# FEMINIST APPROACHES TO INTERNATIONAL LAW: AN OVERVIEW

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## DECLARATION

I declare that the dissertation entitled, **"FEMINIST APPROACHES TO INTERNATIONAL LAW: AN OVERVIEW"**, submitted by me for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my original work. This dissertation has not been previously published or submitted for any other degree of this University or any other University.

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## CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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*To my parents with*

*a deep sense of gratitude and affection*

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Miranda Das

*Miranda Das*

## ABBREVIATIONS

| | |
|---|---|
| AIDS | Acquired Immunodeficiency Syndrome |
| ANC | African National Congress |
| ASEAN | Association of South East Asian Nations |
| CEDAW | Convention on the Elimination of Discrimination against Women |
| CLS | Critical Legal Studies |
| CSW | Commission on the Status of Women |
| FAO | Food and Agricultural Organisation |
| HIV | Human Immunodeficiency Virus |
| ICAO | International Civil Aviation Organisation |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for former Yugoslavia |
| IHL | International Humanitarian Law |
| IHRL | International Human Rights Law |
| ILC | International Law Commission |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |
| IMO | International Maritime Organisation |
| NGO | Non-Governmental Organisation |
| NIEO | New International Economic Order |
| OAS | Organisation of American States |

| | |
|---|---|
| **OAU** | **Organisation of African Unity** |
| **PCIJ** | **Permanent Court of International Justice** |
| **PLO** | **Palestine Liberation Organisation** |
| **SAARC** | **South Asian Association for Regional Co-operation** |
| **SWAPO** | **South West Africa People's Organisation** |
| **TWAIL** | **Third World Approach to International Law** |
| **USA** | **United States of America** |
| **UN** | **United Nations** |
| **WHO** | **World Health Organisation** |

# CHAPTER – I

# INTRODUCTION

# CHAPTER- I

# INTRODUCTION

## 1. Introduction

In recent years, international law has come under the scrutiny of feminist scholarship which has challenged its claim to objectivity and neutrality.[1] The feminist approach to international law is viewed as 'a mode of analysis, a method of approaching life and politics, a way of asking questions and seeking for answers, in the specific context of international law'.[2]

The feminist approach to international law is advanced by a group of scholars who share the common minimum aspiration of looking at the history, structure and process of international law from the standpoint of women. These scholars argue that the development of international law is characterised by the absence of women. It is therefore not adequately concerned with issues that impact their lives with the result that it has produced a narrow and inadequate jurisprudence. As such, feminist scholarship seeks to question the limited base of international law's claim to universality and neutrality. Feminist international law scholarship has demanded greater recognition and representation of women's voices and experiences and also that greater attention be given to issues affecting women in the mainstream literature.

The feminist approach to international law is not a monolithic approach but is expressive of a diversity of thought. There are different strands of feminist international law scholarship and these include liberal, cultural, radical, post-modern and third world feminism. Despite the fact that they are diverse while proposing an alternative standpoint, the different feminist approaches pinpoint the failure on the

[1] D. E. Buss (1997), "Going Global: Feminist Theory, International Law, and the Public/ Private Divide" in S. B. Boyd (ed.), *Challenging the Public/ Private Divide: Feminism, Law and Public Policy*, Canada: University of Toronto Press, p. 360.

[2] J. O'Brien (2002), *International Law*, USA & UK: Cavendish Publishing Limited, p. 53.

part of the traditional system of international law in taking cognizance of women's experiences.

The application of feminist approach to international law has been characterised by a focus not just on international law as a system of patriarchal oppression, but also as a body of knowledge. According to feminist scholarship, international law rests on a series of distinctions. These include objective/ subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected and so on. These binary oppositions are gendered in nature, where the first term signifies 'male' characteristics and the 'second' female. The male side is given more value and privilege, while the female side is devalued.

Feminist international law scholars seek to build theory from the shared experiences of women's lives, from their personal testimonies, and other revelatory techniques. For instance, the experiences of women that are victims of domestic violence have gradually found their way into legal debate in the form of a United Nations General Assembly resolution. It has been the vocalisation of women's pain that has led to the recognition of 'new' legal wrongs such as sexual harassment. Moreover, feminists bring a different epistemological outlook to the table that helps in dispute resolution. Feminist legal scholars have drawn in particular on the works of psychologist Carol Gilligan to investigate whether there is a distinctively feminine way of dispute resolution. Gilligan's research indicates that women tend to invoke an 'ethic of care' and see things in terms of relationship, responsibility, caring, context and communication. Whereas men rely on an 'ethic of rights' or 'justice' and analyse problems in abstract terms of right and wrong, fairness, logic, and rationality, ignoring context and relationships. Gilligan's work has been used to critically analyse legal reasoning, which lays claim to abstract, objective decision making. Feminists argue that if legal reasoning simply reproduces a masculine type of reasoning, then its objective and authority are reduced. As such, they have been able to describe the possibility of an equally valid 'feminine' reasoning based on factors usually considered irrelevant to legal thinking. Alternative, non litigious, dispute resolution

and non- confrontational negotiation techniques to international dispute resolution are proposed as example of such an approach.[3]

Feminist scholars have also questioned the very foundations of international law in terms of its sources and subjects. In so far as sources are concerned, the feminist focus has been mainly on customs and treaties and the whole phenomenon of 'soft law'. Most of the legal texts concerned with the rights of women fall within the category of soft law. Charlesworth and Chinkin argue that issues concerning women suffer a double marginalisation in terms of traditional law-making. This is because they are seen as the 'soft' issues of human rights and aré developed through soft modalities of law-making that allows states to appear to accept such principles while minimising their legal commitments.[4] They are also of the opinion that customs and treaties as sources of international law manifest the will of powerful actors, which are mostly men.

Talking about subjects of international law, it is to be noted that states and international organisations are the primary subjects of international law. But in both states and international organisations, there is a striking invisibility of women. States are patriarchal in structure excluding women from elite positions and decision making roles. The structures of international organisations replicate those of states, restricting women to insignificant or subordinate roles.[5] Furthermore, there is no international law mechanism for denying a state the right to participate fully in the international system on the grounds of gender discrimination. As long as a state maintains its defined territory, permanent population and some form of government with the capacity to engage in relations with other states, its statehood is more or less unquestionable under international law.

[3] H. Charlesworth, C. Chinkin and S. Wright (1991), "Feminist Approaches to International Law", *The American Journal of International Law*, Vol. 85, No. 4, p. 616.

[4] H. Charlesworth and C. Chinkin (2000), *The boundaries of international law: A feminist analysis*, Manchester (UK): Manchester University Press, p. 66.

[5] H. Charlesworth, C. Chinkin and S. Wright (1991), "Feminist Approaches to International Law", *The American Journal of International Law*, Vol. 85, No. 4, p. 622.

Feminist scholars have also been successful in documenting the absence and exclusion of women from international institutions. International institutions are seen as functional extension of states that allow them to act collectively to achieve their objectives. For example in the United Nations, which has near universal membership, this universality does not apply to women. Similarly, law-making institutions like International Law Commission and International Court of Justice is also characterised by serious under-representation of women.

International human rights law and international humanitarian law have also been a focus of feminist international law scholarship. This is because they have a direct impact on the lives of women. It is believed that the rules of human rights law and humanitarian law have failed to protect women's interest.

If we look at international humanitarian law, it can be seen that women are the most obvious victims of armed conflict. Yet international humanitarian law has been insensitive to the experiences of women. International humanitarian law provides a detailed legal regime protecting combatants in international conflicts (who are mostly men), whereas they provides a considerably weaker protection to the civilian population (consisting mostly women and children) during non-international or internal conflicts. Furthermore, from the feminist perspective, international humanitarian law is narrow and limited in its scope. It is protective in nature rather than being prohibitive. For example, if we take a look at Article 27 of the Fourth Geneva Convention, it becomes clear that the article places an obligation to protect women in international armed conflict "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". As such, this article provides for protection and not prohibition of violence against women. Moreover, it also provides for protection of women from sexual crimes because they implicate women's honour, and not because they constitute violence.

The Statute of the International Criminal Court (ICC), which was proclaimed to be an advanced enumeration of gender based crimes, has failed to advance the prosecution of gender based crimes. This failure on the part of ICC has resulted in greater indulgence of states in gender specific crimes.

Although, feminist scholarship was earlier confined to only human rights law and humanitarian law, its scope has increased in recent times. Today, international economic law, international environmental law and even international law relating to terrorism have started attracting feminist attention. To sum up, feminist international law scholarship aims to deconstruct international law to investigate the ways in which international law has brushed aside the injustices of women's situation around the world and to reconstruct international law so that it responds to these injustices.

In fact, the available literature indicates that feminist international law scholarship is concerned with analysing international legal structures, with identifying their effects on the condition of women and with suggesting reforms that could correct gender injustices and exploitation. However, figuring out what it means to achieve gender equality in international law's diverse institutions, practices and doctrines is the greatest challenge for feminist international law scholarship.

## 2. Objective and scope of the study

In the present dissertation an endeavour will be made to provide an overview of the feminist approaches to international law. For this, an attempt will be made to analyse feminism and to show how international law gradually opens up to feminist scholarship. An evaluation of the sources and subjects of international law from feminist perspective will also be made. In so far as sources are concerned, focus will be on customs, treaties and the whole phenomenon of 'soft law'. The primary subjects of international law like states and international organisations will also be examined from feminist perspective. An attempt will also be made to discuss the gendered nature of international humanitarian law and to see if feminist analysis has made any positive change in it. To sum up, attempt will be made to see if feminist international law scholarship has made any difference within the mainstream of the discipline.

## 3. Limitations of the study

The present dissertation will be limited in so far as it will not provide any in - depth feminist critique of any international legal regime other than international humanitarian law. Moreover, the dissertation will also not provide any case - study, but will only make reference to cases as and when necessary. The present dissertation, however, will provide a basic understanding of feminist international law scholarship. In other words, the difference of the present dissertation lies in the fact that it will provide a general survey of the feminist approaches to international law, in order to show the difference (if any) feminist analysis has made within mainstream international law scholarship.

## 4. Research Questions

• What has been the historical contribution of feminist approaches to international legal scholarship?

• What are the areas of international law that have been the main focus of feminist scholars?

• Are sources of international law structured to exclude the concerns of women?

• Does the mainstream discussion on subjects of international law pay inadequate attention to the patriarchal structure of its principal subject, i.e., states?

• Are the existing international legal instruments for the protection of women during armed conflicts adequate to address their concerns? If not then what can be done to improve them?

## 5. Hypotheses

• Gender concerns within international law are not sufficiently addressed by mainstream international law scholarship. As such, incorporation of feminist voices will produce more inclusive and effective legal regimes.

• The areas of sources and subjects of international law are structured to exclude the experiences and concerns of women.

• Existing international legal frameworks for protection of women during armed conflict are not adequate because they are merely protective in nature.

## 6. Methodology

The present study will be a doctrinaire one, materials for which will be collected from both primary and secondary sources. Reliance will be placed on treaties, declarations, and resolutions pertaining to the rights of women along with secondary source materials like books, articles from academic journals and relevant website materials. Descriptive, analytical, and evaluative methods will be adopted in the study to draw inferences and conclusions.

## 7. Chapterisations

The dissertation is divided into four further chapters.

Chapter II is devoted to *the history of feminist scholarship in international law.* Accordingly, the Chapter is divided into two parts. The first part discusses the history of feminist international law scholarship. The second part looks at the main concerns of feminist scholars within international law and how these concerns are addressed. The various schools of thought within feminist international legal scholarship is also examined, with particular reference to distinction between first world feminisms and third world feminisms.

Chapter III deals with *the feminist approach to sources and subjects of international law.* In this chapter a feminist analysis of the sources and subjects of international law is provided. An attempt is made to critique the very foundations of international law in terms of sources and subjects from the feminist approach.

Chapter IV presents *the feminist approach to international humanitarian law.* In this chapter, an attempt is made to analyse international humanitarian law from feminist approach and to see if feminist analysis has made any significant change in it. The chapter also examines the existing legal instruments pertaining to protection of

women during armed conflicts in order to see if these instruments are adequate enough.

Chapter V contains *conclusions* and summarises the major findings of the present study. It also includes concluding observations and suggestions.

# CHAPTER – II

# HISTORY OF FEMINIST SCHOLARSHIP IN INTERNATIONAL LAW

# CHAPTER – II

# HISTORY OF FEMINIST SCHOLARSHIP IN INTERNATIONAL LAW

## 1. Introduction

There is a need today to introduce the students of international law to the feminist approaches to international law exploring the nature, character, and subject matter of international law. This is important because the character of contemporary international law is essentially masculine, with no place for women. Issues of gender discrimination are very rarely studied on an international plane, although there is comparatively deep sensitivity to concerns of racial and cultural discrimination. Within international law, women's issues are often ignored as either too partial or too domestic to come within its ambit.[1] As such, feminist international law scholarship has much to offer both as critique of masculine legal theory, and also as theorising about law from the perspective of the women who have traditionally been excluded from its discourse of empowerment.

Feminist approaches to international law are advanced by a group of scholars who attempt to look at the history, structure and process of international law and institutions from the perspective of women. They are different from mainstream international law scholarship because they use the category of gender in their analysis of international law. Feminist scholars have demanded not only greater representation of women in the international fora and also demanded that greater attention be given to issues affecting women in mainstream international law literature.

Feminism has been part of society for over a century. This phenomenon is responsible for social change through challenging the inherent biases and oppressions against

[1] D. Buss and A. Manji (ed.) (2005), *International Law: Modern Feminist Approaches*, North America: Hart Publishing, p. v.

women. However, in the field of international law, feminism came to the fore only after the Critical Legal Studies movement in the nineteen eighties.[2]

Although initially viewed with scepticism, feminist scholarship in international law has, since 1990s evolved and expanded to the point where it appears to be an accepted part of the legal academy. Room is made for feminists to sit on panels at the main international law conferences, feminist articles appear, although less frequently in mainstream international law journals, and topics of particular concern to feminist legal scholars, like violence against women, occasionally make it into international legal textbooks.[3]

In this background, an attempt has been made in this chapter to trace the history of feminist scholarship in international law. This chapter has been divided into two parts. In the first part, an attempt has been made to explain what feminist analysis means, followed by history of feminist scholarship within international law. The second part addresses the main concerns of feminist scholars within international law and also various schools of thought within feminist international legal scholarship. A detailed discussion on the distinction between third world feminism and first world feminism has also been provided. Finally, the chapter ends with a description of the distinctive character of feminist approaches.

## 2. What is feminist analysis?

Before discussing what feminist analysis means, it is essential to mention that feminist analysis has begun in international law only recently. On the question of why gender has not previously been an issue in international law, Charlesworth points out certain possible reasons. The first reason is the lack of women scholars and practitioners within international law. Second, the abstract nature of the concept and subject of international law do not seem to affect on women's lives directly. Third,

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[2]S. Robbert, "Feminism And Feminist Research Methodology In Law", *Article Dashboard*, [Online: web] Accessed on 21 January 2011, URL: http://www.articledashboard.com/Article/Feminism-and-feminist-research-methodology-in-law/1380206.

[3] D. Buss and A. Manji (ed.) (2005), *International Law: Modern Feminist Approaches*, North America: Hart Publishing, p. 1.

she points to the inhospitability of the positivist school of international legal theory to feminist inquiry. However, since 1990s, gender has increasingly come to be used as a category of analysis.[4]

Feminist scholarship is expressive of significant diversity of thought and derives from a range of different political, cultural, and philosophical traditions. These include liberalism, socialism and Marxism, American critical legal studies and critical race theory, post structuralism and postmodernism and psychoanalytic perspectives. However, despite the breadth and variety of feminist scholarship, it is still possible to identify some common features of feminist analysis of international law and to do so without essentializing feminism or denying the complexity and contestability of the features thus described. There is, at least, threefold common feature. First, feminist legal scholars seek to highlight and explore the gendered content of law. Second, they are part of cross-disciplinary feminist effort to challenge traditional understanding of the social, legal, cultural and epistemological order by placing women, their individual and shared experience, at the centre of their scholarship. Third, feminist legal scholars attempt to expose how international law leads to women's disadvantageous position with a view to bringing about transformative social and political change.[5]

Generally speaking, to adopt a feminist perspective means to bring a gendered perception of legal and social arrangements to bear upon a largely gender-neutral understanding of them. The objective is to highlight the gendered assumptions embedded in such arrangements, assumptions too often rendered invisible by the allegedly objective analysis of mainstream scholarship. Feminism thus presupposes that gender has a much greater structural and /or significance than is commonly assumed, a significance which is ideologically but not practically diminished by its relative invisibility. In this sense, feminism purports to offer a better understanding of the legal order by addressing aspects which have hitherto been ignored or

[4] H. Charlesworth (1993), "Alienating Oscar? Feminist Analysis of International Law" in D. G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, p. 2.

