartime rape is necessarily permitted, though that is often the case; it is that wartime rape is irrelevant to the prevailing objectives of military victory. Humanitarian law does not prohibit wartime rape so much as it regulates it. Feminist efforts to strengthen humanitarian law, therefore, must also challenge the ideological assumptions inherent in that law which marginalize women and enable wartime rape.

Wartime rape thus needs to be seen in the context of different systems of oppression including war, militarism, nationalism, religion, and law. In part II of this chapter, I look once again at international humanitarian law. In this analysis, I examine how humanitarian law has evolved out of the concept of laws of war, incorporating some of the standards and values of the military establishment. In part III, I explore some of the cultural myths and norms about war, women and rape that are important to structuring the meaning ascribed to wartime rape within international humanitarian law. International humanitarian law, I argue, builds on and

\[\text{Catharine MacKinnon made this observation in the context of domestic law of rape. It applies equally to international law: "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983) 8 Signs 635 at 651.}
\[\text{Michael Smith, drawing from the work of Stuart Hall, sees ideological analysis as a two part dialectic: (1) the ideological representation of "real relations" (in his case, rape) through language and other communicative practices, and (2) the construction of individual subjectivities and behaviour by the creation of meanings. This latter component involves looking at how commonsense beliefs "enable things to occur": "Language, Law and Social Power: Seaboyer, Gayme v. R. and A Critical Theory of Ideology" (1993) 51 University of Toronto Faculty of Law Review 118 at 152. In my analysis, I am hoping to show how commonsense views about war and the role of men and women enable wartime rape to occur.} \]
reinforces ideologies of womanhood and rape. Attempts to use international humanitarian law to address the mass rape of Muslim women must therefore critically examine how international law is itself complicit in wartime violence against women. In the final section of this paper, I draw together my discussion of the international law framework in place to address atrocities committed in the former Yugoslavia, and my analysis of the ideologies of war, women and violence incorporated within international law. In this section, I consider how the current developments in international humanitarian law reinforce rather than challenge existing ideologies of women and rape.

II. INTERNATIONAL HUMANITARIAN LAW

In Chapter 4, I discussed the system of international law applicable to the atrocities committed in the former Yugoslavia which include the Geneva Conventions, laws of war, crimes against humanity and the Genocide Convention. With the exception of the laws of war, the legal framework relied on in the context of the former Yugoslavia emerged out of the destruction wrought by the second world war. The cornerstone of this system of laws was the Geneva Conventions. Crimes against humanity and the Genocide Convention, while important developments, were developed primarily to address particular criminal acts not caught by the Geneva Conventions and the laws of war. My discussion of international humanitarian law therefore, is focused on the Geneva Conventions and their evolution from the laws of war.

1. History of Humanitarian Law

The impetus for the Geneva Conventions came from the mass destruction and devastation of civilians and property during World War II. The widespread loss of civilian life during that

6 Although developed in the aftermath of World War II, the Genocide Convention applies to conduct in war and in peace: Article 1.
war effectively displaced the myth that civilian populations were incidental to the battlefields of war. The notion of humanitarian law which is encoded in the Geneva Conventions, however, has a much longer history. Its direct roots can be found in the codification of rules of military engagement found in army field manuals or common practice. The notion that civilians could be granted special protection is tied to the view that war itself could be regulated and controlled. Although there is a tendency in legal scholarship to see a distinction between the laws of war and the humanitarian principles of the Geneva Conventions, in fact these two cannot be seen as separate; one necessarily requires the other. Protection of civilians could not even be contemplated without the belief that war can be waged humanely, and the laws of war could not gain any international legitimacy without granting at the very least, symbolic protection to civilians.

In the following section, I briefly trace the history of the laws of war from the just war period of the crusades through to the positivist era of the late nineteenth century. Humanitarian law is the product of various philosophical and legal traditions. It draws from: (a) the acceptance that war could be subject to laws, (b) the notion of just war as it originally evolved in early Christian thought, and (c) the pragmatic approach of the enlightenment period. During the early just war period of the crusades, the rationale for restricting warfare was

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10 Humanity in Warfare, supra note 8 at 17.
11 Ibid. at 16.
based on "categorical imperatives derived from the general value-systems of the culture".  
Following that period, restrictions on warfare, influenced by enlightenment ideals of reason and civility, were based on "prudential consideration which demand that the costs of war do not outweigh its benefits." The twentieth century formulation of humanitarian law has incorporated aspects of both approaches, relying on a notion of just war that is steeped in the logic of military necessity dressed up in the language of humanity.

For my purposes, the history of the laws of war can be traced back to the sixteenth century and the Christian notion of a just war. Just war theory, as its name suggests, was the belief that wars were waged in the name of God. Because wars were holy and therefore just, there was no reason to limit the nature of warfare; the ends justified the means. To the extent restrictions were in place, they were based on the chivalric code. Under that Code and its attendant notion of knightly honour, it was understood that war was inevitable and could be legitimately waged "for a cause in itself just, to make reparation for an injury or to restore what had been wrongly seized and with the intention of advancing good and avoiding evil." 

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13 Ibid.
14 In fact, the history of laws of war can probably be traced back much further. Chris af Jochnick and Roger Normand argue that restrictions on waging war are "as old as war itself." "The Legitimation of Violence: A Critical History of the Laws of War" (1994) 35 Harvard J Int L 49 at 55 [hereinafter "Critical History"].
15 Howard, supra note 12 at 8. By tracing the history of humanitarian law to Western philosophical traditions, I am not suggesting that only Western countries adopted limitations on warfare. What is important is that the Hague and Geneva Conventions, as material sources of international humanitarian law, have their roots in a particular, but perhaps not exclusively, Western view of war and humanity. In the Western tradition, humanitarian law was the extension of a view of man that was secular (and therefore rational), humane and, civilized. For a discussion of the laws of war in different countries, see: Louise Doswald Beck and Sylvain Vite "International Humanitarian Law and Human Rights Law" (March-April 1993) International Review of the Red Cross (n. 293) 94 at 95 and *International Dimensions of Humanitarian Law*, (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988).
In the seventeenth and eighteenth centuries, legal theorists such as Grotius, Suarez and Vattel challenged the notion of just war and advocated limitations on the waging of war.16 Throughout this period the chivalric code was rejected as a prescription for behaviour in favour of rhetoric emphasizing the dignity of man.17 The prevailing theory underlying the waging of war was that:

... in peace, nations should do as much good as possible and in times of war, as little injury as possible (within the dictates of military necessity), without consideration of the rights or wrongs of any particular war.18

Prudence dictated that war should not be fought unless there was "a reasonable prospect of victory" and should only be a last resort after all available peaceful options had been exhausted.19 In addition, non-combatants should not be attacked and "the amount of force used should not be disproportionate to the ends achieved."20

17 Draper, ibid. at 241. Though not adopted by all theorists, Rousseau's theory of war, and the justification of limits on war, perhaps best summarizes the influence of enlightenment ideals in the formulation of laws of war:

The object of war being the destruction of the enemy State, one has the right to kill its defenders only when they have weapons in their hands, but immediately they put them down and surrender, thus ceasing to be enemies or agents of the enemy, they once more become ordinary men, and one no longer has any right to their life. Sometimes one can extinguish a State without killing a single member of it; moreover, war confers no right other than that which is necessary for its purpose. These principles are not those of Grotius, are not founded up the authority of poets, but they flow from the nature of things and are founded upon reason.

Rousseau, Contrat Social, Book I, ch. iv. as cited in Draper, ibid.
18 Howard, supra note 12 at 5.
19 Ibid at 8.
20 Ibid at 8.
Throughout this period, the approach to war was based on reason and civility. There was an underlying conception of war as perhaps a brutal act but one which distinguished men from animals because it was conducted according to guidelines. Notions of war, and conduct during war, were influenced by an aristocratic ruling class with strong conceptions of gentlemanly honour.  

At the beginning of campaigns, for examples, officers of each side would "negotiate conventions (local and limited in duration) for the respect of each other's wounded and medical units ...". The laws of war developed as a "universalization of the customs and conventions of vocational/professional soldiery".

In the nineteenth century, with the predominance of positivism and enlightenment ideals, the laws of war became codified in what are now known as the Hague Conventions. The

21  *Humanity in Warfare supra* note 8 at 60
23  *Humanity in Warfare, supra* note 8 at 60. Some of the dominant principles in the laws of war include:

1. The *Ratione Personae* restriction - belligerents will leave non-combatants outside of the area of combat and will not attack them deliberately.
2. The *Ratione Loci* restriction - legitimate attacks must be direct only against military objectives which are defined as objects whose total or partial destruction would constitute a definite military advantage.
3. The *Ratione Conditionis* restriction - weapons and methods of warfare likely to cause excessive suffering are prohibited.