[5] J. Conaghan (2000), "Reassessing the Feminist Theoretical Project in Law", *Journal of law and society*, Vol. 27, No. 3, pp. 358-359.

misrepresented, while at the same time, countering the ideological effects to which such misperceptions give rise.[6]

While discussing feminist analysis, it is essential to throw some light on the term 'feminism'. It is often seen that the question 'what is feminism?' has little meaning for both feminists and non- feminists. This is because the meaning of feminism has always been taken for granted. So that as it may, there is a consensus that at the very least a feminist is someone who holds that women suffer discrimination because of their sex. However, this understanding is only partially true as feminism is not restricted to female gender alone. The central focus of feminism is on challenging the social construction of gender. Therefore the various divisions that are associated with these constructions are considered as a crucial part of the phenomenon.[7]

It should also be noted that women's rights organisations was not, in general, in the late sixties and early seventies, called feminism. Feminism was a position adopted by and ascribed to particular groups. In the writing of feminist history the broad view which predominates is that feminism is usually defined as active desire to change women's position in society. In so far as international law is concerned, feminism is viewed as a 'mode of analysis, a method of approaching life and politics, a way of asking questions and seeking for answers in the specific context of international law'.[8]

Within international law, feminist analysis sets out to show how gender is both ignored and enshrined in international legal theory and practice by highlighting the ways in which it is imitated and constructed in international legal discourse. One approach involves analysis of how women are disadvantaged by rules formally complying with the rule of law. The gist of such work is to demonstrate how 'gender-neutral' law can impact upon men and women differentially. Another closely related approach considers the extent to which legal concepts are gendered not just in their

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[6] Ibid. p.360.

[7]S. Robbert, "Feminism And Feminist Research Methodology In Law", *Article Dashboard*, [Online: web] Accessed on 21 January 2011, URL: http://www.articledashboard.com/Article/Feminism-and-feminist-research-methodology-in-law/1380206.

[8] J. O'Brien (2002), *International Law*, USA and Great Britain: Cavendish Publishing Limited, p. 53.

application, but also in their meaning and scope. Yet another feminist approach examines the numerous ways in which international law constructs gender by invoking images of 'women', which include the good battered wife, the bad mother, the deserving and undeserving homemaker, the real rape victim and so on. These images serve to coerce women, both by penalising them for corresponding or failing to correspond to the images invoked by international law and by forcing them into believing that certain identities are natural and inevitable.[9]

## 3. History of feminist scholarship within international law

In order to understand the history of feminism in international law, one has to first look at history of feminism in general, followed by history of feminism within international relations and then history of feminism within international law. This is because feminist scholarship within international law is a part of a larger feminist academia.

In the Western context, the debate concerning the status of women dates back to the Ancient Greeks. Plato and Aristotle both sought to analyse the actual and appropriate role of women in society and their writing may be seen to include many of the ideas which continue to exercise feminist scholarship.[10] However, it is eighteenth, nineteenth and early twentieth century feminist campaigns for the elimination of discriminatory laws which prevented women from participating fully in civic life which mark the origins of contemporary feminist thought. The struggle for the franchise and the battle to be admitted to universities and the profession represented a seminally important campaign, which ultimately led to largely successful movement on which subsequent work towards the full emancipation of society was founded.

Similarly in Asia as well, feminist consciousness arose during periods of political consciousness, especially in the nineteenth and early twentieth century, in the form of

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[9] J. Conaghan (2000), "Reassessing the Feminist Theoretical Project in Law", *Journal of law and society*, Vol. 27, No.3, pp. 360-61.

[10] H. Barnett (1998), *Introduction to Feminist Jurisprudence*, London: Cavendish Publishing Limited, p. 3.

struggle against external foreign rule and against the local tyranny of feudal monarchs.[11] As for instance in India, the woman question has historically been linked to anti-imperialist struggles whether for nationhood or an authentic Indian identity. The voices against women's sub-ordination during this period took the form of a demand for the possibility of widow re-marriage, for a ban on polygamy, the practices of sati and of purdah, and demands for the education and legal emancipation of women.[12] In this sense, the removal of practices and customs that resulted in oppression of women was part of the larger agenda of social reform. It is noteworthy that Indian women were in a better position than that of Western women. This can be argued because after India achieved independence and adopted democratic system of government, women were granted political status fully equal to that of men. As such, Suma Chitnis argues that "Indian women did not have to bear the kind of injustices that women in the West had to suffer because of the continuing gap between political ideals and realities"[13]

In the global level, the appeal for justice and equality for women was made in the closing paragraphs of Mary Wollstonecraft's *A Vindication of the Rights of Women*, published in 1792[14] which gave rise to shock and admiration. Although there had been isolated female voices in the long running and often discreet debate about women, Wollstonecraft injected it with a new passion and urgency. She had indicated that an authentic feminist consciousness was emerging.

In the century after Wollstonecraft's death in 1797, the yell for change grew steadily louder. In the middle years of the 19th century, the movement gained an energetic supporter in John Stuart Mill, who argued in *The Subjection of Women* for the need to

[11] K. Bhasin and N. S. Khan (2005), "Some Question on Feminism and its Relevance in South Asia" in M. Chaudhuri (ed.), *Feminism in India: Issues in Contemporary Indian Feminism*, New York: Zed, p. 7.

[12] Ibid.

[13] S. Chitnis (2005), "Feminism: Indian Ethos and Indian Convictions" in M. Chaudhuri (ed.), *Feminism in India: Issues in Contemporary Indian Feminism*, New York: Zed, p. 11.

[14] M. Wollstonecraft (1792), *Vindication of the Rights of Women*, New York: WW Norton.

replace the legal subordination of one sex to the other by a principle of perfect equality.

The period between First World War and Second World War and also subsequent years was a quiet phase for feminist endeavours. However, the movement was revitalised in 1949, when Simone De Beauvoir's *The Second Sex* was published.[15] Simone De Beauvoir's work still forms the foundation for much feminist analysis and a focus for differing approaches to the question of gender and its significance.[16] In so far as history of feminism is concerned, Simone De Beauvoir maintains that the first time we see a woman take up her pen in defence of her sex was Christine de Pizan, who wrote *Epitre au Dieu d' Amour* (Epistle to the God of Love) in the 15th century.[17]

Feminist scholars in the liberating 1960s were dedicated to the political struggle for the equality of women in the family, in the work place and in politics. By identifying sites of exclusion and oppression, feminist scholars, whether writing from a social or political science or a philosophical base, demonstrated the supremacy which men have traditionally assumed and maintained in society.

In so far as international relations is concerned, feminism gained entry within the discipline during 1980s. Although, feminism was greatly ignored initially. Yet, over the last few decades, it has emerged as important critical approach to the study of international relations.

The first wave of feminist international relations was focused on challenging the discipline and reformulating the theories and improving the knowledge of global politics through the accommodation of gender and women's experiences. The second wave of feminist international relations, on the other hand, was mainly concerned with military prostitution, domestic service, diplomatic households and so on.

[15] S. De Beauvoir, *The Second Sex* was originally published in 1949, and (trans. and ed.) by H. M. Prashley, London: Picador, in 1989.

[16] H. Barnett (1998), *Introduction to Feminist Jurisprudence*, London: Cavendish Publishing Limited, p. 4.

[17] S. De Beauvoir (1949), *The Second Sex*, trans. & ed. by H. M. Parshley (1989), London: Picador, p. 136.

Through these areas, feminists mainly attempted to highlight the important roles that women play in international relations.

Started in the 1980s, feminist international relations was accepted as a rich, complicated and often contradictory body of research in the study of the discipline at the end of the twentieth century.

Feminist legal scholarship became a natural and integral part of this larger feminist movement.[18] Legal scholars first began generating a body of what has come to be called as feminist legal theory or 'feminist jurisprudence' in the early 1970s. However, the term 'feminist jurisprudence' was first applied to this school of thought in the early 1980s. The emergence of this new school was attributed to a natural extension of the engagement of female voices and values to one more area of discourse. Legal scholars were influenced, then, by the development in other disciplines, like sociology, psychology, philosophy, theology and so on.[19] Feminist jurisprudence is both simultaneously challenging and alternative, and reflects the demand of women- irrespective of race, class, age, or ability- to be recognised as an equal partner to the social contract which is underpinned.[20]

The birth of this discipline was attributed to the large number of women who began entering law schools in the late 1960s. It was believed that these female law students questioned why the curriculum was silent on issues that mattered deeply to them as women, that is, unequal pay and job opportunities, rape and sexual assault, battering of wives, reproduction, and so on. In response to these women's concern, the law schools initiated in the late 1960s and early 1970s the first course entitled "Women

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[18]H. Barnett (1998), *Introduction to Feminist Jurisprudence*, London: Cavendish Publishing Limited, p. 4.

[19] D. K. Weisberg (ed.) (1993), *Feminist Legal Theory: Foundations*, Philadelphia: Temple University Press, p. xv.

[20]H. Barnett (1998), *Introduction to Feminist Jurisprudence*, London: Cavendish Publishing Limited, p. 4.

and the Law". The first shift in nomenclature occurred in the mid 1970s when many of these law schools courses were renamed "Sex-Based Discrimination".[21]

There is believed to be another source of origin for feminist legal theory – the critical legal studies (CLS) movement. Some contemporary feminist legal theorists subscribe to the early principles of the critical legal studies movement in the 1970s, including the 'basic critique of the inherent logic of the law, the indeterminacy and manipulability of doctrine, the role of law in legitimating particular social relations, the illegitimate hierarchies created by law and legal institutions'. They incorporated the insights of CLS into feminist scholarship.

Feminist legal scholarship is frequently presented as having differing phases or waves, although none of these is totally distinct or isolated from other phases. First phase feminism which may be dated from mid Victorian times, although most prominently from the 1960s through the mid 1980s, is dedicated to exposing the features which exclude women from public life. The quest is for equality, whether in employment generally, or in the professions or in politics. First phase feminists worked within the system in order to remove the inequalities inherent in the system, without necessarily questioning the system itself. In other words, the objection voiced by feminists in this phase was to not law per se but to the law which operated to the exclusion or disadvantage of women.

Second phase feminism which dominated the late 1970s and 1980s, addressed not so much the substantive legal inequalities under which women exist but rather the legal and societal structure which perpetuates inequalities. Here the focus is less on the male monopoly of law and the related inequalities of women, but on understanding the deep seated male orientation which infects all its practices. For second phase feminists, of differing, political persuasions, the root problem with law lies in its untrue impartiality, objectivity and rationality. By assuming gender neutral language, law masks the extent to which law is penetrating by constructs, male standards. It was

[21] D. K .Weisberg (ed.) (1993), *Feminist Legal Theory: Foundations*, Philadelphia: Temple University Press, p. xvi.

believed that if women are to be reasonable within the legal meaning of the term, they must adopt the male standard of reasonableness.

Third phase feminism goes much beyond the analysis of law as male monopoly, and questions law's claim to objectivity and rationality. Third phase feminism questions whether- as second phase feminists pointed- law and legal systems operate in an invariably sexist manner. The perception of third phase feminists is that while law is gendered, this does not necessarily mean that law operates consistently, inevitably or uniformly to promote male interests. Rather, law is too complicated a phenomenon to be portrayed in its holistic manner. The approach of third phase feminists is one which necessarily rejects the grand theories of second phase feminisms and argues that law is the reflection of the society it serves and is as complex as that society.

The current phase of feminist reflects both the rejection of 'grand theory' and the uncertainties and doubts concerning the role of law. Arising out of the late 1980s and continuing through the 1990s, feminists adopt postmodernist ideology which questions all 'meta- narratives' and denies the validity of global explanations.

Accordingly, and as is evident from the above mentioned discussion, it cannot be assumed that feminist legal scholars adopt a united stance in relation to their subject over and above the unifying desire and quest for equality. As such, 'feminist jurisprudence' is an umbrella concept and it includes liberal feminists, cultural feminists, socialist feminists, Marxist feminists, radical feminists and feminists who centre their scholarship on particular issues raised by race and gender orientation.

The breadth of the avenues of inquiry should is understandable in a post modern era in which traditional modes of thought about society and law have come under analytical scrutiny, leading to a denial that society can be understood through 'grand theories' which have hitherto been used to explain the world. Fragmentation, multiplicity and uncertainty all portray postmodern thought. Within feminist scholarship, postmodernist approach challenges the notion that women can be encapsulated within the some single legal theory; denies that the interests of all women are the same, as if there is some 'essential women' representing the

characteristics and needs of every woman, irrespective of age, race or class. There accordingly exists in recent times a rich diversity in feminist writings,[22] a detailed discussion of which will be made in the latter part of this chapter.

In one sense, the concern with the treatment of women by the legal system is not new. Although feminist voices existed centuries prior to the 'first wave' of organised feminism in the United States occurred in the mid-nineteenth century when feminists united to fight for the vote, for married women's property acts, for custody of their children, and for other legal rights. The enfranchisement of women in 1920 is thought to have marked the end of this wave.[23]

Over the last 40 years feminist perspectives on law have increasingly gained ground within the legal academy. Although it was initially received with scepticism as a 'political' rather than 'academic' engagement with law, yet it has become, by the start of the 1990s, a significant body of legal scholarship.[24] Started in the 1990s, feminist scholarship on international law has developed and expanded to the point where it appears to be an accepted part of the legal academy. In scholarly terms, 1990s witnessed an impressive publication of feminist research and writing in the international law field.[25]

## 4. Feminist concerns within international law

Feminist scholarships have twofold concerns within international law. One is deconstruction of the international legal system to investigate whether international law has adequately responded to the injustices of women's situation around the world.

[22] H. Barnett (1998), *Introduction to Feminist Jurisprudence*, London: Cavendish Publishing Limited, pp. 5- 8.

[23] D. K. Weisberg (ed.) (1993), *Feminist Legal Theory: Foundations*, Philadelphia: Temple University Press, p. xv.

[24] J. Conaghan (2000), "Reassessing the Feminist Theoretical Project in Law", *Journal of Law and Society*, Vol. 27, No.3, p. 352.

[25] D. Buss and A. Manji (ed.) (2005), *International Law: Modern Feminist Approaches*, North America: Hart Publishing, p. 01

And the second is the reconstruction of international law so that it can respond to these injustices.

In so far as deconstruction of international law is concerned, feminist international law scholarship has developed along two different but compatible lines. The first has been an examination and deconstruction of various international legal regimes, more particularly international human rights law and international humanitarian law. These legal regimes are believed to be directed to the needs of men, thereby excluding women from their scope and effect. Secondly, feminist international law scholarship has gone beyond looking at particular legal regimes to suggest deconstruction of international legal doctrines and structures generally.[26] As such, the central concern of much of the feminist scholarship in the 1990s was why international law was not doing more to address the inequality and oppression of women. They focused on the structural bias of international law, the way in which the discipline's doctrinal exercises position women's inequality as outside international law's concern.

Believing that international law was structurally biased, then the task was not for women to be included within a slightly reformed international law. A more fundamentally restructuring process was required. Given this, feminist international law scholarship undertakes to reconstruct international law. In fact, the objective and scope of feminist international law literature indicates a continuous effort to engage with, and even rewrite, the disciplinary categories of international law.[27]

However, the reconstruction of the system of international law is a more difficult task. This is because it requires changing of the conceptual foundations of international law. Such a task seems easier in areas such as history and anthropology which deal directly with individuals in society. International law, like international relations theory is premised on a separation of the domestic and the international. The tentative

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[26] D. E. Buss (1997), "Going Global: Feminist Theory, International, and the Public/ Private Divide" in S. B. Boyd (ed.), *Challenging the Public/ Private Divide: Feminism, Law and Public Policy*, Canada: University of Toronto Press, p. 362.