24  Draper, "Modern Law", * supra* note 16 at 243. A series of "peace" conferences were held starting in the 1860's and continued into the early 20th century. Though not all were held in the Hague, they are generally grouped under the term "Hague Conventions" which refer to the 1907 Conference for Peace and Disarmament held in the Hague at which the rules for military engagement were codified. The Hague Conventions as the codification of the laws of war are generally thought of as distinct from the Geneva Conventions which are principally about protecting individual combatants and civilians. The Hague Convention for Peace and Disarmament was the result of a series of conferences concerning the reduction of weaponry: 1868: St. Petersburg Convention prohibiting the used of certain types of missiles; 1899: first Hague Peace Conference at which four Conventions were established; 1907: second Hague
influence of the newly emerging doctrines of sovereignty and legal positivism is reflected in
the drive to codify the laws of war. In 1907, for example, European states adopted thirteen
conventions, twelve of which dealt with war.\textsuperscript{25} The legal regime embodying the laws of war
was dressed in the modernist language of the age. Laws of war were seen as "secular,
humane and 'civilized'."\textsuperscript{26} To a large measure, however, the codification of the laws of war
was a product not only of humanitarian considerations but also political and military necessity.
In an era marked by perhaps the first significant arms race, at Jochnick and Normand argue
that the various meetings and conventions leading to the Hague Conventions were the product
of political posturing. Public opinion was strongly in favour of peace, a fact which countries
like Russia manipulated in an effort to slow down an arms race that would leave them
militarily disadvantaged.\textsuperscript{27} Agreements on limiting warfare were difficult to reach and the
resulting conventions tended to have only minor, inconsequential concessions that were, in
any event, only applicable if military necessity permitted.\textsuperscript{28}

The failure of the laws of war to mediate the destruction of the two world wars resulted in the
1949 Geneva Conventions. Unlike the previous Hague Conventions, humanitarian law under
Geneva Convention IV extended its protection to civilians. Reflecting its enlightenment
tradition, humanitarian law is steeped in the language of humanity and primacy of the
individual.\textsuperscript{29} Humanitarian law, according to Jean Pictet, a preeminent scholar in the field of
humanitarian law, is defined as law "ensuring respect for the individual and his [sic] well-

\textsuperscript{25} Draper, "Modern Law" \textit{ibid} at 243.
\textsuperscript{26} Draper, \textit{ibid} at 243; Best, \textit{Humanity in Warfare, supra} note 8 at 16-17; Best, "War by
Land", \textit{supra} note 22 at 20.
\textsuperscript{27} "Critical History", \textit{supra} note 14 at 69/70.
\textsuperscript{28} "Critical History", \textit{ibid}.
\textsuperscript{29} Pictet, \textit{supra} note 23 at 12.
The moral force of humanitarian law has incorporated some of the pragmatic values of the previous age but has elevated those to the level of a moral code.

Humanitarian law receives its impulse from moral science all of which can be summed up in one sentence, 'do to others what you would have done to yourself'.

Modern humanitarianism originates from this idea which is a developed, rationalized form of justice and charity tending to make life more worthy of being lived.

The renewal of a moral code justifying restrictions on warfare, combined with the general prohibition against war, signals a renewal of just war theory. Michael Howard notes that wars in the twentieth century "can be irreversible in their consequences" and "[t]here is little inclination to conduct them with restraint." Because war is illegal and morally uncountenanced, war is always a last resort. As a last resort, however, war is justified because it takes on the quality of a holy war. Jean Bethke Elshtain argues, for example, that during World War I, "Western nations sanctified their war effort, turning it toward the crusading extreme." To acquire the status of just war, according to Elshtain, the following requirements must be met:

1. War must be a last resort after all other means have been exhausted.
2. War must actually be a redress of rights violated or defense against unjust demands backed by the threat of force.
3. War must be openly and legally declared by properly constituted governments.
4. There must be a reasonable prospect for victory.
5. The means must be proportionate to the ends.
6. Combatants must be distinguished from non-combatants in the waging of war.

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30 Ibid at 15.
31 Ibid at 16-17.
32 Supra note 12 at 6.
The definition of just war, therefore, includes reference to humanitarian law principles. By incorporating requirements such as reciprocity and protection of civilians into the conception of just war, humanitarian law becomes part of the justification for war. Thus, humanitarian law, through its regulation of violence is also part of the moral framework which justifies that violence.

2. Humanitarian Law and the Ideology of War

The emergence of "humanitarianism" in the context of war heralds a return to the notion of just war, in effect bringing the history of the laws of war full circle. A constant theme in the evolution of the laws of war has been a relationship between the laws of war and the dictates of military necessity. Although the above discussion demonstrates that the laws of war are a product of the cultural values and orientation of different periods, they are also defined by what is considered militarily necessary. The laws of war take as their starting point the legitimation of war. Humanitarian law as the descendant of the laws of war, is heavily influenced by the dictates of military necessity. The influence of military reasoning is evident in humanitarian law through the assumptions inherent in the very existence of humanitarian law that: (a) war is a rational act whose conduct and effect can be at least partially controlled; and (b) humanitarian ideals can be achieved by limiting rather than prohibiting military activity.

The evolution of the laws of war into a type of practiced humanity is very much tied to enlightenment ideals of rationality and primacy of the individual. War is depicted as a rational act, whose timing, pace, and effect can be controlled or at least decided on at the outset.

34 Ibid at 150.
The evolution of the laws of war as a formal, codified legal regime has, in effect, legitimated war. The laws of war embody the view that war is inevitable but can and should be waged within a legal framework of rules and regulations. Under this formulation, some acts are repugnant, morally blameworthy and therefore illegal, whereas others are not only legal but are, by implication, morally justified. By the very act of regulating war and violence, there is a validation of war and violence. Under humanitarian law then, violence is accepted and normalized. The discourse shifts from issues of humanity and morality to what is militarily acceptable and justifiable. The logical extension of this view, is that war itself can be justly waged within controlled guidelines.

The discourse of war within international law is thus characterized by a fundamental tension. On the one hand, humanitarian law is primarily the law governing the waging of war. It is humanitarian because it ostensibly limits the type of violence used, but it ultimately accepts as valid, and through this process legitimates, the use of force. There is a tension between the

35 For example, the originating document for the Hague Conventions is the Lieber Code: supra note 7. This code is often held out as the original example of the humanitarianism of laws of war because it included the stipulation that the means available for war were not unlimited. As af Jochnick and Normand point out supra note 14 at 65-6, however, the Code, which was used during the American Civil War, subjected all humanitarian provisions to the overriding dictate of military necessity:

The practices that Lieber explicitly condoned under his definition of military necessity included, for example, starvation of civilians, bombardment of civilians without warning, and destruction of all armed enemies and enemy property.

36 This point is explored more thoroughly by Jochnick and Normand supra note 14 at 56, who argue:

[t]he mere belief that law places humane limits on war, even if factually mistaken, has profound consequences for the way people view war, and therefore the way that war is conducted. The credibility of laws of war lends unwarranted legitimacy to customary military practices.
very existence of humanitarian law and the United Nations Charter and various treaties, in which states have overwhelmingly agreed to refrain from the "threat or use of force" against other nations. While humanitarian law applies regardless of the legality of the war, war itself is unusual, exceptional and beyond the bounds of commonly recognized international conduct. The doctrine of just war that informs much of our current conception of the legitimacy of war, represents war as occurring only in a case of absolute necessity. Thus, in the mythology of war, resort to violence is a last effort that is ultimately justified as a desperate response to a desperate situation.

Characterizing war as an extreme situation requiring extreme measures, elevates the waging of war to the position of dominant national imperative. Everyone's best interests are served by a quick resolution to the war and a return to a normal, peaceful state. Thus, achieving military victory is the goal shared by everyone and short-term interests must be subverted to that long-term goal. War becomes an "emergency situation" justifying the suspension of all other


38 Howard, supra note 12 at 11-12 in which he quotes Hersch Lauterpacht:

The phenomenon of war does not fully admit of treatment in accordance with the canons of logic. Banished as illegal, war now remains an event, calling for legal regulation for the sake of humanity and the dignity of man."

39 Elshtain, supra note 33 at 135 notes that Luther, reworking Augustine's notion of just war, accepted the view that "the aim of a just war is peace, and seeing war as a last resort, a defence of a way of life against possible destruction."
national aspirations or initiatives. In Canada, for example, a state of war once justified the suspension of civil and political rights.40

Because war is an extreme, unusual situation, it is immune from scrutiny41 and ultimately deserving of its own specialized analysis. Any analysis of conduct in war must incorporate a new set of standards which recognize the extreme, unusual context of war. In this way, the discourse of war is defined and promoted by recognized war experts. Only those people who know war are qualified to comment upon it. There is a sense that one had to "be there" to really understand what war is all about.42 Because women are generally not at the centre of war, their credentials to comment on war are limited.