[27] D. Buss and A. Manji (ed.) (2005), *International Law: Modern Feminist Approaches*, North America: Hart Publishing, p. 02.

and partial nature of feminist reconstruction is inevitable. While critical male international law theorists can aim to produce flawless alternative accounts of the international legal order, feminist international lawyers must acknowledge the many flaws and tensions in their account.[28]

Feminist legal theory has link to different schools of feminism. An understanding of the nature and underlying assumptions of these philosophical schools is important in understanding the epistemological strand of feminist legal theory.[29]

### 5. Various schools of thought within feminism

Feminist theories are diverse, but they all tend to be concerned with the silencing of women and the failure of the traditional system of international law to accommodate women's experiences. Feminist theories can be presented in different ways. These include liberal, cultural, radical, post-modern and third world feminism. It should be noted that these different categories within feminism is not distinct but overlap each other in some way.

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#### 5.1 Liberal feminism

Liberal feminism mainly aims to achieve equality of treatment between women and men. They mainly argue that women be treated in the same way as a similarly situated men. However, critics argue that this approach of insisting that women and men be treated similarly falters when women and men are not in the same position either because of physical or because of structural disadvantages. Moreover, the similar treatment theme in liberal feminism requires women to conform to a male-defined world. Apart from this limited acknowledgement of the need for structural change to achieve equality, liberal feminists do not generally regard the legal system as

[28] H. Charlesworth (1993), "Alienating Oscar? Feminist Analysis of International Law" in D. G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, pp. 12-13.

[29] D. K. Weisberg (ed.) (1993), *Feminist Legal Theory: Foundations*, Philadelphia: Temple University Press, p. xviii.

contributing to the inferior position of women. In short, they see male-centredness as a methodological bias in all disciplines which, once identified, can be eradicated.

### 5.2 Cultural feminism

Cultural feminism is concerned with the identification of qualities and perspectives identified as particular to women. They believe that certain qualities like love, caring, emotion and so on are inherently attached to women. As such, epistemologically, cultural feminism is a 'standpoint' theory that emphasises the importance of knowledge based upon experience and asserts that women's subjugated position allows them to formulate more complete and accurate accounts of nature and social life – 'morally and scientifically' preferable to those produced by men.[30] They also argue that with the fundamental male orientation of law, traditional forms of legal reform are of limited utility. Indeed the language of equal right and equal opportunities and the strategies of litigation, advocacy and lobbying tacitly reinforce the basic organisation of society.

### 5.3 Radical feminism

Radical feminism explains women's inequality, both politically and sexually, as the product of domination of women by men. Radical feminism is epistemologically also a standpoint theory that attempts to outline a method for constructing effective knowledge from the insights of women's experience. Radical feminism is different from cultural feminism. It believes that qualities such as caring and conciliation have been imposed on women by the structure of patriarchal societies and are based on a male view of personhood.

### 5.4 Post-modern feminism

Post-modern feminism is sceptical of modernist, universal theoretical explanation of the oppression of women and embraces the fractured identities of women. Post-modern feminism argues that international law does not operate in a monolithic way

[30] S. Harding (1986), *The Science Question in Feminism*. Ithaca: Cornell University Press, p. 25.

to oppress women and advantage men. They are concerned with the specific operation of law and the particular context of women. In short, this approach emphasises that oppression of women is always contextual.

### 5.5 Third world feminism(s)

The term 'third world feminism' is used to refer to the approaches developed by women in the Third World and women of colour in the First World countries. These approaches have taken many different forms, responding to particular historical contexts and in many cases are based on a long history of often violent nationalist struggle. Many third world feminists have become increasingly critical of the attempted wholesale application of Western feminist theories to their communities and societies and in particular the liberal feminist emphasis on the removal of sex discrimination. They have argued that while gender and class underline the oppression of women in the West, third world women also have to cope with oppression based on race and imperialism.

To sum up, it may be noted that amongst the feminist scholarship in international law, there are a number of approaches. These include liberal feminists who stress the need for non-discrimination and equality of opportunity, cultural feminists who point to the male dominance within the international legal order, radical feminists who stress the need for legal action as method of remedying wrongs against women, post-modern feminists who stress the need for diversity of thought within feminist legal scholarship, and third world feminists who are concerned with problems of economic and racial exploitation, illiteracy and poverty. Although there is difference of approaches, yet it is possible to see in all the viewpoints a common humanitarian concern and a desire to use international law and its institutions to achieve a measure of justice and equality for women.[31]

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[31] J. O'Brien (2002), *International Law*, USA & UK: Cavendish Publishing Limited, pp. 53-54.

## 6. Difference between First World feminism(s) and Third World feminism(s)

Feminist international law scholarship gives rise to questions about not only the male world of international law but also the difficulties of a feminist theory that attempts to analyse women's global oppression. Feminist analysis of international law, in fact, raises the issues of diversity and exclusion within feminist theory itself. It is argued that feminist analysis of international law should not only look at the ways in which western women are affected by international law or policy but also of the marginalised position of Third World women within both law and feminism. It is important to draw a distinction between First World feminism and Third World feminism. This distinction is essential because postmodernists claim that feminists themselves are in danger of essentialising the meaning of women when they draw exclusively on the experience of white western women. To put it differently, multiplicity of voices must be heard otherwise feminism itself will become one more hierarchical system of knowledge construction. And any attempt to construct feminist perspectives on international law must take this concern of postmodernists seriously.

Third World feminism emerges out of anger from feminists in developing countries because they believed that mainstream Western feminists ignored the voices of non-white, non-western women for many years. In fact, scholars like Chandra Talpade Mohanty argue that "unlike the history of Western (white, middle class) feminisms, which has been explored in great detail over the last few decades, histories of third world women's engagement with feminism are in short supply. There is a large body of work on 'women in developing countries', but this do not necessarily engage feminist questions."[32]

Again, scholars like Vasuki Nesiah maintains that in the context of third world women 'the ground of struggle is varied and is often intersecting between working conditions and economic self determination, family and ideology, ethnic conflict and

[32] C. T. Mohanty (1991), "Cartographies of Struggle: Third World Women and Politics of Feminism", in C. T. Mohanty, A. Russo and L. Torres (ed.), *Third World Women and the Politics of Feminism*, Bloomington (USA): Indiana University Press, pp. 3-4.

pluralism, sexuality and subversion, disciplinarity and the production of academic knowledge, religion and secularism, human rights and super-liberalism.'[33]

Feminist analysis of international law raises in an severe form the issue of essentialism. It questions if "women's experience" on which such analysis is based excludes the importance of factors such as race, class, and sexual orientation for women? Feminists from the developing world have been critical of the across-the-board application of western feminist theories to their societies and the creation of monolithic categories such as "third world women". They believe that oppression of women is universal, but the oppression is established and maintained in many different ways. Feminist analysis cannot present "one true story" of women's domination worldwide. It must acknowledge the range of cultural, national, religious, economic, and social concerns and interests to which it responds. As Chandra Mohanty argues that 'women are constituted as women through the complex interaction between class, culture, religion, and other ideological institutions and frameworks'.[34] Analysis of international law means confronting the inevitable tension between universal theories and local experience and being receptive to a diversity of feminism thoughts.[35]

By discussing the application of international law to Third World women, Western women actually goes beyond their own limited experience to explore the experiences of other women. Third World women are differently positioned and are exposed to international law in different ways. A western attempt at theorising Third World women's subordination carries the danger of reinforcing Western 'positional superiority'. In a sense, it may lead to the superiority of Western women over Eastern women.

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[33] V. Nesiah (2003), "The Ground Beneath Her Feet: "Third World" Feminisms", *Journal of International Women's Studies*, Vol. 4, No. 3, May, p. 30.

[34] C. T. Mohanty (1988), "Under Western Eyes: Feminist Scholarship and Colonial Discourses" *Feminist Review*, No. 3, pp. 61-88.

[35] H. Charlesworth (1993), "Alienating Oscar? Feminist Analysis of International Law" in D. G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, pp. 3-4.

Recognising the diversity of women affected by and involved with international law, feminist international law theory starts from the assertion that 'feminist analysis of international law must take account of the differing perspectives of First and Third World feminists'.[36] This approach means incorporating the 'issues raised by Third World feminists' to restructure feminism 'to deal with the problems of the most oppressed women, rather than those of the most of the most privileged'.[37]

Feminist scholars, like Charlesworth, Chinkin and Wright have noted that Third World women have a complex and often incompatible relationship not only with international law but also with feminism. Although feminists and Third World scholars occupy similar positions on the margins of international law, these authors argued that the western voice of feminism is resisted by both the European-American establishment of international law and the intensely patriarchal 'different voice' discourse of traditional non-European societies.[38]

The reliance on Western analytic categories without first accounting for their differential application to Third World women is believed to be destructive for Third World women whose lives do not conform to Western norms. Some of the feminist international law literature also fails to appreciate the intersection of factors such as race, class, culture, religion, and gender in producing women's oppression. Feminist international law scholarship focuses on women's shared position of oppression or disempowerment. However, in doing so the important context of women's differential cultural and historical experiences is lost. Minus its colonial, historical, and cultural context, the category 'women' gets defined in the image of Western women. Using analytic categories developed in the context of western experience carries the risk of constructing the West as the norm and it is seen as the standard against which all women's oppression is judged. Applying these analytic categories cross culturally means that all women's oppression is discussed in terms that mirror Western

[36] H. Charlesworth, C. Chinkin and S. Wright (1991), "Feminist Approaches to International Law", *The American Journal of International Law*, Vol. 85, No. 4, p. 618.

[37] Ibid. p. 621.

[38] Ibid. p. 619.

experiences. Constrained by bounded categories, it becomes difficult to talk about Third World women's different experiences of oppression.[39]

To explore and mediate the ways in which feminist international legal theory constructs Third World women, the feminist project and its impact must continually be questioned. In the words of Gayatri Spivak, such vigilance requires that feminists have a 'simultaneous other focus: not 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 problem I discuss?'[40] Starting from Spivak's caution, there is a need to explore the ways in which feminist international law theory may define Third World women and their engagement with law and legal structure in a narrow and problematic way.[41]

Similarly, Ratna Kapur also argues that the First World feminism uses the 'victimisation' rhetoric when discussing the situation of Third World women. This notion of victimhood has invited a protectionist response from the state and thereby has led to confining women in their place by presenting them as vulnerable and ignorant.[42]

Although international legal order has slowly moved beyond its origin as a white, European preserve by accommodating the critique of developing nations, it has never been forced to reflect on its failure to take women seriously.

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[39] D. E. Buss (1997), "Going Global: Feminist Theory, International, and the Public/ Private Divide" in S. B. Boyd (ed.), *Challenging the Public/ Private Divide: Feminism, Law and Public Policy*, Canada: University of Toronto Press, pp. 367-69.

[40] G. C. Spivak (1987), *In Other Worlds: Essays in Cultural Politics*, New York and London: Routledge, p. 150.

[41] D. E. Buss (1997), "Going Global: Feminist Theory, International, and the Public/ Private Divide" in S. B. Boyd (ed.), *Challenging the Public/ Private Divide: Feminism, Law and Public Policy*, Canada: University of Toronto Press, pp. 360-61.

[42] R. Kapur (2002), "The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject in International/Postcolonial feminist Legal Politics", *Harvard Human Rights Law Journal*, Vol. 15, p. 2.

## 7. Feminist Critique of the theories of International Law

Feminist scholarship has also challenged the dominant theories of international law in order to show their limited explanatory character with respect to the position of women. Feminists have attempted to critique the six main theories that have varying degrees of influence on international law. Scholars such as Charlesworth and Chinkin argue that none of the main theories of international law has been able to address the situation of women worldwide.[43] In order to sustain this claim of the feminist scholarship, it is essential to explain the six main theories of international law one by one.

### 7.1 Natural Law

Early accounts of international law point to a system of 'law of nature' which had the potential of regulating states' behaviour. The natural law theorists attempted to identify international law completely with the law of nature.[44] This was because the law of nature was seen as a foundation for an international legal order and its attraction was enhanced by the absence of international legislative and judicial institutions. In absence of central authorities, natural law was seen as the only applicable law to regulate the co-existence of nation states.

Neo- natural law theories emerged within international law particularly after World War II. As regards the content of the law of nature, various scholars have expressed various opinions. According to some scholars, natural law was synonymous with divine, religious law; while for others it constituted rules developed from right reason.

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[43] H. Charlesworth and C. Chinkin (2000), *The Boundaries of international law: A feminist analysis*, Manchester (UK): Manchester University Press, p. 25.

[44] M. N. Shaw (2003), *International Law*, Fifth Edition, Cambridge University Press, p. 24.

From the feminist perspectives, natural law as a theory of international law has failed to deal with inequality between women and men. In fact, such a theory did not question the basic inequalities in the social and legal order.[45]

### 7.2 Positivism

Positivism is another important theory of international law. It developed within international law as a response to the alleged failure on the part of natural law theory to articulate objective and reliable principles of international conduct and also as a response to the challenge posed by natural law theory to state sovereignty. Positivists distinguished between international law and natural law and emphasised on state practice.[46]

Positivists believed the nation state to be the ultimate source of international law. Positivism was seen as the only intellectually articulate approach given the fact that international order was characterised by the absence of any centralise law-making authority. Positivists are of various shapes, sizes and nationalities. While some insists on a strict and complete adherence to the principle of consent in international law, others have described a gradual movement away from consent to consensus and a good will. Legal positivism is closely related to the realist school of thought within international relations. Realist explanation of all form of international behaviour involves reference to the national interest of the particular nation in question. Realist account, however, cannot be justified when we talk of international law. This is because such realist accounts fail to explain why international law is regularly obeyed even when it seems to go against national interest of states.

From the feminist standpoint, positivism is inadequate to address women's issues. This is because the question about structural disadvantages within states rarely emerged as a legal issue within positivism. Moreover, a positivist analysis does not

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[45] H. Charlesworth and C. Chinkin (2000), *The Boundaries of international law: A feminist analysis*, Manchester (UK): Manchester University Press, p. 26.

[46] M. N. Shaw (2003), *International Law*, Fifth Edition, Cambridge University Press, p. 24.

require any questioning or examination of the legitimacy of global or national power structures that effectively subordinate women.

### 7.3 Liberal international legal theory

Liberal international legal theory is the dominant theory of modern international law. Liberal theory sees international order as being based on subjective, sovereign consent, just as a national order is based on a social contract negotiated by individuals. The liberal account of international law includes element of both natural law and positivism. Liberal theory, however, is not without criticism. It is claimed to lack substantive theory, as sovereign autonomy as its only commitment of value in the international context.

Liberal account of international law rests on a series of distinctions between the 'public' and the 'private' and this is what feminists see as problematic. In fact, feminists argue that the continued separation of public and private domain in liberal theory and practice has engendered consequences in the international arena. Moreover, it is also believed that liberal idea of equality is limited to procedural rather than substantive equality. As such, it is seen as a sharp tool when dealing with long-term, structural disadvantage between women and men.

### 7.4 The New Haven Approach

The New Haven approach to international law was developed by a number of scholars connected with the Yale Law School in New Haven, Connecticut. As early as 1959, Myres McDougal and Harold Lasswell argued for a new form of legal theory that was built upon, but went beyond, the insights of American legal realism. Such an approach rejects the idea of international law as a system of neutral rules and seeks to develop a 'policy science' of international law, focussing on the processes which lead to legal decisions and policies. Its assessment of international law is based on international law's capacity to enhance human dignity.