Even within academic discourse, war is treated as a special preserve, incorporated within, but different from, related subject areas. Within international legal discourse for example, the laws of war are treated as an exceptional or idiosyncratic area where typical approaches and norms do not apply.43

40 The War Measures Act, R.S.C 1985, c. W-2, as rep. by Emergencies Act, S.C. 1988, c. 29, s.80. Despite its title, however, the War Measures Act could have been, and was, invoked even when Canada was technically not at war.
41 Ann Scales notes, for example, that the U.S. Supreme Court, in upholding a rule barring women from registering for military duty, emphasized the need for the Court to defer to the judgment of military experts (Rostker v. Goldberg, 453 U.S. 57 (1981)). Scales argues that in this way, military necessity doctrine defines a "special preserve of decision-making, separated from civic life". "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?" (1989) 12 Harvard Women's L J. 25 [hereinafter "Militarism, Male Dominance"].
42 Elshtain, supra note 33 at 213; Scales, ibid. at 39. Scales notes that the parallel example to war is child birth: the sense that one has to have a child in order to fully appreciate child birth. However, while women generally have little or no say in the waging of war, men have managed to exercise control over child birth.
43 For example, international law textbooks generally do not include much discussion on the laws of war. To the extent they are discussed at all it is limited to the notion of international crimes. (see for example, Ian Brownlie, Principles of Public International Law, 4th ed., (Oxford: Clarendon Press, 1990) and Hugh M. Kindred et al, International Law: Chiefly as Interpreted and Applied in Canada, 5th ed., (Emond Montgomery Publications
This construction of war as being necessarily extreme and unusual allows for the predominance of just war and military necessity doctrines. Both of these doctrines serve to entrench -- and obscure -- certain values and assumptions about the nature of war, the benefits of war and the collective national interest in war. Because war is a desperate, emergency situation, military necessity becomes the predominant consideration. Everyday discourse is subverted in the name of achieving military goals. The compelling interests inherent in military victory make it difficult to challenge the allocation of resources or the choice of some values over others.44 Military necessity doctrine, Judith Gardam argues, has been a "constant barrier to the development of humanitarian law."45 The military has resisted granting strong protection to civilians because that protection may encroach upon the military's ability to wage war. Thus, as Gardam notes, humanitarian law is premised on the notion that citizens and soldiers deserve a measure of protection only when military necessity permits.46 Military necessity is accorded a higher status over soldier and civilian lives because everyone's interests are ultimately secured by the military and military victory.

Limited, 1993). The development, and existence of laws of war seems to be downplayed or treated as something of an historical anomaly. This tendency to treat war and the military as though it were unusual, marginal - and therefore almost invisible - is not confined to international law. Theorizing on the nature of the state within feminist theory has tended to treat the state as though it were composed solely of government and administration. The military is treated as "an optional extra, there to obey civilian orders". (Rosemary Pringle and Sophie Watson, "Fathers, Brothers, Mates: The Fraternal State in Australia" in Sophie Watson, ed., Playing the State: Australian Feminist Interventions (London: Verson, 1990).

44 I do not mean to suggest that the notion of military necessity grants the military blanket immunity for all acts. Clearly, military actions must be demonstrably necessary to be justified. My point is that the balancing act between the use of force and the exercise of restraint entailed by military necessity is skewed in favour of the use of force.


46 Ibid.
Thus military actions deemed necessary -- and this will be the case for most military decisions -- are immune from public scrutiny. First, they are decisions made in the context of war and are therefore beyond simple analysis. Second, they are decisions made as part of a military strategy and therefore understandable only by military people. Finally, they are decisions made to further military victory and consequently, in the best interests of everyone.

Within the discourse of war, there are two competing images of war. One is that war is ultimately a rational act that follows set patterns, rules and limitations. This is the version that provides the basis for the laws of war and humanitarian law. The second image is war as chaos. In this version, the "thin veneer of civilization" is "being ripped away by war." These two images of war play off against each other. The doctrines of military necessity and just war, for example, rely on the view that during war rational decisions and objectives can be pursued in a systematic way. Central to these doctrines is highly abstract reasoning, steeped in ideals of reason. Military necessity, however, also requires the image of war as chaos and the military as the sane actor in an insane situation. In the world of combat, where violence is uncontrollable, spasmodic and rampant, the military must be given room to make the hard decisions entailed by an out of control situation. Should military decisions or the conduct of military personnel appear questionable, they can be justified as a normal reaction to an abnormal situation.

3. Critical Review of Humanitarian Law

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In recent years, humanitarian law has come under criticism from critical legal scholars and feminist international law theorists who have challenged its very claim to humanitarianism. Critical theorists have argued that humanitarian law is essentially a political instrument that veils the prioritizing of military necessity behind humanitarian rhetoric. The institutionalization of laws of war has "facilitated rather than restrained wartime violence." In the following section, I briefly outline the work of critical legal theorists and feminists in humanitarian law. The work of these theorists raises some important issues not only about the effectiveness of current international humanitarian law, but also humanitarian law as an ideological instrument.

(a) Critical Legal Studies Analysis of the Laws of War

Throughout my discussion of international humanitarian law, I have relied on the analysis of Jochnick and Normand, who provide a strong critical and historically situated analysis of the laws of war. Jochnick and Normand argue that the laws of war legitimate military violence by (1) privileging military necessity over humanitarian considerations; (2) cloaking that privilege in the language of humanitarian ideals; and (3) ratifying the choice of priorities through the laws of war. The codification of these interests in the laws of war is important because of law's legitimating function. Jochnick and Normand argue that the very notion that "law places humane limits on war, even if factually mistaken, has profound consequences for the way people view war" which, in turn, affects the way war is conducted. Law, they argue, legitimates war in two ways. First, compliance with law is generally viewed as "an

49 af Jochnick and Normand, supra note 14.
51 af Jochnick and Normand, at 50.
52 Ibid. at 56.
independent good, acts are validated by simply being legal."\(^{53}\) Second, law is a profound legitimator because it functions ideologically as an articulation of "shared values" which "impress upon people a sense of obligation to the existing order". By granting some activities the "psychic trappings of lawfulness", law incorporates and reinforces as natural, hierarchies of "social and political power".\(^{54}\) The laws of war protect as natural the prioritization of military necessity over humanitarian considerations. Nations who purport to adhere to the laws of war are therefore granted "a powerful rhetorical tool" which protects "their controversial conduct from humanitarian challenges."\(^{55}\)

af Jochnick and Normand review the historical evolution and political undercurrent of the laws of war which culminated in the series of Conventions negotiated at the turn of the century.\(^{56}\) Those Conventions, they argue, are essentially political documents designed to appease various interests but, above all, to maintain the dominance of military considerations. For example, the negotiations leading up to, and the outcome of, the Hague meetings demonstrate that peace or meaningful reduction of war and warfare were never seriously considered.\(^{57}\) Any concessions on limiting weaponry that were reached were largely symbolic. The Conventions "banned only those means and methods of combat that had no military utility while permitting new and destructive technologies, like aerial warfare..."\(^{58}\)

\(^{53}\) \textit{Ibid.} at 57.  
\(^{54}\) \textit{Ibid.}  
\(^{55}\) \textit{Ibid.} at 58.  
\(^{56}\) See note 24 and accompanying text.  
\(^{57}\) For example, \textit{af Jochnick and Normand, supra} note 14 at 71, note that prior to the Brussels meeting in 1874, all delegates were instructed by their governments to reject any limitations on arms.  
\(^{58}\) \textit{Ibid.} at 68.
Even the post-World War II Nuremberg trials, af Jochnick and Normand argue, served only to reinforce the basic premise that war and violence, on some level, are legal, and that military necessity may take precedence over humanity:

In many ways, the Nuremberg Tribunal actually bolstered the rights of belligerents to engage in "normal" wartime atrocities, those that can be tenuously (in the eyes of the perpetrator) linked to a military objective. Ironically, the power of Nuremberg's image as a humanitarian milestone may further entrench these "customary" belligerent practices that claim the vast majority of civilian casualties in modern war.  

While af Jochnick and Normand's arguments are insightful and compelling, their depiction of the laws of war is problematic. They characterize the laws of war as entirely the product of political and military posturing, without admitting of any redeeming motive or objective. For example, their critique of the laws of war leads them to conclude that the "basic fact that nations purport to respect the rule of law helps protect the entire structure of war-making from more fundamental challenges." This analysis treats the laws of war as solely the tool of military and political interests without any redeeming humanitarian objective or effect. In addition to suggesting a type of military conspiracy, it constructs as uniform, the impact of laws of war. According to this analysis, the function of law is to protect certain vested interests. It has no other purpose.

In their conclusion, af Jochnick and Normand argue that their critique of the laws of war is meant only as the "first step in a program of constructive legal reform." A second article, meant as a part II, was published later and examines the Gulf War. In that article, the authors propose "strategies for placing humane and effective legal limits on war." Here, af Jochnick and Normand appear to have some faith in law despite their earlier description of the utter

59 Ibid. at 94-5.
60 Ibid. at 58.
61 Ibid. at 95.
failure of the laws of war. This raises the question of how the authors reconcile the apparent failure of the laws of war with the possibility of future laws. How can they guarantee that their proposed amendments are not, or will not become, as politically motivated as the Hague Conventions? More importantly, if af Jochnick and Normand see law as capable of entirely reflecting the interests of one group, without retaining any kind of autonomy or independent character, is it possible to conceive of a new law that would avoid this problem? How can af Jochnick and Normand be sure that their suggested law reforms are not also entirely politically motivated, only this time reflecting a different constituency?