Condemning the negative role of nation-state, New Haven scholars stress the importance of individual as a participant in the decision making process in the capacity of subject of international law. Such scholars also emphasises the importance of international organizations as representing the organised conscience of the world for the fulfilment of human rights. However, in doing so they club organisations like UNESCO and IMF together, without realising that organisations like IMF reinforces inequities by its policies rather fulfilling human rights.[47]

Apparently, the New Haven approach seems similar to feminist approach in a number of ways. But a closer look reveals that such a similarity is nothing but a myth. For example, its concern with the need for self-consciousness about the observer's perspective, developed to reduce bias, seems consistent with feminist interest in identity politics. But actually, New Haven approach does not recognise gender or sex as an observer perspective. Again, the fundamental principle of human dignity that animates New Haven approach appears to fall in line with feminist agenda. But such an approach fails to exhibit any concern with the male characteristics of the human being whose dignity is so essential.

### 7.5 'Newstream' theories

Since the late 1970s, critical legal scholars have challenged international law's rationality, objectivity and principality by exposing its indeterminacy and contradictions. This attempt of the critical legal scholars has been realised on the international plane by the Newstream theorists. Newstream theorists reflect post-modern trend in their scholarship and attempt to reveal difference, heterogeneity and conflict as reality instead of fabricated universality and consensus. Sometimes, newstream techniques and insights are seen as important in understanding the relationship of international law to women. But a close analysis reveals that newstream, just as the mainstream, has shown little interest in the situation of women. This is to some extent because newstream is itself quite vague in its approach.

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[47] B. S. Chimni (1993), *International Law and World Order: A Critique of Contemporary Approaches*, New Delhi/Newbury Park/London: Sage Publications, p. 110.

### 7.6 Third World Approaches to international law

Third World approaches to international law (TWAIL) was developed by the states from the third world, particularly Asia and Africa, after emerging as full members of international law on achieving independent status. They have contested the inevitability or universality of particular international law principles by pointing to the Western origins, orientation and cultural bias of such rules. A major focus of third world approaches has been the international economic system which led to a campaign in the 1970s within the United Nations for a 'New International Economic Order' (NIEO).[48] Such theorists aim to achieve economic and political independence for the states of the third world through achieving a right for peoples and nations to self-determination, development and permanent sovereignty over their natural resources, while prohibiting interference in a nation's economic affairs, and prohibiting all forms of coercion in international economic matters. Third World approaches have also challenged the international law-making process, especially with respect to customary international law. They argue that as third world states did not participate in the development of international law, they should not necessarily be bound by it.

The term Third World is seen as different from that of less-developed, crisis-prone, industrializing, developing, underdeveloped or the south because it captures the oppositional dialectic between the European and non-European, and identifies the exploitation of the latter by the former.[49]

TWAIL is driven by three basic and interrelated objectives. These include objective to understand and deconstruct the uses of international law as a medium for the creation and perpetuation of a hierarchy of international norms and institutions that subordinate non- Europeans to Europeans. Again, it seeks to construct an alternative

[48] Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S - VI).

[49] M. Mutua and A. Anghie (2000), "What is TWAIL", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 94, p. 35.

normative legal edifice for international governance.[50] In this sense, both TWAIL and feminist approach share similarity in their attempt to deconstruct and then to reconstruct international law through their respective standpoint.

TWAIL believed that the contents of international law could be transformed to take into account the needs and aspirations of the peoples of the Third World. But problem lies in the fact that TWAIL perceived the Third World state as a unitary entity that existed independent of and stood above conflicts and tensions generated by class, race and gender within these societies. It is this view of the transcendent Third World state prevented a focus on the violence of the state at home.[51]

On the basis of above mentioned similarities, sometimes a conceptual link between the third world approaches and feminist approaches are attempted to establish. In fact, it is often questioned if women's concerns are already present in international law through the medium of the Third World? The reason for this perceived link between third world approaches and feminist approaches is because of certain similarity in the concerns and objectives of both the approaches. First, historically both TWAIL and feminist approach has viewed international law as a regime and discourse of domination and subordination, and not as one of resistance and liberation.[52] Second, TWAIL, like feminist approach, have challenged the substantive norms and law-making process of international law. Third, most of the issues that are of concern to third world states are in a 'soft law' language in the form of General Assembly resolutions, which is also the case with issues that are of concern to women. Declaration on the Establishment of a New International Economic Order is a classic example of this. Fourth, Third World states have also emphasised on decision making through negotiation and consensus, which find some parallel in the types of dispute resolution often associated with feminist epistemology. Fifth, both feminist approach and TWAIL make argument for change in the international legal order, by

[50]Ibid. p. 31.

[51] A. Anghie and B. S. Chimni (2003), "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts", *Chinese Journal of International Law*, Vol. 2, Issue. 1, p. 82.

[52] M. Mutua and A. Anghie (2000), "What is TWAIL", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 94, p. 31.

emphasising on co-operation rather than on individual self-advancement. Above all, it is believed that both third world states and women need to be trained to fit into the world of developed states and men respectively.[53]

Like feminist approach, TWAIL is also both a political and an intellectual movement. Similar to feminist scholarship, TWAIL scholarship is also characterised with international contradictions but are united in their broad opposition to the unjust global order.[54]

Despite the above mentioned similarities, the first generation of third world scholarship was as indifferent to issues of sex and gender as are other approaches to international law. Such approaches was concerned with power imbalances between states but have little concern with power differentials between women and men within state. In fact, the purpose of TWAIL scholarship was to eliminate the harm that Third World states would likely have suffered as a result of the unjust international legal order.[55] In this sense, the disparities in economic position between states was the main focus of this approach and not the unequal impact of international law on women and men. The oppression of women, if at all considered, was seen as part of the larger issue of colonialism and the achievement of self-determination is seen as the only remedy.[56] However, in recent years, this situation is attempted to be corrected by Third World feminist scholars, supported by increased sensitivity of TWAIL in general to the feminist critique.

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[53] H. Charlesworth, C. Chinkin and S. Wright (1991), "Feminist Approaches to International Law", *The American Journal of International Law*, Vol. 85, No. 4, p. 618.

[54] M. Mutua and A. Anghie (2000), "What is TWAIL?", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol.94, p. 36.

[55] Ibid.

[56] H. Charlesworth and C. Cinkin (2000), *The boundaries of International Law: A feminist analysis*, Manchester (UK): Manchester University Press, pp. 25-38.

## 8. What is distinctive about feminist approaches?

As noted earlier the application of feminist approaches to international law has been characterised by a focus not just on international law as a reform mechanism, or as system of patriarchal oppression, but also as a body of knowledge which can be explored, dissected, and subjected to close scrutiny. In this sense, a feminist approach to international law is not just about reforming the international legal order. In fact, feminist scholars bring a different epistemological outlook altogether. Feminist scholars seek to build theory from the shared experiences of women lives, from their personal testimonies and other revelatory techniques which aim at highlighting perspectives ignored by mainstream scholarship. The objective is the generation of new knowledge which have the capacity both to liberate women and subvert the hegemonic power of men. Such an epistemological outlook operates to displace and destabilise dominant understanding of international legal phenomenon. The effectiveness of this new epistemology cannot be underestimated. For example, the experiences of women victims of male violence have gradually found their way into legal debate on criminal justice reform, resulting in changes in the attitudes, practices, and powers of criminal justice actors.[57]

In the context of methodology, it may be noted that feminist scholarship is often categorised as liberal, cultural, radical, post-modern, and post-colonial. As such when confronted with an issue, no single theoretical method or approach seems adequate. In fact, a range of feminist theories and methods are necessary to deal with those issues.[58]

Feminist international law scholarship has also drawn attention to the binary dichotomies of international legal discourse. For example, distinction is often drawn between objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected and so

[57] J. Conaghan (2000), "Reassessing the Feminist Theoretical Project in Law", *Journal of law and society*, Vol. 27. No.3, pp. 364-65.

[58] H. Charlesworth (1999), "Feminist Methods in International Law", *The American Journal of International Law*, Vol. 93, No. 2, p. 381.

on. In all these dichotomies, the first term signifies 'male' characteristics and second 'female'[59] and the male side is given more value or privilege, while the female side is devalued. The feminist scholars make an attempt in all their work to show the grip that these binary distinctions have on international law, thereby making the system gender biased.

In so far tools and theories are concerned, Charlesworth and Chinkin argues that feminist approach is often compared to an archaeological dig. One obvious sign of power differentials between women and men is the absence of women in the international legal institutions. Below this is the expression of international law. Going further down, many apparently neutral principles and rules of international law can be seen to operate differently with respect to women and men. Another, deeper layer of the digging reveals the gendered and sexed nature of the basic concepts of international law, such as, 'state', 'security', 'self-determination' and even 'individual'. This phenomenon is an integral part of the structure of the international legal order, a critical element of its stability. The silences of the discipline are as important as its positive rules and rhetorical structures. Feminist scholars argue that the silences of international law with respect to women need to be challenged on every level and different techniques will be appropriate at different levels of digging. As such, they adopt method of 'situated judgement' rather than theory.[60]

A number of feminists have developed a useful overarching methodology for analysis of international law based upon dialogue. Dialogue is important because analysis of international law means confronting the inevitable tension between general theories and local experiences, being receptive to a diversity of voices and experiences.

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[59] Ibid. p. 382.

[60] H. Charlesworth and C. Chinkin (2000), *The boundaries of international law: A feminist analysis*, Manchester (UK): Manchester University Press, pp. 49-50.

## 9. Responses to feminist international law scholarship

Feminist approaches to international law have received different responses. This is because, as noted earlier, academic world continues to consider with suspicion that feminist ideas are by definition too political to be scholarly. In fact, feminist analysis is considered as a strange sideshow, which makes little sense to the mainstream of the discipline. One response is that in reality sex and gender are an integral part of international law in the sense that man and maleness is built into its structure and that to ignore this is to misunderstand the nature of international law.[61]

Scholar such as Tesón, for instance argue that feminist scholarship lacks academic rigour and objectivity.[62] For him, the absence of women in the international legal order is a mere statistical underrepresentation rather than an injustice. Injustice to women, he has argued, would only arise if nations actively prevented women from participating in international life.[63]

According to Charlesworth, the responses to feminist analysis of international law are divided into two camps: those who decry the unfair assault on a discipline that could do good for women; and those from the more critical camp who merely offer whispered words of encouragement.[64] Christine Sylvester identifies similar trend in international relations field, describing critical scholars as merely tipping their hats in the direction of feminist theory.[65]

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[61] Ibid. p. 19.

[62] F. R. Tesón (1993), "Feminism and International Law: A Reply", *Virginia Journal of International Law*, Vol. 33, p. 647.

[63] H. Charlesworth and C. Chinkin (2000), *The boundaries of international law: A feminist analysis*, Manchester (UK): Manchester University Press, p. 26.

[64] H. Charlesworth (1996), "Cries and Whispers: Responses to Feminist Scholarships in International Law", *Nordic Journal of International Law*, Volume 65, No. 3-4, pp. 557-568.

[65] C. Sylvester (2002), *Feminist International Relations: An Unfinished Journey*, UK: Cambridge University Press, p. 264.

Chinkin, Wright and Charlesworth argues that over the years feminist work in international law has received strong negative responses as well as support from various unexpected sources. In fact, they describe responses to feminist international legal scholarship as ranging from 'support' to 'a mass of passively resistant inertia'.[66]

Apparently, the significant scholarly literatures in the area of international law over the last 20 years have resulted in feminist ideas being accommodated into the rhetoric of international law and its institutions. But in reality, the feminist issues have been either retained in the margins, or rendered so weak that they have no transformative capacity.[67] In fact, it is argued that international legal academy seem prepared to include feminist scholars within the discipline, provided the discipline's foundational assumptions and modes of operation are left unaltered.[68]

Feminist international law scholarship is seen to be in conversation with mainstream scholarship. But, actually this conversation is merely a monologue rather than a dialogue. This is because despite constant feminist suggestions, questions and criticisms to the mainstream of the discipline, it is hard to find any response on the part of the mainstream scholars. Sometimes one could see some critical and progressive mainstream scholars making passing reference to feminist works. But this is again to show that they have kept up with their reading, rather than acknowledging, debating or refuting feminist works. In this sense Charlesworth argue that 'feminist scholarship is an optional extra, a decorative frill on the edge of the discipline'.[69]

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[66] C. Chinkin, S. Wright and H. Charlesworth (2005), "Feminist Approaches to International Law: Reflections From Another Century" in D. Buss and A. Manji (ed.), *International Law: Modern Feminist Approaches*, North America: Hart Publishing, p. 18.

[67] D. Buss and A. Manji (ed.) (2005), *International Law: Modern Feminist Approaches*, North America: Hart Publishing, p. 44.

[68] Ibid. p. 3.

[69] H. Charlesworth (2010), "The Women Question in International Law", *Asian Journal of International Law*, Volume 1, Issue 1, p.35.

## 10. Summation

Feminist international law scholarship is advanced by a group of scholars who critique international law as a patriarchal system. Such scholars have used the category of gender in their analysis of international law. They have brought a different epistemological outlook altogether within international law scholarship.

Feminist perspective on international law has increasingly gained ground within the legal academy. What was initially received with scepticism as a 'political' rather than 'academic' engagement with law has become, by the start of the new millennium, a significant body of legal scholarship. The growing acceptability of feminism within legal scholarship is expressive of broader intellectual entry by feminist theorist on the academy.[70]

Feminist international law scholarship is relatively new. It was only in 1970s that legal scholars first began generating 'feminist legal theory'. Starting in 1970s, feminist scholarship on international law has developed and expanded to the point where it is accepted as a part of legal academy.

Feminist international law scholarship is concerned with analysing the international legal structures, with identifying their effects on the condition of women, and with formulating new structures or reforms that could correct gender injustices, exploitation and restrictions. Feminists, however, initially started with simply documenting the thorough going disadvantages women face in the present structure of international law.[71]

Despite a popular tendency to assume feminist convention, feminist scholarship derives from a range of different political, cultural, and philosophical traditions and is

[70] J. Conaghan (2000), "Reassessing the Feminist Theoretical Project in Law", *Journal of law and society*, Vol. 27. No.3, p. 352.

[71] H. Charlesworth (1993), "Alienating Oscar? Feminist Analysis of International Law" in D. G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, p. 7.

expressive of diversity of thought. As such, feminist scholarship is further divided into various schools of thought. These include liberal feminism, cultural feminism, radical feminism, post-modern feminism and third world feminism. However, despite the variety, feminist scholarship is united in its concern as regard silencing of international law on women's issues.

Analyzing the class nature of gender inequality is necessary to ensure the integrity and quality of feminist research in international law. As such, feminist scholars must take account of the differing experiences and concerns of women in the First World and women in the Third World.

The need for feminist approach was felt because the dominant theories of international law have failed to accommodate women's concern and experiences. In fact, examining the traditional theories of international law from the standpoint of women make evident that such theories are not concerned with the situation of women worldwide. Although apparently certain theories might seem to be consistent with feminist approach, yet a closer analysis reveals that gender as such is not an issue with those theories.

Given this, it can be concluded that feminist international law scholarship is distinct from mainstream scholarship and has much to add to the understanding of international law.

# CHAPTER – III

# THE FEMINIST APPROACH TO SOURCES AND SUBJECTS OF INTERNATIONAL LAW

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## 1. Introduction

International law has lately come under the scrutiny of feminist scholarship. According to them, international law is a thoroughly gendered regime. This is believed to be true not only in terms of various legal regimes but also in so far its sources and subjects are concerned, which constitute the very foundation of the discipline. Talking about sources, it may be noted that the feminist international law scholars argue that the accepted sources of international law sustain a gendered regime and also maintain that the standard account of sources accommodates women specific harm.[1]

In the context of subjects of international law, it is to be noted that states and international organisations are the primary subjects of international law. But in both states and international organisations, one can see the invisibility of women. States are patriarchal in structure excluding women from elite positions and decision making roles. The structures of international organisations imitate those of states, restricting women to insignificant or subordinate roles. The concept of 'individual' as subject of international law also has gendered connotation. The term 'individual' is not a holistic term, but represents diplomats who are mostly men.

The very foundations of international law have a gender bias. An analysis of the sources and subjects of international law helps substantiate this claim of the feminist international law scholarship. In fact, feminists have made an attempt to provide a gender perspective to the sources and subjects of international law in order to prove the limited base of international law's claim to universality and neutrality.