Missing from af Jochnick and Normand's analysis of the laws of war is an account of the role of law as a social regulator. Roger Cotterrell argues that law can be seen as "both the expression of power relations and an important mechanism for formalising and regularising such relations." af Jochnick and Normand's analysis of the laws of war tends to focus on law's role as an expression of power without adequately accounting for how the laws of war derive their own power. While af Jochnick and Normand recognize that the very existence of laws relating to war has an important ideological function, by focusing on law as an instrument of one hegemonic interest, the military, they do not account for the complex and contradictory operations of the laws of war. For example, af Jochnick and Normand argue that the laws of war are largely meaningless because they apply only to the extent permissible by military necessity. However, within the Hague Conventions some protections are granted

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64 Cotterrell, *ibid.*, argues that:

... contrary ... to the assumption in much critical writing that law is merely a weapon of power, law controls and expresses power at the same time, as two sides of the same process. And since, as has been seen, the nature and distribution of power are complex questions, legal doctrine and the workings of legal institutions necessarily show complex and often contradictory patterns.
absolutely, and cannot be derogated from even in a case of military necessity. Military necessity, while an important factor in defining the operation and substance of the laws of war, is not a monolithic concept. It acts to limit the laws of war but is itself limited by them. It is the second part of this equation that is missing from af Jochnick and Normand's analysis: how have the laws of war, over time and in different contexts, defined and circumscribed what is permissable during war?

(b) Feminist Analysis of International Humanitarian Law

Unlike af Jochnick and Normand, Gardam does not wholly reject humanitarian law as reflecting political interests. While she argues that humanitarian law is flawed because of its overt protection of male interests, she sees possibility of reform within the existing structure of humanitarian law. Her objective is to expose "some of the underlying assumptions on which the law is based." and to dismantle "the myth of gender neutrality of the law of armed conflict".

The gender bias implicit in humanitarian law, Gardam argues, is evident in the incorporation of the public/private divide into the whole structure of the laws of war including the Geneva Conventions. Gardam argues that within the body of law relating to war, distinctions are made between the public world of men and the private or domestic world of women. These distinctions operate to marginalize women within the discourse of laws of war and

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66 "The Law of Armed Conflict", supra note 50 at 421.
67 Ibid. at 424.
humanitarian law in three ways. First, the laws of armed conflict are made in the "public world of men" from which "women's voices are absent". Decisions about the lives of civilians are therefore made primarily by men. Second, international law places more importance on the laws affecting soldiers than those affecting civilians. This privileging of soldiers over civilians is facilitated by the doctrine of military necessity which values military victory over humanitarian considerations. As soldiers tend to be men and civilians women, this distinction has a gendered effect. Finally, humanitarian law draws a distinction between international and internal conflicts. This distinction is predicated on a split between international issues and domestic/state matters which, Gardam argues is "meaningless for women and impacts on them unevenly."

Central to Gardam's critique of humanitarian law is the gendered distinction between soldier and civilian; combatant and non-combatant. Soldiers, she argues, are gendered male and civilians female. The laws of war, including humanitarian provisions, ultimately grant more protection to the soldier over the civilian which means that men receive the benefit of legal protection over women.

Humanitarian considerations are always subordinated to the aim of military victory, Gardam argues. Any attempt to delimit the conduct of warfare must be compatible with the dominant consideration of military necessity. The prioritizing of military victory ensures that the lives

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68 Ibid.
69 Ibid. at 424 - 7.
70 Ibid.
71 Ibid. at 427. Gardam does not explain in what ways soldier and civilian roles are gendered other than through the pure demographic make-up of the two groups. This point was raised by J. Ann Tickner, "Feminist Approaches to Issues of War and Peace" in Dorinda G. Dallmeyer, ed., Reconcepting Reality: Women and International Law. (Washington: American Society of International Law, 1993) 267 at 271 and will be explored infra.
72 Ibid.
73 Ibid. at 426.
of soldiers will be of more concern than the lives of civilians.\textsuperscript{74} Three of the four Geneva
Conventions, for example, are devoted to soldiers, and of the protections granted to civilians,
one none interfere "with the means and methods by which military men get on with the task of
winning wars."\textsuperscript{75}

Gardam argues that Protocol I to the Geneva Conventions,\textsuperscript{76} by attempting to mediate the
distinction between international and national conflicts, operates to place women at further
risk. Protocol I defines wars of self-determination as international conflicts, and extends
humanitarian provisions to combatants in self-determination movements. These recognitions
are problematic for women, Gardam argues, because they (1) legitimate self-determination
movements and by extension, just wars, which have "nothing to offer women";\textsuperscript{77} and (2) they
lower the requirement for combatants to distinguish themselves from civilians, placing
civilians at greater risk.\textsuperscript{78} Gardam argues that recognizing self-determination movements as
international conflicts, "elevates" them to the status of just wars, where the distinction
between combatant and non-combatant "can be dispensed with".\textsuperscript{79} The solution, Gardam
argues, is to completely do away with the distinction between international and non-
international armed conflict.\textsuperscript{80}

Gardam concludes her analysis by arguing that humanitarian law must be altered to extend its
application to women as well as men.\textsuperscript{81} "[O]nce the fallacy is exposed that the goal of armed

\begin{footnotes}
\item[74] Ibid. at 426-7.
\item[75] Ibid. at 429.
\item[76] See discussion, Chapter 4 supra note 64 and accompanying text.
\item[77] Ibid. at 431.
\item[78] Ibid. at 433-5.
\item[79] Ibid. at 434.
\item[80] Ibid. at 434.
\item[81] Ibid at 436.
\end{footnotes}
conflict is universal to men and women", she argues, military necessity will be displaced "as the primary consideration" of humanitarian law.\(^82\)

Gardam's analysis raises some very important questions about the supposed neutrality and in fact, the actual humanity of humanitarian law. Her analysis of military necessity doctrine is particularly insightful and draws an important link between humanitarian law and the dictates of military culture. Where her analysis is problematic, I argue, is in defining women's experience of war in terms of the ideological divide between public and private spheres. My concern with Gardam's use of public/private ideology is two-fold. First, her examples of the public/private divide do not play out in that context of war in the way she says they do, and second, Gardam's understanding of sphere ideology seems based on a very static conception of the public/private divide.

Central to Gardam's public/private analysis is the gendered distinction between soldier and civilian which, Gardam argues, results in less protection for women (as civilians) than for men (as soldiers). However, "civilian" within humanitarian law, can be defined quite narrowly and does not necessarily include all women. Geneva Convention IV, Part I extends general protections to all "persons taking no active part in the hostilities" including injured or surrendered soldiers.\(^83\) Part II of Geneva Convention IV limits the definition of civilian (and hence its protections) to "wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven".\(^84\) Humanitarian law, therefore, constructs multiple types of civilians, some of which are protected in some situations but not others. To equate civilian with woman misses the way in which the law distinguishes between women who are extended protection and those who are not. In addition, it does not capture men who

\(^82\) Ibid. 436
\(^83\) Article 3 (1).
\(^84\) Article 14.
are included in the definition of civilian whether by age or infirmity, or gay men who are feminized by the masculine, heterosexist military discourse of war.

Gardam argues that the gendered public/private distinction is also manifest in the additional protection granted to the soldier over the civilian. While I agree with Gardam that the laws of war ultimately are more concerned with protecting soldiers, it is not clear in what way separate sphere ideology, as opposed to inequality, motivates this valuation of some lives over others. Gardam points to the doctrine of military necessity which prioritizes military victory over the lives of civilians. However, military necessity also prioritizes military victory over the lives of soldiers. While military necessity may have a particular impact on women, this impact may have as much to do with the cultural value placed on war and the military as the division between public and private spheres. Military necessity and the subversion of humanitarian interests in the name of military victory are important issues but they are not necessarily understandable only in the context of a gendered division between public and private spheres. They must also be examined in the context of the discourse of war and militarism in which decisions made on the basis of military necessity seem natural rather than immoral.

Ann Tickner argues, for example, that Gardam's distinction between soldiers and civilians is misleading as "the logic of national security" dictates that the "security needs of combatants must come first". A better way to think about the gendered impact of military necessity, she argues, is in terms of protectors and the protected. The notion of "protectors" is "bound up with the masculinity of war" and are "always gendered masculine". The

85 Supra note 71 at 271; Ruddick, supra note 48 at 109. I agree with Tickner's analysis of the protector/protected relationship, but I do not agree with her reference to the "logic of national security." While I am sure there are real issues of national security to consider, I am wary of relying on the ideology of home front and protection that are incorporated in the "logic" of national security.
86 Tickner, Ibid.
"protected" are usually constructed as feminine, and include not only women, but also children, the elderly, the infirm.\textsuperscript{87}

Tickner argues that by thinking of protector/protected instead of soldier/civilian, we are able to "question the entire notion of who is being protected in times of war."\textsuperscript{88} Tickner's analysis, unlike Gardam's, looks at gender roles in the context of the prevailing military discourse which still may incorporate sphere ideology but does so with particular reference to the values and assumptions of war and militarism.

Looking at the gendered nature of war, I argue, requires examining the way in which the ideologies of war, nationalism, and gender converge. Gender identities in wartime -- and in peace -- are constantly negotiated and reconstructed. The roles of men and women during war are greatly influenced by the convergence and divergence of various ideological systems. By this, I mean that war calls into play different or heightened assumptions about our sense of community, gender, and nation which alter the way we might normally think of our gender roles and identities.\textsuperscript{89} Thus, while separate sphere ideology may influence how ideals of men and women are constructed in the context of war, so does the particular nature of ideologies of war which place a premium on military necessity and male bravery. In the context of war, notions of military necessity and military victory both alter and reaffirm gender identities.