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[1] H. Charlesworth and C. Chinkin (2000), *The boundaries of International Law: A feminist analysis*, Manchester (UK): Manchester University Press, p. 62.

Accordingly, an attempt has been made in this chapter to examine the various sources and subjects of international law to investigate the interests and perspective they support. In the context of sources, an attempt has been made to analyse customary international law, treaties, general principles of law and subsidiary sources of international law. The whole phenomenon of 'soft law' is also discussed. This is because most of the issues that are of concern to women fall within the category of 'soft law'. Moreover, feminist critique of the two main subjects, that is, state and international organisations, has also been provided in the chapter.

## 2. Sources of international law

The sources of international law define how new rules are made and existing rules are repealed or abrogated. By 'sources' one means those provisions operating within the legal system on a technical level. Article 38 (1) of the Statute of the ICJ is widely recognised as the most authoritative statement as to the sources of international law.[2] It lists out several sources of international law. These include: international custom, treaties, and general principles of international law, judicial decisions, and the teachings of highly qualified publicists.[3] The Statute provides that:

> *the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
> *(a)International conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international customs, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subjects to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*[4]

A distinction has sometimes been made between formal and material sources. The former confer upon the rules an obligatory character, while the latter comprise the actual content of the rules. Thus formal sources appear to embody the constitutional

[2] M. N. Shaw (2003), *International Law*, Fifth Edition, Cambridge University Press, p. 66.

[3] The Statute lists the sources of decision- making, not of international law.

[4] Article 38 (1) of the Statute of the International Court of Justice, Department of Public Information, United Nations, New York, p. 91.

mechanism for identifying law while the material sources incorporate the essence or subject- matter of the regulations.[5]

### 2.1. Custom or customary sources of international law

In any primitive society, certain rules of behaviour emerge and prescribe what is permitted and what is not. As the community develops, it will modernize its codes of behaviour by the creation of legal machinery, such as courts and legislature. Custom, for this is how the original process can be described, remain and may also continue to evolve.

Customary international law is binding upon all states. It has two components: material fact, i.e., uniform and consistent state practice and *opinion juris sive necessitates* (states' psychological belief that the behaviour is required by law). Both the requirement, however operate at a high level of generality. It is understandable why the first requirement is mentioned, since customary law is founded upon the performance of state activities and the convergence of practices, in other words, what states actually do. It is the psychological factor (*opinion juris*) that needs some explanation. If the definition of custom is seen as state practice then there would be the problem of separating international law from principles of morality and social usage. This is because states do not restrict their behaviour to what is legally required. Sometimes they are directed by a feeling of goodwill and in hope of reciprocal benefits. Accordingly, the second element in the definition of custom needs elaboration. The *opinio juris* or the belief that a state activity is legally obligatory is the factor which turns the usage into a custom and renders it as a part of the rules of international law.

### 2.2 Treaties

In contrast to the process of creating law through custom, treaties are more modern and more deliberate method of international law-making. In fact, most of the contemporary international law is created through treaties. Many writers believe that

[5] M. N. Shaw (2003), *International Law*, Fifth Edition, Cambridge University Press, p. 67.

treaties constitute the most important sources of international law as they require the express consent of the contracting parties.

Treaties can also give rise to customary international law. The provision of a treaty which constitute the basis of a rule, when coupled with *opinio juris* can lead to the creation of binding custom governing all states. This was considered by the ICJ in the *North Sea Continental Shelf Case.*[6]

Often distinction is made between 'law- making' treaties and contractual treaties or 'treaty-contracts'. The former tend to have universal or general relevance, while the later apply only as between two or more small number of states. Even within 'law-making' treaties, there are some treaties that are of constitutional significance such as the Charter of the United Nations, the Vienna Convention on Diplomatic Relations and so on.

Thus, treaties as sources of international law are of immense importance. In fact, treaties are more important than customary sources. This is because treaties are more precise than customs.

**2.3 General Principles of International Law as recognised by civilized nations**

The content of the category of 'general principles of international law as recognised by civilised states' is controversial. There are various opinions as to what the general principle of international law concept intended to refer. Some writers regard it as an affirmation of natural law concept, which are deemed to underlie the system of international law and constitute the method for testing the validity of the positive rules. Other writers, particularly positivists treat it as a sub-heading under treaty and customary law and incapable of adding anything new to international law unless it reflects the consent of states. Between these two approaches, most writers are prepared to accept that the general principles do constitute separate sources of international law but of fairly limited scope.

[6] *North Sea Continental Shelf Case*, ICJ judgment of 20 February, 1969.

The most important general principles underpinning many legal rule is that of *good faith* which is enshrined in Article 2 (2) of the UN Charter. Another crucial general principle of international law is that of *Pacta Sunt Servanda*, i.e, the idea that international agreements are binding in nature. Again, *Res Judicata*, is another important general principle which provides that if a case is already been decided by a court, in accordance with law, then the same case cannot be taken to another court.

It may be noted that general principles of international law as recognised by civilised nations are essentially rules practiced by domestic legal system. However, it is also a primary source of international law. The drafters of the Statute of the PCIJ suggested that general principles would form a safety net to avert the danger of a non- liquet[7] if neither custom nor treaty law provide an answer to the question before the court. General principles can also be used in interpreting treaties and articulating customary law.

### 2.4 Subsidiary sources of international law

In addition to the above mentioned primary sources of international law, there are also secondary sources of international law. They are:

#### 2.4.1 Judicial decisions

The rules of international law-making are also sometimes derived from judicial decisions. The phrase 'judicial decisions' refer to PCIJ and ICJ. However, the phrase also encompasses international arbitral awards and the rulings of national courts. Although judicial decisions are subsidiary sources of international law, yet they are of immense significance. They are considered as subsidiary sources because judicial decisions that courts arrived at are not agreed upon by courts themselves.

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[7] The term 'non- liquet' means no law. Non-liquet has been generally viewed as refusal by a court or a tribunal to decide a case exclusively on account of absence or ambiguity or uncertainty in the relevant law.

### 2.4.2 Writings of highly qualified publicists

The writings of highly qualified publicists constitute the subsidiary means of determination of rules of international law. Historically, the influence of academic writers on the development of international law has been marked. Writers such as Gentili, Grotius, Vattel, etc were the supreme authorities of the $16^{th}$ to $18^{th}$ centuries and determined the scope, form and content of international law.

## 2.5 Hierarchy of sources and *jus cogens*

In terms of hierarchy, customs and treaties occupies an interchangeable first and second place in view of article 38 (1), while the role of general principles of law as a way of complementing custom and treaty law places that category fairly firmly in third place. Judicial decisions and writings of highly qualified publicists clearly have a subordinate function within the hierarchy of sources. The question of priority as between custom and treaty law is more complex. As a general rule, the latter in time will have a priority. Treaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and be replaced by new customary rules.[8]

While discussing the sources of international law, reference may be made to the principle of *jus cogens*. Article 53 of the Convention on the Law of Treaties, 1969,[9] provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Such peremptory norm is known as *jus cogens*. It is defined by the Convention as one 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. The concept of *jus cogens* is based upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders. Various examples of the content of *jus cogens* have been provided by the

[8] M. N. Shaw (2003), *International Law*, Fifth Edition, Cambridge University Press, pp. 115-116.

[9] Vienna Convention on the Law of Treaties, 1969.

International Law Commission, such as an unlawful use of force, genocide, slave trading and piracy. However, no clear agreement has been manifested regarding other areas, and even the examples given are by no means uncontroverted. More important, perhaps, is the identification of the mechanism by which rules of *jus cogens* may be created, since once created no derogation is permitted.[10]

### 2.6 Soft Law

Apart from the primary and secondary sources of international law, there is also the phenomenon of 'soft law'. The concept of 'soft law' has been developed to cover non- legally binding instruments that nevertheless create expectations about future action. States that reject the normative content of a particular instrument may simply emphasise its non-binding nature, while others assert the opposite view. The subject matter of many soft law instruments is significant. States use 'soft law' structures for matters that are not regarded as essential to their interests or where they are reluctant to incur binding obligation. On a traditional analysis, 'soft law' can develop into customary international law if supported by the appropriate state practice and opinio juris. A soft law instrument may also be the forerunner of a subsequent treaty on the same subject.[11] Georges Abi-Saab has identified three significant interdependent criteria for determining whether a soft law instrument has crystallised into customary international law: the circumstances of the adoption of the instrument, including voting patterns and expressed reservations; the concreteness of the document; and the existence of follow up procedures.[12]

Claims of the normative nature of soft law instruments have led on the one hand to strong reaffirmations of the exclusivity of the traditionally accepted sources and the places of states within them, and, on the other, to assertions of the inadequacy of those sources in providing mechanisms for change and development in modern international

[10] M. N. Shaw (2003), *International Law*, Fifth Edition, Cambridge University Press, pp.117-118.

[11] E.g. the Declaration on the Elimination of Discrimination against Women, GA Res 2263 (XXII), 7 November 1967, preceded the Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

[12] G . Abi-Saab (1987), "Cours general de droit international public", Vol. 207, *Recueil des Cours*, pp. 160-61.

law. In sum, international law now comprises a complex blend of customary, positive, declarative and soft law.[13]

## 3. Feminist Critique of the sources of international law

Although article 38 (1) was drafted several years ago to guide the PCIJ, it remains widely cited as the authoritative list of the sources of international law. However, it has generated considerable debate. Feminist international law scholarship argues that the debate about sources of international law have not examined the way in which international legal doctrine on sources is built on a gendered base. They argue that the vocabulary of international law making relies on concepts that have a gendered dimension. For example, the sources of international law are based on a hierarchical and abstract model and they are presented as identifiable through rational means. The distinction drawn between hard and soft law also rest on a dichotomy that has gendered significance, implying the superiority of the 'hard' (male) over the 'soft' (female). International legal scholarship does not discount the value of soft law entirely, but hard binding law remains the preferred paradigm of international law, and all forms of international lawmaking are assessed in relation to this form. What is of more importance to feminists is that the issues that concerns women falls within the category of soft law, and as such suffer a double marginalisation in terms of traditional international law-making. This is because they are considered as soft issues of human rights and are developed through soft modalities of lawmaking that allows state to appear to accept such principles while minimising their legal commitments.[14]

Another gendered tendency in traditional law doctrines on sources is the emphasis on obligation formed through consent. The model of the individual, autonomous state freely choosing to accept or reject international law rules reinforces models of behaviour that are coded as male.

[13] H. Charlesworth and C. Chinkin (2000), *The boundaries of International Law: A feminist analysis*, Manchester (UK): Manchester University Press, pp. 66-67.

[14] Ibid. p. 66.

A careful analysis of the various sources of international law from feminist perspective reveals that the sources of international are gendered in nature. In order to substantiate this argument of the feminist international law scholarship, the various sources of international law needs to be analysed one by one.

### 3.1 Customary international law and 'soft' law

A careful analysis of customary international law reveals its limitation with respect to women. This can justified if one tries to assert that violence against women constitute breach of customary international law. Despite the fact that diverse forms of violence against women can be seen all over the world. Yet to assert that this violence breaches customary international law is not easy. A number of doctrinal difficulties have to be dealt. First, state practice is not consistent with such a norm. Where the facts of state practice do not conform to the assertions of legal norms, the reality may be ignored in preference for the statements of governments that such actions are prohibited. Jurists have proposed various devices to interpret state behaviour. For example, Oscar Schachter has argued that where the conduct is 'violative of the basic concept of human dignity' statements of condemnation are sufficient evidence of its illegitimacy under customary international law.[15] Christian Tomuschat has propounded the deduction of custom from 'the core philosophy of humanity' that is sanctified in the unwritten constitution of the international community and the UN Charter.[16] This process is limited to fundamental human rights norms including those relating to the right to life, the prohibition against torture and slavery and equality of the human beings. This deduction is seen as free-standing and as not entailing reference to state practice and opinio juris.

None of these approaches necessarily facilitates the assertion of a rule of customary international law condemning violence against women. First, unlike acknowledged human rights abuses, violence against women within home is not even formally

[15] O. Schachter (1982), "International Law in theory and practice: general course on public international law", Vol. 78, *Recueil des cours/ collected courses*, pp. 334-338.

[16] C. Tomuschat (1993), "Obligations arising for state without or against their will", 241 *Recueil des cours/ collected courses*, Vol. IV, p.303.

condemned as illegal in many societies. Second, social, traditional or religious considerations provide grounds for tolerance of violence against women and as such are excluded from international concern. In fact, until 1993 there had been no UN General Assembly resolution condemning violence against women. Not only this, violence against women was not even regarded as 'destabilizing or morally unacceptable' or contrary to the 'core philosophy of humanity'. There was no wish on the part of international community to eliminate violence against women or to impose state responsibility for failure to do so. Thus, there was no strong evidence of opinio juris to justify discounting the contrary state practice. Third, the connection between the dominance of women by men and systemic violence is not well understood. Noteworthy is the fact that Schachter's list of human rights violation that are considered contrary to customary international law includes slavery, genocide, torture, mass killings, prolonged arbitrary imprisonment, and systematic racial discrimination, or any consistent pattern of gross violation of human rights,[17] but omits gender discrimination or gender violence. Fourth, in order to constitute opinio juris, condemnation of behaviour must be through official government channels. The voices of women's groups have failed to make such an impact. This is where public/private distinction plays its role as violence against women is often presented as a 'private' affair outside the control of the state.

Another process that might generate customary principles would be through repetition and elaboration of a treaty prohibition on violence against women. Such a treaty when concluded and ratified could be influential in creating a customary norm. Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993 can be considered as the beginning of such a treaty with broad applicability. Prior to it, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was adopted by the Organisation of American States, but was applicable only in its region. The Declaration on the Elimination of Violence against Women defines gender-based violence broadly and asserts that states should 'exercise due diligence to prevent, investigate and ... punish acts of violence against women whether those acts are perpetrated by the State or

[17] O. Schachter (1982), "International Law in theory and practice: general course on public international law", Vol. 78, *Recueil des cours/ collected courses*, pp. 334-338.

private persons'.[18] The formulation of principles has been described as the first step in the law-making process by identifying the wrong and directing attention towards the substance of the potential rule. The Declaration on the Elimination of Violence thus has the potential to generate state practice and opinio juris to get transformed into customary international law. It is to be noted that some of the text of the Declaration, no doubt, is path-breaking, yet, some significant sections were removed in negotiations to facilitate its adoption by the General Assembly. For example, United States and Sweden insisted on removing an explicit nexus between violence against women and human rights.

The ICJ has emphasised the importance of norm generating, rather than aspirational language in instruments that evidence custom.[19] The operative provisions of the Declaration by contrast contain mainly aspirational language, for example 'states should condemn violence against women'[20] and 'the organs and specialized agencies of the United Nations system should ... contribute to the recognition and realisation of the rights'.[21] Implementation and monitoring mechanisms are considered significant in enhancing the normative value of a soft law instrument. The Declaration, however, has no enforcement provisions. The obligations to implement the purposes of the Declaration are not implied in mandatory terms. In contrast, the Inter-American Convention on Violence against Women is of binding nature which allows for 'harder' implementation mechanisms.

Thus, the analysis has suggested how evidence of opinio juris can be assembled in order to argue that the Declaration on the Elimination of Violence against Women has contributed to customary international law. Consistent state practice is also needed to achieve this status.

[18] Declaration on the Elimination of Violence against Women, article 4(c).

[19] The ICJ maintained in the *North Sea Continental Shelf case*.

[20] Declaration on the Elimination of Violence against Women, article 4.

[21] Ibid. article 5.

It is to be noted that a great amount of energy and commitment was required to bring the soft instrument requiring the elimination of violence against women under the traditional sources of international law, yet its non binding nature reduces the normative effect.

### 3.2 Treaties

Treaties have become increasingly important in recent times as a means of securing states' commitment to legal obligation. However, feminist international law scholarship has successfully pointed out some of the inherent problems in using treaty law to improve the position of women. It is argued that women are almost always under-represented in government bodies that play the leading roles in treaty-making. Even if they are present, women may find it difficult to be taken seriously and to make their voices heard. For example, the International Law Commission (ILC) which has the responsibility for the codification and progressive development of international law under the UN Charter has witnessed just five female members since its inception. The invisibility or under-representation of women and dominance of men within government treaty-making bodies has resulted in an accumulation of material being considered and evaluated from a single-gendered perspective.