The convergence of different ideological systems means that during war, women tend to perform many different and sometimes incompatible roles. They are sometimes the cause of

\textsuperscript{87} \textit{Ibid.} Once again, homosexuals are probably feminized within military discourse but I am not sure if the same mythology of masculine protection would extend to them.

\textsuperscript{88} \textit{Ibid.}

\textsuperscript{89} In making these arguments, which are explored more fully later, I am drawing on a specifically Western experience of war. While there are probably many parallels in different cultural mythologies about war, my purpose here is merely to outline how Western notions of war and gender are embedded in humanitarian law.
war, the solace from war, the keepers of the home front, and the personification of a nation. Thus, while the centre stage of war is occupied by men, women are nonetheless very visible and important in the construction of cultural myths of war. Although gender roles during war are shaped to some degree by sphere ideology -- women keep the home fires burning while the men fight to protect the country -- women's multiple roles during war require that they move in and out of the public and private spheres. For example, as keepers of the home front, women are seen as part of the private sphere of "home". As the locus of national identity, however, women are seen as part of the public arena. As individual actors, women are also in the public sphere, doing the jobs normally seen as the purview of men. In a similar way, the military negotiates a division between public and private spheres. Although at the centre of government due to the prevailing consideration of military victory, the military also operates behind a cloak of national secrecy. During war, the requirements of national security and military necessity operate to construct a special arena for military operations. While formally part of the government, during war -- and to a lesser extent during peacetime -- the military functions in a private sphere.

During war, as in peace, the public/private spheres are constantly negotiated and redefined. In the context of war, the fluidity of the public/private divide must be viewed in the context of different ideological systems, like militarism, patriarchy and nationalism, that define the place of war in our cultural and symbolic framework.

As with my earlier comments about af Jochnick and Normand, my critique of Gardam is primarily centered on how she theorizes the role of law in women's oppression and as a possible tool for social change. Also like af Jochnick and Norman, Gardam tends to treat law as an instrument of a particular interest -- in her case, patriarchy -- without considering how

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90 See discussion infra, notes 112-121 and accompanying text.
different interests may be defined and constituted through law. In the next section, I return to the subject of wartime rape and its construction through different ideological systems: militarism, patriarchy and nationalism. By exploring how women are constructed by and defined through their engagement with different structures of oppression, I provide a context for considering international law efforts to address wartime rape. In the context of the mass rape of Muslim women, I look at how international humanitarian law has incorporated some of the ideologies of women and violence that may make it difficult to use this area of law as a tool for social change.

III. IDEOLOGIES OF WOMEN, WAR AND RAPE

The war in the former Yugoslavia has made clear the very real suffering of women during war. Reports of the horrific suffering of Bosnian and Muslim women received widespread media attention, placing the safety of women firmly on the public agenda. Now, as the war in the former Yugoslavia drags into its third year, tales of wartime rape are missing from the headlines. It seems doubtful that the incidences of rape have stopped, only that the ability of these stories to titillate and horrify has diminished. Just as quickly as rape entered the public arena, it has been dropped from the agenda.

This treatment of wartime rape -- widespread publicity followed by a collective silence -- is not unusual and, in fact, is consistent with the treatment of wartime rape in other wars of this

92 I am not suggesting, however, that efforts to prosecute rape and other breaches of international law have been similarly dropped. In fact, it appears the Tribunal is still proceeding with its mandate. In addition, different avenues are being pursued by other interested groups: Beth Stephens, "The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women" (1994) 5(2) Hastings's Women's Law Journal 143.
For example, both the rape of French and Belgian women by German soldiers in World War I, and the mass rape of Bengali women by Pakistani soldiers received fairly extensive publicity. In both cases, however, the violence suffered by women in the context of war was the subject of a propaganda campaign to solicit support for the war. Brownmiller argues, for example, that the publicity surrounding the mass rape of Bengali women resulted from the "desperate need of Sheik Meyibur Rahman's government for international sympathy and financial aid ..." In addition, Suzanne Gibson notes that in European and American history the prospect of raped sisters, mothers and wives was used to raise public support for military intervention.

Although rape by soldiers has long been considered a military offense, wartime rape has been and continues to be, a part of many wars. Despite the prevalence of rape during war, it has not received international censure. For example, although rape and forced prostitution were documented throughout World War II, it was not prosecuted at Nuremberg as a war crime.

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93 Ruth Harris recounts in "The 'Child of the Barbarian': Rape, Race and Nationalism in France During the First World War" (1994) 141 Past and Present 171 [hereinafter "Child of the Barbarian"] that the rape of French women was extensively publicized, sometimes with lurid detail, in order to garner support for the war. Despite this publicity, the raping of French (and German) women has not been part of the iconography or story of World War I.


95 Brownmiller, *ibid.* at 86


98 Theodor Meron, "Rape as a Crime under International Humanitarian Law" (1993) AJIL 424 at 425-6. Meron goes on to note that rape was prosecuted at Tokyo.
The fluidity with which wartime rape moves in and out of the discourse of war -- and thus the public agenda -- suggests that the experience and understanding of wartime rape is very much tied to cultural norms about war, women and violence. The seeming contradiction in the Western community's treatment of wartime rape suggests that rape occupies different and perhaps contradictory places in our cultural understanding of war and violence. Understanding wartime rape, therefore, requires exploring the cultural context of war.

War and war stories hold a central part in our definition of self and community. Although there is a tendency to think of war only in terms of the destruction it causes, war also plays a significant role in cultural and national self-definition. Elshtain argues, for example, that war is "productive destructiveness". It "shifts boundaries, defines states, and alters balances of power." More importantly, however, it becomes part of the cultural property of the peoples it has helped to create. It is part of the "system of signs we read without much effort because they have become so familiar to us." Mythologizing about war becomes an

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99 My discussion of war in this context works from the presumption that war occupies a central part in most cultures. However, my discussion will be restricted to what I know of Western culture. While there will be certain commonalities between different cultural representations of war, it is not my purpose to explore them in this chapter. Thus, my comments are intended to apply only to a Westernized notion of war and its discursive importance in defining our cultural identity, recognizing that even generalizing about "Western" culture can be a risky undertaking. My comments do apply, I think to some aspects of the international law treatment of war crimes in Bosnia. I am not interpreting the events in Bosnia in terms of their significance for Bosnian/Serbian/Croatian/Muslim culture. Rather, I am sketching a framework, partially constructed by international law, through which cultural symbols of war, women and violence are interpreted and which impact on the treatment of rape in humanitarian law.

100 *Women and War* supra note 33 at 166-167; "Thinking about Women and International Violence" in Peter R. Beckman and Francine D'Amico, eds., *Women, Gender and World Politics: Perspectives, Policies and Prospects* (Westport, Conn: Bergin & Garvery, 1994) 109 at 115 [hereinafter "Thinking about Women"].

101 Elshtain *ibid.*

102 *Women and War, supra* note 33 at 166-7.
important factor not only in defining who we are as a people, but also our identities as men and women.\textsuperscript{103} Gender roles are reflected in and defined by war. These roles become encoded in "symbolic as well as social and economic systems" which converge during war:

During total war, the discourse of militarism, with its stress on "masculine" qualities permeates the whole fabric of society, touching both women and men. In doing so, it draws upon preexisting definitions of gender at the same time that it restructures gender relations. When peace comes, messages of reintegration are expressed within a rhetoric of gender that establishes the postwar social assignment of men and women.\textsuperscript{104}

Narratives of war become an important source of the symbolism that surrounds war. Thus, holding the right to narrate is the ultimate spoil of war.\textsuperscript{105}

In the following section, I explore some of the mythology that surrounds women's roles during war and wartime rape. My intent is not to describe in its entirety the ideological universe that is constructed by and entrenched in war and war stories. Rather, I consider different myths concerning women and violence that are inscribed in, or reinforced by, international humanitarian law.

1. Women and War\textsuperscript{106}

\textsuperscript{103} Ibid. at 166.
\textsuperscript{104} Margaret R. Higonnet, Jane Jenson, Sonja Michel and Margaret Collins Weitz, "Introduction" in Margaret R. Higonnet, Jane Jenson, Sonja Michel and Margaret Collins Weitz, eds., \textit{Behind the Lines: Gender and the Two World Wars} (New Haven and London: Yale University Press, 1987) at 4.
\textsuperscript{105} Huston, \textit{supra} note 47 at 274, argues that in war, "cessation of hostilities" does not happen until "the right to describe them has been appropriated by one side over and above the other".
\textsuperscript{106} I am not suggesting by this analysis that men are not also constructed along predetermined guidelines. Elshin argues for example that the primary role assigned to men is the "just warrior" who "fights by a code of honor that permits violence but also limits it to certain situations": "Thinking about Women" \textit{supra} note 100 at 111. Men who do not conform to the ideal of masculine warrior are also marginalize within military discourse.
Although men tend to be the principal actors in war and war stories, women perform several important functions in war and war mythology. First, women are often held out as the pretext for war. Wars are fought to protect the home front from the ravages of marauding villains. Second, women can be "booty for the aggressors" or "recompense for the allies". Third, women stand in as symbols of national identity and national achievement. As such, they are representative of a system of values that binds a community together, making national sacrifice both possible and necessary. In this role, women are constructed as embodying all of the ideals of national identity and as such are constructed as racially pure, chaste and "incarnating peace and virtue".