The feminist international law scholarship has also highlighted the role of NGOs in international law-making. Involvement of NGO in the international level is not a new phenomenon. In fact, women's NGOs have been strong in promoting humanitarian and social reform since the time of the League of Nations. The most important provision in the UN Charter that prohibited discrimination on the ground of sex[22] and the establishment of the Commission on the Status of Women (CSW) was achieved largely through their effort. Despite their achievements, feminists have maintained that there must be caution about regarding the growing prominence of NGOs in international treaty-making as being inevitably of major benefit for women. This is because men continue to dominate mainstream NGOs which have led to a failure to recognise the relevance of power imbalances between women and men.

[22] Charter of the United Nations, article 1(3).

The voluntarist account of international law underpins the right of a state to qualify its acceptance of treaty term through reservation. Treaties concerning women have been particularly vulnerable to reservation and 'interpretative declarations'. Thus, for instance, more than fifty states have entered reservations to the CEDAW. A number of these are reservations to the Convention's dispute settlement procedures, while others raise fundamental questions about the purpose of the Convention and the seriousness with which the international community regards its objective of achieving equality for women. In fact, reservations are made to the first five articles which are crucial to the fulfilment of its objective. In order to show the importance of the first five articles, a brief discussion on these articles is essential. Article 1 describes the term 'discrimination against women'; Article 2 urges state parties to pursue a policy of eliminating discrimination against women and to take necessary steps to this end; Article 3 urges state parties to take all appropriate measures to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men; Article 4 provides that adoption by state parties of temporary special measures aimed at accelerating de facto equality between men and women and at protecting maternity shall not be considered discriminatory as defined in the Convention; and Article 5 urges state parties to modify their social and cultural patterns of conduct which are based on the idea of the inferiority or the superiority of the either of the sexes or on stereotyped roles for men and women and to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.[23]

A number of state parties have entered reservations which provide that their domestic law prevails over these five and other articles of the Convention. Algeria, for example, agrees to apply provisions of these articles only if they do not conflict with the provisions of their family code. Lesotho declares that it does not consider itself bound by article 2 to the extent that the provision of this article conflicts with Lesotho's constitutional stipulation relating to succession to chieftainship and that none of the obligations in the Convention, particularly those in article 2 (e) will be treated as extending to the affairs of religious dominations. New Zealand defers to

[23] Article 1-5 of the Convention on the Elimination of All Forms of Discrimination Against Women.

traditional customs within the Cook Islands by reserving articles 2(f) and 5(a) to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions. India maintains that it will apply article 5 (a) in conformity with its policy of non-interference with the personal affairs of any community. While Bahamas and Fiji have filed unexplained reservations to article 2 (a) and 5 (a) respectively.[24]

What is more problematic is that there is no specific article to which reservations are prohibited, nor are there any non-derogable rights. The reservations and the failure of most state parties to the CEDAW to object to sweeping reservations undermine their commitment to it. The impression is created that the Convention is not as binding an international obligation as other treaties and that these reservations are not scrutinised against the yardstick of international standards of equality for women. This is because of the religious and cultural sensitivity of the subject matter involved.

Thus, the international law relating to reservations reflects the problem of constructing international communal norms in a system based on consent. In the particular context of the equality of women, the reservation mechanism has been used by some states to effectively to avoid their formal obligations.

Reference may also be made to the modern treaty doctrine of *jus cogens* which asserts the existence of fundamental legal norm from which no derogation is permitted. However, feminist international law scholarship argues that the *jus cogens* reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experiences of life. In fact, the formal development of the *jus cogens* doctrine indicates its gendered origin.[25] The most essential human rights are considered to be part of the *jus cogens*. The human rights norms that are typically considered to constitute *jus cogens* are the prohibition of

[24] Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women, Sixteenth Session, New York, January, 1997, [Online: web] Accessed on 4 April 2011, URL: http://www.un.org/documents/ga/cedaw/16/cedawc1997-4.htm.

[25] H. Charlesworth and C. Chinkin (1993), "The Gender of Jus Cogens", *Human Rights Quarterly*, Vol. 15, No. 1, p. 67.

genocide, slavery, murder/ disappearance, the right to life, torture, prolonged arbitrary detention and systematic racial discrimination. The list, however, is silent on gender issues. This silence of the list indicates that women are peripheral to the understanding of fundamental community values. For example, although race-based discrimination consistently appears in the list of *jus cogens* doctrine, gender-based discrimination is not generally understood as a *jus cogens* norm. The above analysis indicates that the norm of *jus cogens* promises much more to men than to women. This phenomenon is partly due to male domination of all human rights fora. Feminist international law scholarship argues for a feminist rethinking of *jus cogens* which would give prominence to a range of other human rights, such as the right to sexual equality; to food; to reproductive freedom; to freedom from fear of violence and oppression; and to peace.[26]

The above account suggests that treaties as sources of international law have limitation for women. The process of giving consent has largely excluded women and the subject matter of most treaties reflects a limited perspective to the advantage of men. The law of treaties reinforces voluntarism through doctrines such as that relating to reservations and limited declarations. Further, the modest recognition of a communitarian system of values through the *jus cogens* is undermined in practice by the male centred account of fundamental norms.

### 3.3 General Principles of International Law

There has been a recent academic renewal of interest in the potential of article 38(1) (c) which had largely become a 'historical remnant'. It has been argued that today's age of globalisation has exposed the limitations of customary international law and treaties in responding to major issues such as human rights, the environment, economic development and international criminality. As such, the role of general principles has been emphasised, which may be drawn upon to fill the gaps and that they may indeed become the most important and influential source of international law.

[26] Ibid. p.75.

However, a serious problem with the use of general principles is that such principles are essentially rules practiced by domestic legal system. This use of general principles of the domestic law in the international legal system will simply transpose the problems of the former into the latter. The national legal systems have been fashioned by men and as such reflect their interests. The subordination of women to men through both the structure and substance of law is one of the few truly universal features of national legal systems and there is little evidence of a general principle prohibiting gender-specific violence. Rather such violence has been tolerated or condoned. As such, use of general principles of domestic law in the international arena will only turn domestic treatment of gender violence or discrimination into universal practice, which will eventually prove to be of no advantage to women.

### 3.4 Subsidiary sources of international law

Article 38 (1)(d) of the Statute of the ICJ lists judicial decisions as a subsidiary source of international law. However, there are two potential limitations to this strategy: first, the lack of female participation in both domestic and international judicial institutions; and second, the task of finding a tribunal with appropriate jurisdiction. In order to substantiate the first limitation, it may be noted that in the history of the ICJ there has been just five female judges in all. These include Suzzane Bastid, Christine Van den Wyngaert, Dame Rosalyn Higgins, Xue Hanqin, and Joan Donogrue. There have been till date only two female ad hoc judges, one regular judge, and two female judges have been elected recently. A detailed discussion on this will be undertaken in later part of this chapter.

The other subsidiary sources of international law as listed in article 38 (1)(d) is the writings of highly qualified publicists. The tradition of international law scholarship has been created almost completely by male scholars who have little or no interest in questions of sex and gender. Feminist writings are sometimes referred to briefly in only recent international law scholarship but this attention is usually limited to a brief extract of a single article. Theoretical works consistently fail to consider the impact of feminist theories on international law. The absence of feminist writing results in the

fact that subsidiary sources replicate their silences and omissions of treaties and customary international law.[27]

## 4. Subjects of international law

"Subject" is a basic constituent unit of international law. Ordinarily international law deals with the rights and duties of the states being the principal subjects of international law. Generally it is the states that enters into treaties with each other and are thus bound by its provisions. In the colonial era, only "civilised states" were subjects of international law. The UN Charter has also incorporated the term 'civilised states'. Other states are termed as uncivilised, barbaric and so on and are not subjects of international law.

The above account does not, however, mean that other entities or individuals are outside the scope of international law. International law applies upon individual and certain non-state entities in addition to state. It is important to note that although many entities have emerged as subjects of international law, yet state has a pre-dominant role. Entities such as individuals and international organisations can assert some degree of international personhood for particular purposes, but the state is considered the most complete expression of international legal personality.

Any entity to be subject of international law must be capable of possessing certain rights and obligations and also exercise them. It must have the capacity to maintain rights through claims both in international and domestic forums. Moreover, such entity must be essentially a legal entity. It must possess treaty-making powers. A subject of international law is supposed to be a state or grouping of states. As for example, an international organisation such as the European Union is a grouping of states, which is considered to be a subject of international law. As such, traditionally only sovereign states have been subject of international law. Articles 4 of the UN Charter maintains this.

[27] H. Charlesworth and C. Chinkin (2000), *The boundaries of International Law: A feminist analysis*, Manchester (UK): Manchester University Press, pp. 62- 87.

As noted earlier, to be a subject of international law, an entity must have established legal person. The subjects of international law, thus, include: state, and other non-state entities such as international organisations and individuals. Moreover, national liberation movements such as Palestine Liberation Organization (PLO), South West Africa People's Organization (SWAPO), African National Congress (ANC) and so on are also considered as subject of international law. Such liberation movements are conferred the status of 'Observer States' by the United Nations.

A brief discussion on each of the subject of international law is given below:

### 4.1 State

The state is at the centre of the universe of international law. It is, even today, the principal subject of international law. The definition that international law offers to its central actor is, however, a formal one. It is confined to indicating the criteria of statehood.[28] The Montevideo Convention on Rights and Duties of States (1933) sets out the accepted definition of a state in international law. Article 1 of the Convention provides:

> *The state as a person of international law should posses the following qualities: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.*[29]

These criteria are apparently neutral and value-free. It may be noted that state practice since 1933 indicates that further consideration such as the process of formation of state and observance of human rights may be relevant to statehood.

In addition to the above mentioned four criteria, there are certain principles that need attention, if one is to discuss the international law of statehood. A brief discussion on these principles is given below:

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[28] B.S. Chimni (2004), "An Outline of a Marxist Course on Public International Law", *Leiden Journal of International Law*, Vol. 17, Issue. 1, p. 5.

[29] Article 1 of Montevideo Convention on Rights and Duties of States, signed at Montevideo, December 26, 1993.

One such principle is the principle of recognition. Recognition of a state by other states or international institutions signifies its acceptance as a member of the international community. The second important principle is the principle of state jurisdiction. It implies the capacity of a state to assert judicial, legislative and administrative jurisdiction over territory and nationals. A state also has considerable discretion in the exercise of jurisdiction. However, a noteworthy point is that a state's exercise of civil and criminal jurisdiction is limited by the principle of state immunity. The principle of sovereign state immunity is based on the notion of equality of states and requires that the court of one state not adjudicate on the rights of another state. State responsibility is also another important principle of statehood. The principle of state responsibility allocates liability for breach of an obligation imposed by international law. A breach of international law must be linked to a state in order for it to be justifiable in the international system. In fact, the centrality of the state to the international legal system is reflected in the principle of responsibility. Reference is to be made to the principle of self-determination which is also an important aspect of the international law of statehood. It has both 'internal' and 'external' dimensions. In so far as internal self-determination is concerned, a sovereign state is in theory builds on the self-determination of its people. And the legal right to self-determination attaches to peoples or groups and allows them to choose for themselves, albeit only in the colonial context, a form of political organisation and their relation to other groups. The Charter of the United Nations maintains that the right to self-determination does not mean the right to secede from the state. In its external dimension, however, the principle can allow a particular group to reject claims of jurisdiction by other states and assert its own status as state.

Historically, various opinions have been expressed by different scholars regarding the concept of 'state'. Grotius, for example, defined the state as 'a complete association of free men, joined together for the enjoyment of rights and for their common interests'.[30] Similarly, Pufendorf, defined the state as 'a compound moral person, whose well, interwined and united by the pacts of a number of men, is considered the

[30] *De lure Belli ac Pacis (1646), Bk I, ch I,§ xiv*, cited from J. Crawford (2006), *The Creation of States in International Law*, USA: Oxford University Press, p.6.

will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security'.[31]

Vitoria, lecturing a century earlier, gave the definition of a 'State' much more legal in expression than either Grotius or Pufendorf. According to Vitoria, 'A perfect state or community...is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own councils and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and the like... Such a state, then or the prince thereof, has authority to declare war, and no one else.'[32] For Vattel, 'Nations or States are political bodies, societies of men who have united together and combined their forces in order to procure their mutual welfare and security'.[33]

### 4.2 International Organisations

International Organisations are also the subject of international law. This is because most of the international organisations are established by sovereign states. They represent the transition from the 'Westphalian' order, in which the interests of individual state is paramount, to the 'Charter' regime, characterised by increasing prominence of intergovernmental institutions.

International legal scholars generally use the term 'international organisations' to mean intergovernmental organisations alone. However, there are also a range of diverse international NGOs that have access to and influence the international legal system. International Organisations have many forms. The most significant of all international organisations today is the United Nations. With near universal membership, the UN operates as a complex system of organs, commissions, committees and specialised agencies. The principal organs established by the UN

[31] *De Iure Naturae et Gentium Libri Octo, Bk VII, ch 2, § 13, para 672*, cited from J. Crawford (2006), *The Creation of States in International Law*, USA: Oxford University Press, p.6.

[32] *De Indis ac de Iure Belli Relections (publ 1696, ed Simon); DeIure Belli, para 7, §§425-6*, cited from J. Crawford (2006), *The Creation of States in International Law*, USA: Oxford University Press, p.7.

[33] *Le Droit des Gens (1758), vol I, Introduction, § 1; ch I, §I*, cited from J. Crawford (2006), *The Creation of States in International Law*, USA: Oxford University Press, p.7.

Charter are the General Assembly, Security Council, the ECOSOC, the ICJ and the Secretariat.

The UN also includes various specialised agencies. These includes financial institutions, the International Monetary Fund and the World Bank, and bodies with specialised mandate such as the International Labour Organisation (ILO), the Food and Agricultural Organisation (FAO), the International Maritime Organisation (IMO), the International Çivil Aviation Organisation (ICAO) and the World Health Organisation (WHO).

Furthermore, an important category of intergovernmental organisations are regional organisations such as the Association of South East Asian Nations (ASEAN), the Organisation of African Unity (OAU), the Organisation of American States (OAS), the South Asian Association for Regional Co-operation (SAARC) and so on.

To be a subject of international law, International Organisations should achieve institutionalised co-operation. Moreover, international organisations have a functional role to play. They are to carry out mandate conferred on it by sovereign states. International Organisations are considered to have international legal personality and to contribute to the generation of international law through the practice of their judicial, legislative and executive branches.[34] Undermining the traditional state-based focus of international law, international organisations have become the subject of international legal regulation.

**4.3 Individual as subject of international law**

Apart from states and international organisations, contemporary international law includes individuals as at least a partial subject. However, only a certain category of individuals are considered to be subject of international law. These are the persons who are accredited as diplomats. Diplomats are considered to be the sovereign ruler. As states are sovereign equal. So, sovereign rulers are also considered equal with the

[34] On the international legal personality of the UN see *Reparation for Injuries suffered in the service of the UN 1949.*

state. Whatever immunities are available to a state, are also available to a state diplomat. Diplomatic immunity is said to ensure the effective functioning of the diplomatic process and the promotion of friendly relations between states. Diplomats are recognised as agent of the sending states and are accordingly allowed some privileges and immunities in pursuit of their official business. The protection of the diplomatic person from action or constraint is central to the law of diplomatic immunity. This is known as the principle of 'inviolability'. As such, they are subjects of international law.

## 5. Feminist critique of the subjects of international law

The feminist international law scholarship argues that the international legal order reflects a male perspective and ensures its continued dominance. The primary subjects of international law are states and, increasingly, international organisations. In both states and international organisations the dominance of male is evident.[35] In order to substantiate this argument of the feminists, a close analysis of the various subjects of international law is needed.

### 5.1 State

According to the feminists, states are patriarchal in structure. As long as states fulfill their requirements, i.e., population, territory, government and capacity to enter into relation with other states, its statehood is more or less unquestionable under international law. Such prerequisites for statehood in international law endorse particular views of masculinity and femininity. In fact, a closer look at the concept of state with all its qualifications reveals the gendered nature of state. For example, international legal doctrine does not require a minimum number of inhabitants for an entity to qualify as a state. The fact that Vatican City is recognised as a state in international law suggests that there is no problem if an entity restricts its population to exclusively adult men and that the population is reproduced asexually, through recruitment. The notion of citizenship, when analysed properly, also reveals the

[35] H. Charlesworth, C. Chinkin and S. Wright (1991), "Feminist Approaches to International Law", *The American Journal of International Law*, Vol. 85, No. 4, p. 621.

gendered character of state. Citizenship is the legal recognition of being part of a particular population. The notion of citizenship, developed in the Athenian *polis* that forms the basis of modern Western understandings, was based on property and/or military service, which are essentially associated with men and so effectively excluded women.

Independence or its synonym sovereignty in international law is considered the principle criterion of statehood. Sovereignty means full competence to act in the international arena as well as exclusive jurisdiction over internal matters. This notion of independence and sovereignty has been explicitly seen as equivalent to manhood, in implicit contrast with the assumed dependence of womanhood. As such, feminists argue that the sex of the state in international law is constructed through a process of distinction between female and male body types.

As noted earlier, the principles of recognition play an important role in the international law of statehood. This principle, if analysed from feminist perspective, strengthen the 'male' character of the state. For example, state practice with respect to recognition of government reveals that in some contexts institutionalised racial discrimination has been regarded as an obstruction to recognition of government. However, concern with institutionalised discrimination against women has been much rarer. It is believed that notions of international law operate to ensure that member of the international community resemble each other, in a manner reminiscent of the practice of a men's world. The outer limit of recognition includes the overtly racist origins of a state, the illegal use of force, the establishment of 'puppet' regime,[36] or some combination of all these. Other factors, such as institutionalised discrimination against women, do not obstruct significantly on recognition practice and cause little disadvantage to the state in question. Not only this, states built upon a system of sex discrimination have no particular identity in international law. Thus, it is of little significance with respect to statehood that a particular nation denies basic political rights to women, such as the right to vote or to participate in public life. For example,

[36] E.g., the non-recognition of the Heng Samrin government established in Kampuchea after the invasion by Vietnam in 1979.

territorial sovereignty of Kuwait was defended without any question despite Kuwait's denial of women's civil and political rights.

Another gendered character of statehood is that of state responsibility. The feminist international law scholarship argues that the rules of state responsibility have provided a number of barriers to the recognition of women's concern as issues of international law. One such barrier is that the law of state responsibility distinguishes 'public' actions for which the state is accountable from those 'private' ones for which it does not have to answer internationally. This distinction between public and private has significant consequences for women. This is because the most widespread violence sustained by women around the world occurs in the 'private' sphere, particularly the home. Such violence is not regarded as an international legal issue. At the most, legal and political system provides inadequate remedies to the victims of violence that occurs in the 'private' sphere of home.

Another noteworthy aspect of the international law of statehood is the principle of self-determination. There have been several debates about the meaning of the right to self-determination, such as identification of the unit of self-determination, political arrangement that satisfies the right to self determination, and so on. However, there has been little questioning of its equal application to, and meaning for, all those within the group. Self-determination assumes the right to autonomy, freedom from foreign oppression and the right to choose an economic, political and social system 'free from outside intervention, subversion, coercion or constraint of any kind whatsoever'. Once external self-determination has been achieved and internal self-determination is guaranteed, it is assumed that all members of the group will equally benefit. The consequences of this limited notion of self-determination have resulted in the failure to deliver the same level of personal freedom and independence for women as for men. These consequences for women are evident despite of the fact that historically there has been a historical association between nationalist and feminist movements[37] and a high degree of women's participation in the decolonisation process.

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[37] K. Jayawardena (1986), *Feminism and Nationalism in the Third World*, London: Zed Books, p. 103.

It might prove useful to review the various changing opinions on the term 'state',[38] if one is to establish the fact that state is a patriarchal institution. In fact, in all the definitions, 'state' is equated with association of men, pacts of a number of men, societies of men and so on. As such, the term used is men and not individual which is a more generic term. The direct reference to men indicates that state has historically seen as a masculine entity. Again, as noted earlier the writing of academic writers on the development of international has been significant. Accordingly, the concept of 'state' was considered by academic writers to have male characters. In fact, till date state is seen as a masculine institution with little or no place for women.

### 5.2 International Organisations

Feminist international law scholarship has tried to highlight how international organisations contribute to the gendered character of international law. International organisations are functional extensions of states that allow them to act collectively to achieve their objectives. Women are excluded from all major decision making by international organisations on global policies and guidelines, despite the often different impact of those decisions on women.

The feminist have mainly focused on the largest international organisation, i.e., the United Nations, because of its size and claim to almost universal membership and also because of its immense significance in the international legal system. Although in the United Nations, where the achievement of nearly universal membership is regarded as a major success of the international community, this universality does not apply to women. The silence and invisibility of women characterises not only the UN, but also those bodies with special functions regarding the creation and progressive development of international law.

Not only within UN, women are also seriously under-represented in organisations that play a leading role in international law-making. As for instance, within the International Law Commission (ILC) which has the primary responsibility of law-

[38] Various definitions of the term 'state' is discussed in the text related to the above note 30-33 at pp. 59 - 60.

making under the UN Charter, there is striking under-representation of women. Since the inception of the Commission, its membership has been overwhelmingly male. Female candidates were nominated for the first time only in 1961 and 1991 elections. However, it was only in 2001 that the General Assembly elected the first two female members to the Commission. Again, in 2006 three female members were elected. Out of the three female members, Ms. Xue Hanqin from China resigned in 2010. The resignation came in the event of Ms. Hanqin being elected as judge to the ICJ. As such, the ILC presently has just two female members and their term will expire in the end of this year.

Talking about the ICJ, it may be noted that in the history if the ICJ virtually all judges have been male. There have been till date only two female ad hoc judges, namely Suzzane Bastid from France in the 1980s and Christine Van den Wyngaert from Belgium in the year 2000. The only female regular judge was Dame Rosalyn Higgins from 1995- 2009. She was the President of the ICJ from 2006- 2009. However, recently two more female judges are being elected. They are Ms. Xue Hanqin from China on 29th June 2010 and Mrs. Joan Donogrue from USA on the 9th September, 2010. As such, ICJ has witnessed only five female judges in all.

Participation of women in the judiciary is important. This is because judiciary is reflective of the society of whose laws it interprets. As such, people will put more confidence in courts that represent all individuals that make up a society. Moreover, a court comprised of judges of both the sexes is believed to provide a more balanced and gender impartial perspective on matters before it.[39]

In recent past women judges have played critical roles in shaping international law relating to gender-based violence through their participation on international tribunals. For example, judges Florence Mumba of the High Court of Zambia has served on both domestic courts and international criminal tribunals such as the international criminal tribunal for the former Yugoslavia, the international criminal tribunal for Rwanda, and presently, the Extraordinary Chambers for the Courts of Cambodia. Her

[39] S. D. O'Connor and K. K. Azzarelli (2011), "Sustainable Development, Rule of Law and the Impact of Women Judges", *Cornell International Law Journal*, Vol. 44, No. 1, pp. 5-6.

efforts in classification of rape and other gender based crimes as crime against humanity has been significant.[40]

### 5.3 Individual as subject of international law

According to feminist scholarship, individual as subject of international law further enhances the male character of the discipline. The principle of diplomatic immunity is based on the same respect for the equality of states as foreign sovereign immunity but it can be claimed only by a specific category of persons- namely diplomats- the vast majority of whom are still men.[41]

Diplomatic immunity has been regularly invoked to avoid the application of the receiving state's criminal laws to diplomatic personnel. As such, diplomatic personnel are free from legal proceedings of the receiving state even in case of sexual abuse of women. Not only the diplomats, but offences committed by the family of the diplomatic agents are also given protection from legal proceedings.

The utility of the immunity argument in preventing scrutiny of men's domination of women has been well described by Catharine MacKinnon. She has argued that the ideology of sovereignty supports patriarchal systems:

> *Immunities govern and mark every level of this sovereignty scheme. Marital immunity has governed the family.....Familiarity immunity still de facto governs acquaintance or intimate relations....Official immunity protects state actors within states. Sovereign immunity protects them in the law of nations.*[42]

The international law of immunity sustains the invisibility of women in several areas and reinforces the notion of the impermeability of statehood and its recognised agents.

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[40]S. D. O'Connor and K. K. Azzarelli (2011), "Sustainable Development, Rule of Law and the Impact of Women Judges", *Cornell International Law Journal*, Vol. 44, No. 1, p. 7.

[41] C. Enloe (1989), *Bananas, Beaches, and Bases: Making Feminist Sense of International Politics*, London: Pandora Press, p. 93.

[42] C. MacKinnon (1997), *remarks in Contemporary International Law Issues: New Forms, New Applications*, The Hague, Nederlandse Vereniging voor International Recht, p.152.

6. **Summation**

The above analysis makes it clear that the very foundation of international law is gender discriminatory in nature. An examination of the sources and subjects of international law helps sustain this conclusion. The orthodox and accepted sources of international law are structured to exclude the experiences and concerns of women. As such, feminist international law scholarship has argued for new methods of international law-making that focus less on the role of states and consider the actions of other actors within the international arena, notably those of NGOs and international civil society.

Coming to the subjects of international law, states are an inadequate representation of a complex phenomenon that is gendered in nature. The sex of the state operates to legitimate understandings of sexual difference that rest on a model of (male) domination and (female) subservience within state as natural and immutable. In fact, feminists such as Catherine MacKinnon have presented the state as synonymous with the legal system which is seen as a direct expression of men's interests.[43] The structures of international organisations imitate those of state and thereby sustain gender discrimination. In fact, the absence or under-representation of women from all major international organisations is a major concern for feminist scholars. By excluding women, these organisations have succeeded in keeping women's concern or outlook out of their decision-making. Despite the fact that in recent times attempt has been made to giving representation to women in major international institutions such as ILC and ICJ, yet this attempt cannot be consider adequate. This is because membership in these institutions is still far from being equal in terms of men and women. Although new actors are considered as subjects of international law, yet women's interests continue to be in a marginalised position.

It is also to be noted that feminist scholars are not just concerned about representation of women. In fact, they argue for recognition, redistribution and representation of

[43] C. MacKinnon (1989), *Towards a Feminist Theory of the State*, Cambridge, Mass., Harvard University Press, pp. 162-3.

women's concern and experiences within the sources and subjects of international law.

# CHAPTER – IV

# THE FEMINIST APPROACH TO INTERNATIONAL HUMANITARIAN LAW

# Chapter-IV

# THE FEMINIST APPROACH TO INTERNATIONAL HUMANITARIAN LAW

## 1. Introduction

Wars and conflicts have become a fact of life today. In fact, wars and conflicts rage around the world. However, many of these wars go unreported, sometimes due to political unwillingness and sometimes due to lack of interest. In spite of the fact that the preamble of the Charter of the United Nations urges us to "save the succeeding generation from the scourge of war", we are witnessing disgusting increasing of wars and conflicts. These wars are catastrophic not only for combatants but also for civilians. The United Nations Security Council in 1999 noted: "that civilians account for the vast majority of casualties in armed conflicts and are increasingly targeted by combatants and armed elements."[1] What is more worrying is the fact that women constitute vast majority of civilians. A larger and growing number of women are suffering in the midst of armed conflict and its aftermath.[2] In fact, armed conflict exacerbates the global inequalities experienced by women. It creates new and different types of discrimination against women.

In recent times, the connection between gender based violence and armed conflict has attracted international attention. In fact, the issue of violence against women have led to several attempts to address accountability and impunity. However, despite attempts to address issues of gender based violence during and after armed conflict, such violence continues to be a major problem.[3]

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[1] Security Council Resolution 1265 on The Protection of Civilians In Armed Conflict (UN Doc S/RES/1265), 17 Sep, 1999, [Online:web] Accessed on 15 February 2011, URL: http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1265(1999).

[2] R. Sharma, "Protection of Women and Children during Armed Conflicts under International Humanitarian Law", [Online:web] Accessed on 25 September 2010, URL:http://www.sharmalawco.in/downloads.

[3] R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, p. 11.

In this light, an attempt has been made in this chapter to analyse the experiences of women during armed conflict and to match it with the existing legal regime regulating armed conflict and to investigate reasons for the silence of the latter in relation to women's experience during war. Accordingly, the chapter begins with an account of what constitutes international humanitarian law, and its differences with international human rights law. An attempt has also been made to analyse the unique experiences of women during and after armed conflicts. An assessment of the response of international humanitarian law to women and armed conflict is also made. An examination of the effectiveness of international criminal tribunals and international criminal court in prosecuting gender based crimes is also made. Suggestions for improving the law in relation to women have also been provided. In short, this chapter provides a gender perspective to international humanitarian law.

## 2. What is international humanitarian law?

International humanitarian law (hereafter IHL) applies to armed conflicts. It is the branch of international law which regulates the conduct of hostilities. It is a set of rules which seek, for humanitarian reasons, to limit the effect of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. It is applicable in international and non-international armed conflicts and is binding on both State parties and armed opposition groups. IHL is also binding on multilateral peacekeeping and peace enforcement operations if they take part in the hostilities.[4]

IHL, like international law, comes from both treaty law and rules of what is known as customary international law. Customary IHL is of crucial importance in today's armed conflicts because it fills gaps left by treaty law in both international and non-

[4] C. Lindsey (2001), "Women Facing War", *ICRC Study of the Impact of Armed Conflict on Women (Executive summary)*, p. 4.

international armed conflicts and so strengthens the protection offered to non-combatants.[5]

A major part of IHL is contained in the four Geneva Conventions of 1949. The Conventions have been developed and supplemented by two further Protocols: the Additional Protocols of 1977 relating to the protection of victims of armed conflicts. Other agreements prohibit the use of certain weapons and military tactics and protect certain categories of people and goods. These agreements include:

• The 1954 Convention for the protection of Cultural Property in the Event of Armed Conflict, plus its two protocols;

• The 1972 Biological weapons Convention;

• The 1980 Conventional Weapons Convention and its five protocols;

• The 1993 Chemical weapons Convention;

• The 1997 Ottawa Convention on anti-personnel mines;

• The 2007 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

The rules of IHL seek to extend protection to a wide range of persons. The basic distinction drawn has been between combatants and those who are not involved in actual hostilities. The Geneva Conventions of 1949, as noted above, cover the wounded and sick in land warfare; the wounded, sick and shipwrecked in warfare at sea; prisoners of war; and civilians.

The First Geneva Convention concerns the Wounded and Sick on Land and emphasises that members of the armed forces and organised military groups "shall be respected and protected in all circumstances." They are to be treated humanely by the

[5] Customary international humanitarian law: Overview, ICRC, Geneva, 2010, [Online:web] Accessed on 10 December 2010, URL: http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm

party to the conflict into whose power they have fallen. It prohibits torture and biological experimentation. Moreover, such person should not be left without medical care and assistance. The wounded and sick armed forces that falls into enemy hands are to be treated as prisoners of war. The parties to a conflict shall take all necessary measures to protect such wounded and sick members of armed forces. They should also search for their dead bodies and prevent them from being despoiled.[6]

The Second Geneva Convention concerns the conditions of wounded, sick and shipwrecked members of armed forces at sea and is similar to the First Geneva Convention. It provides that members of armed forces and organised military groups that are wounded, sick and shipwrecked are to be treated humanely and cared for on a non- discriminatory basis. The Convention also provides that hospital ships should not be attacked or captured under any circumstances. The provisions of these conventions were reaffirmed in and supplemented by Additional Protocol I of 1977 in its Part I and II.

The Third Geneva Convention of 1949 is concerned with prisoners of war. It consists of a comprehensive set of rules which argues for humane treatment to prisoners of war in all circumstances. The definition of prisoners of war is provided in article 4, which is regarded as the elaboration of the combatant status. It covers members of the armed forces of a party to the conflict and members of other military groups provided the following conditions are fulfilled: (a) being commanded by a person responsible for his subordinates; (b) having a fixed distinctive sign recognizable at a distance; (c) carrying arms openly; (d) conducting operations in accordance with the laws and customs of war.