Males who are very young, very old, or unfit for military service are feminized as part of the class of protected civilians: Tickner, supra note 71 at 271. In addition to being male, the "ideal" warrior is also heterosexual. A significant part of the construction of gender identities within war and military discourse has focused on sexuality, and gays and lesbians have been actively excluded from military service: Wilbur J. Scott and Sandra Carson Stanley, Gays and Lesbians in the Military: Issues, Concerns, and Contrasts. (New York: Aldine de Bruyter, 1994). My discussion in this section is focused primarily on the construction of female gender roles because of their importance in legitimating violence against women. Certainly, a part of this equation will be the role of the military in constructing a masculine culture which permits -- or encourages -- violence against women. Understanding military culture is an important but large area that I could not adequately cover in this thesis. I have limited my analysis, therefore, to a general consideration of the construction of female gender roles and how they intersect with dominant military interests enshrined and codified in international humanitarian law. For work concerning women within the military, see: Jeanne Holm, Women in the Military: An Unfinished Revolution, Rev. ed. (Novato, Ca: Presidio Press, 1992); Carol Wekesser and Matthew Polesetsky, eds. Women in the Military (San Diego, Ca.: Greenhaven Press, 1991).

107 Huston, supra note 47 at 274; Harris, supra note 93.
108 Huston, ibid.
110 Huston, ibid; Gibson, ibid.
On a more functional level, women also play the roles of producers of male warriors; they send their sons to war and give birth to future warriors.\textsuperscript{111} Anthias and Yuval-Davis note that as biological producers of community members, women become important signifiers of ethnic/national differences, and thus the focus and symbol of nationalist discourse.\textsuperscript{112}

For the purposes of this section, I want to focus on two aspects of women's identities during war: (1) as symbols of the nation; and (2) as the essential value to be protected by resort to armed conflict. These two roles demonstrate the ways in which the discourse of war constructs gender identities which in turn structure our understanding of wartime rape as an unfortunate but inevitable aspect of war.

During wartime, nationalism and nationalist rhetoric is a driving force of propaganda efforts. The fight for nation and peoples is the rallying cry which ultimately justifies war. Women as the embodiment of "nation" become the reason for war. The relationship between women and nation is, however, a complex one. Elshtain argues that the nation-state is the actual and metaphoric successor to the walled, city-state.\textsuperscript{113} City-states were able to define the size and make-up of their community by those living within the walls of the city. An attack on the walls of the City was considered an act of war. In the modern era, the walls of the City have been replaced, symbolically and legally through "the vast pretensions of sovereignty".\textsuperscript{114} In place of armed fortresses, states now surround themselves with the trappings of an inclusive, and by extension exclusive, nationalism. Instead of walls to monitor egress and ingress, states use documents and citizenship to permit or deny entrance and membership. Women, who are often denied full citizenship in the sovereign state, become "entangled with the life of the body

\textsuperscript{111} Elshtain, \textit{Women and War}, supra note 33 at 93.
\textsuperscript{113} Elshtain, \textit{Women and War}, supra note 33 at 66-67.
\textsuperscript{114} \textit{Ibid.}
politic" through "symbolic representations" and "semiotically charged events".\textsuperscript{115} In a time of war, women become the symbol of civic virtue and national pride. As representatives of the national body politic, women's position in war can be proactive and empowering.

The woman of republican militancy is no mere victim of events; rather, she is empowered in and through the discourse of armed civic virtue to become an author of deeds - deeds of sacrifice, of nobility in and through suffering, of courage in the face of adversity, of firmness in her ...\textsuperscript{116} 

While the discourse of war empowers women, it does so only to the extent that they conform to wartime construction of their gender identities. During war, nationalist identities are imposed, they are not "engendered nationalisms as lived cultural identities", nor do they "unfold gradually over time".\textsuperscript{117} This means that difference is manipulated in the name of creating national consensus and homogeneity. National identity thus, requires a "sorting process" to determine "who is inside and who is outside the nation."\textsuperscript{118} Forced national unity requires that differences among people be negated through assimilation, deportation or assignment to a ghetto.

For women, forced national unity is particularly significant because women are generally the subject of essentializing discourse within nationalism. "Our Woman" gets constructed as racially and sexually pure and as the keeper of the national line. It is through women, that the nation keeps itself true (i.e. untainted by other nationalities or ethnicities). Differences among women, whether based on sexuality, heritage, religious conviction etc, are obscured by the dominant images of woman as mother, brave keeper of the home front, and committed

\begin{itemize}
\item \textsuperscript{115} \textit{Ibid} at 67.
\item \textsuperscript{116} \textit{Ibid} at 93.
\item \textsuperscript{118} \textit{Ibid} at 10.
\end{itemize}
supporter of the war effort. Thus, through nationalist rhetoric, women are constructed as both visible and invisible. They are visible only to the extent that they conform to the nationalized identity and invisible for who they really are as individuals. In this way, women's "differences" are subject to multiple constructions. First, women are constructed as homogenous and conforming to set gender roles of mother, widow etc. Second, they are constructed as "different" from other nationalities. They embody the border between nations: they are the pure version of the home nationality.

By embodying the spirit and future of the nation, women symbolize the value that is to be protected by war. Threats to the future of the nation are symbolized as threats to women and vice versa. During war, the military are cast in the role of protectors and women/civilians become the protected. Characterizing women as the national value that needs to be protected by recourse to war, however, obscures the way in which women's safety is actually jeopardized by war.

Military necessity and the construction of a common goal of military victory, therefore, function to negate the experience of women during war. In the early stages of conflict, reports of the victimization of women abound because they (1) justify engaging in armed conflict, and (2) reinforce the image of the soldier as protector. Once the justification period of war is over, reports of women's victimization are no longer relevant because they do not conform to the predefined roles accorded to women. To the extent that women's experiences

119 Mertus notes, for example, that throughout the Balkans, and in Serbia particular, there is a high intolerance of homosexual practices which are seen as contrary to the nationalist rhetoric premised on the masculinity of war and the motherhood images of nation. Ibid. at 21.
120 Zillah Eisenstein, "Seeing Women in Eastern European Nationalism: Post-Communism's 'New-Old' Borders and Women's Bodies" (Dec. 1993) [unpublished], as discussed in Mertus, Ibid. at 13. Mertus accredits Eisenstein with the observation that because women are never fully inside or outside of a nation, they straddle the border between nations and become the border. Ibid at 14.
121 Tickner, supra note at 271.
deviate from the constructed norm, either as sexually or ethnically impure, or as victims of war, they are constructed as "outside" of the military discourse. They are either "outsiders" in the sense of "not one of us" or they are outside of military priorities: their death or suffering is "incidental" or "collateral" to the main military objective.

Violence against women is enabled by the constellation of different roles assigned to men, women and the military. As symbols of the nation and the protected, women are targets of violence by opposing armed forces. As I will discuss below, the rape of the "enemy's woman" can symbolize the rape of the nation or the expression of male defeat; the inability to protect "one's own women".

Thus, through the construction of certain gender identities and the privileging of military values, violence against women gets constructed as unfortunate but unavoidable, regrettable but nominal.122 The discourse of war points to certain beliefs about women's expendability during war. Women, as civilians, are ultimately accorded less value and less protection within the laws of war. Their interests are subverted to the common aim of protecting the soldier and ending the war. These beliefs about women ultimately enable continued violence against them without legal censure.

2. Wartime Rape

Recognizing that war, and the waging of war, play an important role in defining our cultural and national identity, I now explore how these different discourses affect our understanding of wartime rape and its prevalence.

122 Ruth Seifert "War and Rape: A Preliminary Analysis," in Mass Rape , supra note 54 at 66-67. Seifert notes that the 'silence' surrounding wartime rape cannot be attributed to "coincidence, embarrassment or the pain of women" but rather, to its historiographical treatment "as an isolated incident." (66-67)
(a) History of War and Rape

Like the laws of war, wartime rape has been around probably as long as war. In the history of war, wartime rape seems to occupy contradictory positions: it is held out as the prize of the victors along with pillaging, formally prohibited by military policy or laws of war, but ultimately the responsibility of the woman when it occurs.

Jean Bethke Elshtain notes that as early as the eleventh century, some women were granted special protection in the laws of war and were among the list of persons and things exempt from assault. For example, assault and destruction were prohibited against:

... clerics, monks, nuns, women, pilgrims, merchants, peasants, visitors to councils, churches and their surrounding grounds, cemeteries and cloisters ... agricultural animals, wagons in the fields and olive trees.

Susan Brownmiller observes, however, that the protection against rape was probably only extended to women of the nobility and even then it was probably contingent upon the "chivalry" of knights of invading armies to ensure that women of rank were protected from rape.

123 Huston, *supra* note 47 at 274-5; Brownmiller, *supra* note 94.
124 Best, "War by Land" *supra* note 22 at 26; Elshtain, *Women and War*, *supra* note 33 at 132.
125 Elshtain notes, *ibid.* at 129, for example, that as part of the Roman code of virtuous conduct for women, "any woman violated in time of war, having been shamed, will do the honorable thing by killing herself."
126 Elshtain, *ibid.* at 132-3.
127 *Supra* note 94 at 33 and 37.
While a ban on rape seems to be a common feature of the laws of war, whether codified or informal, wartime rape has been a constant feature of war. There is a sense that among soldiers, rape is considered inevitable. While some may prefer that it does not happen, and in fact, may formally ban it, very little is actually done to stop it. It is seen simply as part of the "dark side" of war.

A freehand with the girls seems always to have been a basic component of what the common soldier hopes for, believes he deserves, and feels entitled when circumstances permit, to get, forcibly, if nothing else will get it. The literature of war is full of evidence of this disagreeable dark edge to military behaviour and no more need be said about it here than that ... this sort of thing is still with us.

The disjunction between the prohibition and pervasiveness of rape points to a military culture which implicitly condones rape as part of the "right" of soldiers while turning its head from the disagreeable reality of wartime rape. Within the literature of war, rape -- or, "a free hand with the girls" -- does not warrant full exploration. It is enough to point out that it goes on, but as the "dark edge" to military behaviour, there is no need to elaborate upon it.

(b) Symbolism and Wartime Rape

Just as women play many roles in the discourse of war, so does the wartime rape of women. The cultural symbolism of war -- the importance of war stories in defining our communities -- includes stories of rape. Cynthia Enloe has noted, for example, that stories of rape "have been a staple of war reporting". Rape invariably becomes part of the description of war: "murder, pillage and rape" is a standard refrain, suggesting, as Enloe argues, that "rape

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129 Ibid. at 31-113.
130 Best, "War by Land", supra note 22 at 26.
131 Cynthia Enloe, "Afterword: Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?" in Mass Rape, supra note 71 at 220.
naturally accompanied pillaging". Understanding the place of rape in the stories of war is therefore an important part of uncovering the meaning we ascribe to wartime rape in our cultural narratives. Wartime rape, I argue below, carries complex symbolic meaning. It is a sign of utter defeat, weakness, national devastation. But it is also a rallying cry; a cause for war and retaliation. Importantly, however, the stories of wartime rape, like the stories of war, have been "instruments wielded overwhelmingly by men ... to shape the larger political conflict".

Because women are constructed as the locus of national identity and male honour, rape can be a symbol of one nation's defeat; its inability to defend itself from attack. Rape, in this context, is not only a symbol of defeat, "it communicates from man to man ... that the men around the women in question are not able to protect "their women". In this way, wartime rape can be an intensely public act. It is meant to communicate humiliation and defeat. What this analysis overlooks, of course, is that rape may be a symbolic act but it is still an act of violence and power by one person -- usually a man -- against another -- usually a woman. This element is missing from most accounts of wartime rape precisely because wartime rape tends to be appropriated in the name of military necessity. Just as wartime rape can be a symbolic act between victor and loser, it can also be a tool for garnering international support and approval for war. Suzanne Gibson argues that rape lends itself to propaganda because women stand in as symbols of national identity and male honour. An attack on women's chastity is characterized as an attack on the soul of the nation. Under this depiction, war-time rape is significant only as an act of violence against a people rather than against a woman or women. This view of rape is codified in Article 27 of Geneva Convention IV which defines rape as an attack on a woman's honour. Within Geneva Convention IV, the prohibition against rape is

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132 Ibid.
133 Ibid.
134 Seifert, supra note 122 at 59.
135 "On Sex, Horror and Human Rights" supra note 109 at 256.
included with other attacks on a nation's "religious convictions and practices", "manners and customs". The structure of Geneva Convention IV suggests that rape is seen as an attack on a nation rather than simply as an act of violence against a woman.

Susan Brownmiller notes that wartime rape receives attention only at critical junctures in a war but is forgotten once the need for public support subsides.

The plight of raped women as casualties of war is given credence only at the emotional moment when the side in danger of annihilation cries out for world attention. When the military histories are written, when the glorious battles for independence become legend, the stories are grossed over, discounted as exaggerated, deemed not serious enough for inclusion in scholarly works. And the women are left with their shame.

Thus, when war-time rape receives public attention it is portrayed not so much as an issue of violence against women but as violence against a nation. Indeed, I would argue that in the discourse of war, wartime rape only makes sense as a crime against a nation's honour. Although there are legal and customary prohibitions against rape, it is not surprising that rape is generally not prosecuted or punished. Once wartime rape gets filtered through the discourse of war and humanitarian law, it becomes almost irrelevant. Everyone knows it goes on, but in the language of war, it becomes an "incidental" act of violence. In a discourse which privileges military necessity, wartime rape or other acts of violence become unfortunate side-effects of a larger military objective geared toward the common aim of military victory.

It is difficult, in this discourse of war, to find room to talk about the effect of war and violence on women. War is ultimately about men and their roles as protectors and heroes. Violence against women, in this framework, will always seem marginal, nominal and of secondary importance. When a soldier dies in war, he is sacrificing his life for home and country. When

136 See Chapter 4, note 66 and accompanying text.
137 "Making Female Bodies the Battlefield" in Mass Rape supra note 71, 181 at 182.
a civilian, generally a woman, dies in war, she is an unfortunate victim whose death was a necessary by-product of the goal for military victory.

In order for rape to make it into the category of crime and on the international agenda, there has to be something unusual about the rape - something other than mere atrocity. The systematic rape of Muslim women in the former Yugoslavia is an example of wartime rape that has transcended notions of "normal" rape and made its way onto the public agenda. Reports of the mass rape of Muslim women as part of a campaign of 'ethnic cleansing' has raised the specter of rape as a tool of genocide. The consequent public outcry has encouraged the involvement of women's groups to address war violence against women in a meaningful way. The question that remains is if the feminist response to this tragedy has in fact significantly challenged the discourse of wartime rape.

IV. WARTIME RAPE IN CONTEXT: BOSNIA REVISITED

Through an exploration of wartime rape and the particular case of the mass rape of Muslim women in Bosnia, I have tried to do two things: (1) draw out the ideological assumptions about women and violence that are imbedded in, and give structure to, international humanitarian law's treatment of rape; and (2) critically analyse feminist theorizing on mass rape. In Chapter 4, I provided a description of the international law framework in place to address atrocities committed in the former Yugoslavia. In this chapter, I have delved deeper into the structure of humanitarian law and laws of war to explore their ideological orientation. I now want to draw those two separate analyses together to place wartime rape, with specific reference to mass rape in Bosnia, in the context not only of international legal structures, but also different structures of oppression that define how mass rape is perceived.
The history of international humanitarian law demonstrates that it is a product of the intersection of military culture and enlightenment theories on the dignity of (man). The result is a system of law which accepts at the outset the right to wage war and sacrifice lives in the name of a higher good. That right, however, is tempered by an obligation to protect individual (primarily male) liberties, including the right to life. While doctrines of military necessity and just war go a long way towards limiting the impact of "humanitarian" considerations on military strategy, there is nonetheless a balancing act that must be struck. How that balance occurs, however, is quite telling about the values implicit in international humanitarian law and the relative power of different groups.

Against this backdrop of international humanitarian law is a general prohibition against rape which is narrowly defined as a crime against the honour or special respect due to women. This construction of wartime rape as not quite an act of violence reinforces the belief that some rapes are not real crimes. Within international law a distinction is made between ordinary rape -- rape that is expected to happen in the normal course of war -- and "real" rape which is rape as an act of violence against a nation. In the context of wartime rape, therefore, the balancing act entailed by military necessity is perhaps not as central as Gardam and af Jochnick and Normand would argue. Wartime rape could never be technically justified as a legitimate policy of war. However, in the case of wartime rape, a distinction is made between random acts of violence that are worthy of prosecution and those that are not. In the vast majority of cases, rape will fall into the latter category.

Gardam and af Jochnick and Normand all argue that international humanitarian law is an instrument of a specific dominant interest -- the military or patriarchy. The example of

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138 The distinction between real and normal rape is based on Susan Estrich's distinction between real and ordinary rape in the domestic law context: *Real Rape* (Cambridge, Mass.: Harvard University Press, 1987)
wartime rape, however, demonstrates that violence against women is filtered through numerous different discourses, all of which affect how wartime rape is understood and confronted at the international level.

The mass rape of Muslim women in Bosnia provides a current example of the intersection of different systems that define how violence against women is perceived and confronted. As discussed in Chapter 4, Muslim women are subjected to different and competing interests. They have been the subject of nationalist rhetoric by the Serbian communities who see them as especially virtuous, and therefore a target of ethnic cleansing policies. In Croatia, they are seen as symbols of another nation's defeat, and therefore something to be pitied but avoided. In the larger international community they are seen as always and only victims.\textsuperscript{139} Within international feminist legal theory, they tend to be depicted as one-dimensional victims who are buffeted by events beyond their control.\textsuperscript{140} And, international law ultimately reinforces the view that their personal suffering is the suffering of the community at large.

The international law structure in place to address the atrocities in Yugoslavia, while representing progress in the development of international law, reinforces the existing characterization of rape as an unfortunate, but incidental part of war. As discussed in Chapter 4, the emphasis on mass rape as ethnic cleansing and genocide has reinforced the distinction between real rape and ordinary rape, thereby legitimating rape as a part of war. This distinction is probably most evident in the comments of the Commission of Experts where

\textsuperscript{139} Mertus, \textit{supra} note 117.

\textsuperscript{140} I would include my own analysis within this description of international feminist legal theory. I have tried to depict Muslim women as negotiating different systems of oppression, rather than as merely victims of those systems. However, I have deliberately avoided more detailed description of Muslim women's experiences during the Bosnian war primarily because there is a dearth of information available at this time. Until Muslim women themselves have had an opportunity to decide how their story will be told, I am reluctant to begin speculating about their experiences.
violence against civilians was divided into two groups: "serious international violations" and incidents that are mere side effects of "military operations directed by military necessity." The almost exclusive focus on rape as crime against humanity because of its ethnic cleansing quality, means that rape is similarly divided into rape that is a normal part of war, and mass rape, which is worthy of prosecution. The development of international humanitarian law in the context of atrocities in Bosnia has in effect, raised the stakes on wartime rape. While it will probably no longer be explicitly defined as a crime of honour, rape will implicitly be defined as a crime only to the extent that it reaches the scale where it can be seen as a concerted attack on a nation.

I am not suggesting by this discussion that international law remedies are futile or that feminist theorizing is ineffective. Rather, I have tried to demonstrate that wartime rape, and the experience of Muslim women is very complex and that complexity needs to be considered. Feminist international law theorists must continually question how we are thinking about law and how we are thinking about women. While I believe international law should be seen as an avenue for addressing atrocities committed in the former Yugoslavia, feminist international law theory should be aware of the ideological context of that law and its consequent strengths and limitations.

141 See: Report of the Commission of Experts, Chapter 4, supra note 82 and accompanying text.
CHAPTER 6
CONCLUDING REMARKS

As often happens, one embarks on a course of study intending to pursue a certain direction but ends up at a different place, often with a different perspective. I suppose that is what scholarship is about. In my case, I intended this thesis to be a balanced exploration of what feminist international law theory says about feminism and what it says about international law; what insights it can bring to international law and what it cannot bring. I have ended up focusing on the relationship between feminist international legal theory and feminist theory generally. As part of this focus, I have concentrated more on the limitations of feminist international legal theory than on its strengths. By way of concluding remarks, then, I would like to briefly comment on the two latent, but perhaps unifying themes of this thesis: the role of law in feminist international legal theory and the promise of feminist international law theory.

While feminist international law theory explores many different facets of international law from sources doctrine to human rights, it is missing a vision of what international law is, the role it plays in women's oppression, and the prospects for reform. To date, most feminist international law theory has focused on international law as a gendered system: privileging men's interests and marginalizing women's.¹ The tendency in this analysis is to view law in relatively static terms as either an instrument of patriarchy or as relatively neutral ground for reform. Missing from this analysis is a conception of the complexity of law as not only an instrument of different interests, but also a sometimes independent system through which

¹Charlesworth, Chinkin and Wright, "Feminist Approaches to International Law" (1991) 85 A.J.I.L 613.
different interests are constituted. Law both reflects and reinforces certain ideologies that define a world view in which women are variably constructed in limited and problematic ways. But law is also a possible arena for waging social struggle. As Carol Smart argues, law has developed unevenly. It is "not a simple tool of patriarchy or capitalism." Nor is it always regressive. "Law both facilitates change and is an obstacle to change." As I will discuss below, feminist international law theory tends to see law as a unified entity without accounting for the different levels at which law affects the lives of women. Law's potential as a site of struggle needs to be assessed in light of the variable and sometimes conflicting roles law plays in women's oppression.

1. Law as One of Several Systems of Oppression

For the most part, feminist international law scholars have treated law as though it were an instrument of male elites, but which paradoxically, was also capable of being reformed to address women's interests. Feminist international law theorists have tended to view international law as a unified whole, applying to women in a relatively uniform fashion. This analysis misses the complex ways in which law interacts with other systems of oppression, affecting women in different ways. For example, as I discussed in Chapter 3, much of feminist international law theory focuses on the ideological division between public and private spheres.

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5I am not suggesting that these theorists see law as equally oppressive for all women. As I have argued in Chapter 3, there is a tendency in this literature to see law's relationship with women as common to all women, but law's impact to vary by degree.
incorporated within international law. That division is highly gendered, it is argued, defining
the public sphere of international law in terms of male interests while relegating women to the
private sphere of state law. The way forward is to redefine the public and private spheres so
that women can seek the protection of international law. The difficulty with this analysis is
that it tends to confirm rather than reject a world view premised on separate sphere ideology.
Feminist international law theory tends to view public and private spheres as static, and
international law's effect as constant. For example, the conception of sovereignty as
necessarily an oppressive doctrine for women misses the way in which sovereignty is a highly
porous concept for countries that lack the economic and political power to enforce it.
Feminist international theory depicts sovereignty as a cemented barrier to women's access to
international law without considering the ways in which sovereignty is negotiated and avoided
in other contexts. This analysis focuses on sovereignty solely as an instrument of patriarchy
and thus misses the complex ways international law affects men and women who are
differently situated in the international social hierarchy. By treating sovereignty as the
principal embodiment of a public/private divide which marginalizes women, feminist
international law confirms the division between public and private spheres. Consequently, that
analysis misses the way other social forces, like colonialism, may erect more significant
barriers to some women's access to international law.

In the context of humanitarian law, I have demonstrated that international law is only one of
several discursive arenas women negotiate. Wartime rape is defined not only through
international humanitarian law, but also through the discourses of nationalism,
ethnicity/religion, patriarchy and militarism. The convergence of these different systems of
oppression means that women's identities are constantly constructed and reconstructed. As
active agents, women engage with these different systems, moving in and out of the
public/private spheres and negotiating the boundaries of their gender identities.
2. Law and Ideology

Within feminist international law theory there is a tendency to miss the complexity of the gender ideologies that are incorporated within international law. For example, a central part of Charlesworth, Chinkin and Wright's analysis of the public/private division within international law is the construction of violence against women as private. The requirement that torture be state sanctioned to be actionable under international law means that the intimate violence suffered by many women goes unrecognized. Wartime rape, however, is an example of a very public (i.e. state sanctioned) act of violence against women which, through a variety of means, is also unrecognized by an international community that is more concerned with militarism than women. The example of wartime rape is interesting for two reasons. First, it demonstrates how international law embodies complex gender ideologies that are not always confined to the notion of separate spheres. As I discussed above, wartime rape provides an example of the multiple systems of oppression women negotiate and through which their identities are constructed in shifting and variable ways.

Second, the example of wartime rape points to the difficulty in using law as an agent of reform when law itself is implicated in women's oppression. Because international humanitarian law legitimates war and violence, using it as an avenue for addressing wartime rape poses the risk that it will also legitimate rape. In Chapter 5, I argued that international humanitarian law and the military culture it reflects construct rape as a normal but unfortunate part of war. The development of international humanitarian law in the context of atrocities in Bosnia plays to, rather than challenges this legitimation of rape. By defining the prohibition against rape as a crime against humanity, international humanitarian law incorporates a distinction between "real" rape that occurs as a policy of ethnic cleansing, and "ordinary" rape, which is an unfortunate but accepted side-effect of war.
So, where does this leave me? Do I conclude that international law is too much an instrument of patriarchal power, and masculine objectives to be the subject of feminist reform? I don't think so. In this thesis I have raised questions about feminist theory within international law in order to continue the process of developing an invigorated, inclusive and meaningful feminism. To reject law as an object of feminist activism and study would be to miss the complex ways women engage with law and its role as a signifier\(^6\) and facilitator of their oppression. Didi Herman has noted that in the context of lesbian and gay activism within Canada, "'law' was resorted to because it was there" and human rights structures were already in place through which lesbian and gay identities emerged.\(^7\) In a similar way, international law already has in place a complex of structures like the United Nations, international human rights, and regional associations. To a large extent those structures define how the international community sees itself. By challenging those structures and the world view they signify, feminist theory has the chance to place women on the international agenda.

Understanding law as a complex, ideological instrument does not mean rejecting law as an object of feminist analysis and activism. It does mean, however, that as feminists we must engage with law from an informed position about the consequences of our efforts. Carol Smart has argued that:

> ... feminism needs to engage with law for purposes other than law reform and with a clear insight into the problems of legitimating a mode of social regulation which is deeply antithetical to the myriad of concerns and interests of women.\(^8\)

In the context of international law, this means considering realistically the relationship between international law and the material reality of women's lives. While feminist theory

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\(^6\)Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 164.

\(^7\)"Beyond the Right Debate" (1993) 2 Social & Legal Studies 25.

\(^8\)Smart, *The Power of Law, supra* note 6 at 164.
should -- in fact, must -- engage with international law, this should be seen as only one of many avenues for addressing the disadvantaged position of women throughout the world. International law is perhaps not so much an agent of social reform as an important signifier of women's global oppression. Taking apart the gendered aspects of international law is therefore an important step in a broad-based assault on the conditions of women's oppression.

The strength of feminist international law theory lies in its ability to challenge the claims to truth made by international law discourse. Operating from the margins of international law, feminists challenge the universality of law and its claim to justice. By placing women at the centre of their analysis, feminist international scholars have challenged what is and is not claimed as international law. By questioning the very contours and structure of international law, feminist theory represents a possible avenue for goading international law out of its own theoretical stagnation. The task for, and the promise of, feminist international lawyers:

is to challenge the objectivity of the existing male-defined international order so as to weaken its imaginative grip; to point out the blind spots of more radical theories; and to insist on inclusion in a new agenda for international law.

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9Ibid.


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