The Fourth Geneva Convention is concerned with protection of civilian in times of armed conflict. Under Article 50 (1) of Additional Protocol I, 1977, a civilian is defined as any person not a combatant, and is case of doubt a person is to be considered a civilian. The Fourth Convention provides a highly developed set of rules

[6] Provided in article 15, article 16 and article 122 of the Third Geneva Convention.

for the protection of such civilians, including the right to respect for person, honour, convictions and religious practices and the prohibition of torture and other cruel, inhuman or degrading treatment, hostage- taking and reprisal. The protection of civilian in occupied territories is covered under section III of Part III of the Fourth Geneva Convention.

It is to be noted that many provisions of IHL are now accepted as customary law- that is, as general rules by which all states are bound.[7] Most of these customary rules correspond to existing treaty norms, but they often have a wider field of application.

## 3. Difference between international humanitarian law and international human rights law.

While discussing IHL, it becomes essential to note that often IHL and international human rights law (hereafter IHRL) are considered to be similar. Both IHL and IHRL strive to protect the lives, health and dignity of individuals, but from different angle. As such, essence of some of the rules of IHL and IHRL is similar, if not identical. Although, apparently both IHL and IHRL appear similar, both are two separate set of rules with separate objectives. The rules of IHL deals with many issues that are outside the purview of IHRL, such as the conduct of hostilities, combatants and prisoner of war status and the protection of the Red Cross and the Red Crescent emblems. Similarly, IHRL deals with aspects of life in peace time that are not regulated by IHL, such as freedom of the press, the right to assembly, to vote and to strike.[8]

[7] "What is International Humanitarian Law?", *Advisory Service on International Humanitarian Law*, ICRC, Geneva, 07/2004, p. 1, [Online;web] Accessed on 25 September 2010, URL: http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

[8] "International humanitarian law and International human rights law: Similarities and Differences", *Advisory Service on International Humanitarian Law*, ICRC, Geneva, 01/2003, p. 1, [Online:web] Accessed on 27 October 2010, URL: http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf.

Although IHL and IHRL are considered to be similar, yet there are differences between the two in terms of its rules, applicability, effects, and implementation. The following discussion will help understand the difference better.

In so far as rules are concerned, IHL is a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non international armed conflicts. IHRL is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from governments. Human rights are inherent entitlements which belong to every person as a consequence of being human.

Talking about applicability, IHL is applicable in times of armed conflict, whether international or non international. Whereas IHRL, applies at all times, both in peace time and in situations of armed conflict.[9]

An important difference between IHL and IHRL is regarding who it binds. While IHL binds all parties to an armed conflict- both government and armed opposition groups- IHRL lays down rules which bind governments in their relations with individuals. The traditional view is that non- state actors are not bound by human rights norms- a view which is increasingly the subject of debate.

As regards implementation, under IHL states have a collective responsibility under article 1 common to the Geneva Conventions to respect and to ensure respect for the conventions in all circumstances. The supervisory system also comprises the Protecting Power mechanism, the enquiry procedure and the International Fact-Finding Commission envisaged in Article 90 of Protocol I. The ICRC is a key component of the system, by virtue of the mandate entrusted to it under the Geneva Conventions, their Additional Protocols and the Statutes of the International Red

[9] Ibid.

Cross and Red Crescent Movement. It ensures protection and assistance to victims of war, encourages states to implement their IHL obligations and promotes and develops IHL. Whereas the IHRL supervisory system consists of bodies established either by the United Nations Charter or by the main IHRL treaties. The principal UN Charter-based organ is the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights. "Special procedures" have also been developed by the Commission over the last two decades, i.e. thematic or country specific special rapporteurs, and working groups entrusted with monitoring and reporting on the human rights situations within their mandates. Six of the main IHRL treaties also provide for the establishment of committees of independent experts charged with monitoring their implementation. A key role is played by the Office of the High Commissioner for Human Rights which has primary responsibility for the overall protection and promotion of human rights. The Office aims to enhance the effectiveness of the UN's human rights machinery, to increase. At the regional level, there are regional human rights courts and commissions established under the main regional human rights treaties in Europe, the Americas and Africa. This is a distinct feature of IHRL, with no equivalent in IHL. Regional human rights mechanisms are, however, increasingly examining violations of IHL. The European Court of Human Rights is the centrepiece of the European system of human rights protection under the 1950 European Convention. The main regional supervisory bodies in the Americas are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The African Commission on Human and Peoples' Rights is the supervisory body established under the 1981 African Charter.

The above account makes clear the differences between IHL and IHRL. In addition to its similarity with IHL, IHRL provides important additional protection through the highly developed mechanism for its enforcement.[10]

[10] C. Lindsey (2001), "Women Facing War", *ICRC Study of the Impact of Armed Conflict on Women (Executive summary)*, p. 8.

## 4. Women and war

The historical indifferences to women and their particular experiences of armed conflict have been marked. In many ways, whether as combatants or civilians, women share many of the same difficulties as men. They are targeted with the same weapons, share the dislocation attendant on armed conflict, and loss of shelter, shortage of medical and food supplies that it entails. There is also overwhelming consensus, however, that women experience armed conflict in a different way to men. This distinctive experience, although its effect differs widely across cultures, depending upon the position of women in particular societies, is related to the vulnerabilities of women when armed conflict breaks out. This vulnerability of women is evident in the catastrophic statistics of violence (including sexual violence) against women during war. It is believed that violence against women during armed conflict is a manifestation of the universal, unequal, power relations between men and women. Such violence has been consistently unreported and unrecorded, despite of the fact that it has resulted in death and suffering of countless women over the years. Violence against women, however, is only one way in which the vulnerability of women manifests itself in armed conflict. The overall experience of women affected by armed conflict is a product of their unequal status generally.[11]

In this backdrop, it is essential to note that on 6th March, 2000, at the United Nations Day for Women's Rights and International Peace, former Secretary General of the United Nations, Kofi Annan maintained that "All too often, conflict happens in societies that can least afford it, takes its toll on those who least deserve it and hits hardest those least equipped with to defend themselves, civilians have become the main target of warfare. From rape and displacement to the denial of the right to food and medicines, women bear more than their fair share of the burden." This can be justified if we carefully analyse IHL from feminist perspective. Despite the efforts to improve the protection of general categories of victims and children, and increasing

[11] J. G Gardam and M. J, Jarvis (2001), *Women, Armed Conflict and International Law*, The Hague/ London/ Boston: Kluwer Law International, pp. 6- 8.

recognition that armed conflict has this differing impact on women, there has been, to date, no serious attempt to address in any comprehensive way the deficiencies of IHL with respect to women. In fact, what has been so long overlooked in the analyses of IHL is the impact of gender. What is to be "feminine" and "masculine", is not a factor that has traditionally been regarded as relevant in the discussion of IHL.[12]

In an attempt to analyse IHL from feminist perspective, it is essential to look at two aspects, that is, unique experiences of women during armed conflict and the existing legal instruments that provide general and specific protection to women.

### 4.1. Experiences of women during armed conflict

One of the major arguments of this section is that women experience armed conflict differently from men. However, this argument is not easy to establish given the rareness of sex differentiated data in relation to the impact of armed conflict.

Violence that women experience during and after armed conflict usually take many forms such as rape, slavery, forced impregnation or miscarriages, kidnapping or trafficking, forced nudity, and disease transmission.[13]

As noted earlier, women are the most obvious victims of armed conflict. Not only are women major victims of armed conflict but they experiences war and its aftermath differently from that of men. However, there is a whole range of difficulty in finding detailed information to support this view. This is because traditionally men compile the data and inevitably treat women under the rubric of male civilian. The unique suffering of women thus remains hidden.

[12] Ibid. p. 10.

[13] R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, p. 12.

Women, generally speaking, are not directly involved in warfare. The main actors in times of armed conflict are combatants, who are predominantly male. Women, however, are arguably the major victims of warfare.[14] The sexual abuse of women during and after war has been well documented. Forcible prostitution has also been regarded as an inevitable and accepted practice in war times. Although sexual abuse is the most obvious area in which women suffer in armed conflict, this is just one aspect of their experience. Other distinctive ways in which warfare impact women are, however, less easily identified as they are rarely the focus of attention unlike the treatment of combatants. Sexual abuse of women during and after war are simply accepted as unfortunate side effects of armed conflict and are unrecorded in the catalogues of war crimes. It may be noted here that Rhonda Copelan maintains that when war is done, rape is comfortably filed away as a mere and inevitable "by-product", a matter of poor discipline, the inevitable bad behaviour of soldiers revved up, needy, and briefly "out of control".[15]

The aspect of warfare which has an appalling impact on women is rape. Rape in warfare has been consistently unreported and unrecorded, although it has resulted in death and suffering of countless women over the years. According to feminist scholars, rape is never truly individual but is an integral part of the system ensuring the maintenance of the subordination of women.[16] In addition to the degradation, pain, and terror caused at the time of attack, rape carries the risk of sexually transmitted disease, including HIV/AIDS, and pregnancy. Women have to face the prospect of bearing the child of invader or of seeking an abortion at a time of intense social dislocation. Sometimes women are so badly injured that they are never able to bear children. Certain women being unable to bear what they perceive as their shame commit suicide. Not only these, where the effects of conflict have caused shortage of

[14] This view was expressed by the UN Secretary General, Boutros Boutros Ghali, at a forum on "Dignity for Women in War" in Sydney, April, 1995.

[15] R. Copelan (1995), "Gendered War Crimes: Reconceptualizing Rape in Time of War" in J. Peters and A. Wolper (ed.), *Women's Rights Human's Rights: International Feminist Perspectives*, New York/ London: Routledge, p 197.

[16] J. G. Gardam (1993), "The Law of Armed Conflict: A Gendered Regime?" in D.G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, p. 174.

food and shelter, and priority health care is directed towards the military, child bearing can impose an impossibly high additional material as well as psychological burden upon women.[17]

Another impact of war on women is that they are to provide fighting men with sexual pleasure. Such actions are sometimes referred to as marriage. But international definitional suggest that such marriages should be regarded as crimes of enslavement. Such women find it difficult to reintegrate with the society and suffer immense psychological harm because of their enslavement.[18]

Reference may be made to the thousands of Asian women who were forced to act as "Comfort Women" for Japanese troops during World War II.[19] A more accurate expression would be "Sex Slaves" as these women were forced into prostitution in military brothels. "Rest and Recreation" is a well- used euphemism for providing fighting men with access to brothels where they have little or no economic choice. In certain cases women in long-continuing conflicts are expected to produce the fighters of the next generation. For example, refugee women in Palestine camps were responsible for giving birth to children who will become the next generation of freedom fighters to continue the struggle against Israel. Any attempt by these women to resist this role and to take control of reproductive rights is seen as undermining the overriding cause of Palestine self- determination.

Not only war, be it international or non international, but its aftermath is also quite different for women from that of men. Although not all women experience their lives

[17] C. M. Chinkin (1993), "Peace and Force in International Law" in D.G. Dallmeyer (ed.) *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, p. 206.

[18] R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, p. 13.

[19] *Historians estimate the number of such women to be between 70,000 and 200,000. Sydney Morning Herald, Sept 19, 1992, at 13, col. 4*, cited from C. M. Chinkin (1993), "Peace and Force in International Law" in D.G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Washington: The American Society of International Law, p. 207.

in times of armed conflict in identical ways, there is a common thread that can be identified. This shared aspect relates to the traditional role of women in all cultures during times of peace and times of war for maintaining the everyday survival of the society of which they are part. Generally women do not take part in the decision making preceding war, or in actual conduct of conflict. They, however, have to live with the result of such conflicts. It is believed to be relatively common for a society to experience an increase in trafficking, forced prostitution, domestic violence, and rape following a major war. Some of these issues, more particularly domestic violence and trafficking increase after the conclusion of a war than were experienced during war.[20]

Moreover, it becomes the responsibility of women to look after their family, which include sick, the elderly, and the young, when their husbands are away in the battlefield. Not only have these, women's reproductive capacity made them vulnerable to shortage in food, medicine, medical treatment and so on. Their subordinate roles in all cultures are additional factors that contribute to their different experience.

However, the position of women during armed conflict is not always entirely negative. War has been an opportunity for women to gain some freedoms and power that they had not previously enjoyed. Cynthia Enloe, for instance, has described how while Palestinian men are denied opportunities to prove their manhood during the armed struggle with Israel, women are proving their strength and resourcefulness by coping with the realities of the intifadah.[21] The imposition of a strict curfew and the arrest and detention of numerous Palestinian males have raised women's status within society and turned their household and other chores in "national imperatives" essential to the continuing struggle. In many cases, however, the crucial question remains whether women are able to retain any of the advances they have made after the conflict is over. The history of women being forced out of the position of power

[20] R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, Winter, p. 13.

[21] C. Enloe (2000), *Bananas, Beaches and Bases: Making Feminist Sense of International Politics*, UK & USA: University of California Press, First published by Pandora Press, 1989, p. 58.

and responsibility they have retained effectively during conflict by males returning to seek peacetime employment is well known. If we take a recent example, Homa Khaleeli maintains that life of Afghan women changed with Allies invasion into Afghanistan in 2001. Prior to that, women were not allowed to work or even to leave their house during the Taliban regime. The Afghan women fears that their new found freedom could be at risk, if the Allies pull out from Afghanistan without insisting on guarantees for women's rights. The U.S. on its part is not interested in providing protection for the women in the region. In fact, women's rights were not seen as relevant and reconcilable with peace in Afghanistan. It means with the end of the war and as the West prepares to pull out, it could lead to loss of hard-won improvements.[22]

Despite the far reaching consequences of conflict upon women, their voices are silenced in all levels of decision making regarding war, including decisions to commence, continue or cease hostilities, about to whom to look for support and the financial and other cost of that support, and the required level of military preparedness and arms build up within the state. In short, women's voices are not included in discussions relating to decision making in any levels, and if there are voices dissenting to the decisions made by the military and ruling elites they will simply not be heard. Similarly, the likely consequences of armed conflict for women are not relevant factor in the substantive doctrines of international law relating to the use of force.

Not only during pre-war decision making, women are also routinely excluded from the aftermath of war including peace negotiations, formulations of the conditions for peace, and decision with respect to retribution. Women's views as to priorities in reconstruction of society are not sought, nor are their potential contributions to the means of securing a lasting peace.

[22]H. Khaleeli (2011), "Afghan women fear for the future", *THE HINDU*, New Delhi, Feb. 5, 2011.

Another issue that needs attention is that images of women are used for diverse, and at the same time contradictory, purpose in times of armed conflict. Women are depicted as maternal comforters, victims, manipulators of men, and sterling citizens, taking over men's work. Sometimes women may be able to take short- term advantage of opportunities that are opened up by the dislocation of normal life, but they may quickly loose the benefits they have gained.[23]

### 4.2. The protection of women in IHL

This section deals with the development and current content of IHL that are of relevance to women. Limited protections for women in times of armed conflict have existed in most civilisations. Their common theme has been the prohibition of the killing of (in common with children and the elderly) and of sexual violence against women.

The law of war, as it was formerly known,[24] is one of the most ancient components of the Law of Nations and the first rules of international law to be partially codified in late nineteenth and early twentieth century. Prior to this period, some of the earliest documents of the law of war also recognised the need to provide protection for women. For example, the Treaty of "Amity and Commerce" between United States and Prussia (1785) stipulated in Article XXIII that "if war should arise between the two contracting parties....all women and children...shall not be molested in their persons."[25] These provisions, however, were limited to the physical integrity of women, the related concept of their honour, and their role in the family.

[23] H. Charlesworth and C. Chinkin (2000), *The boundaries of International Law: A feminist analysis*. Manchester (UK): Manchester University Press, p. 257.

[24] IHL is a relatively new term to describe this area of international law. During the period when war was accepted as a legitimate activity of States, the relevant rules of international law that controlled its conduct were referred to as the law of war.

[25] Treaties, Conventions, International Acts, Protocols and Agreements between the US and Other Powers 1776-1909, vol. 2, (1910), p. 1477.

From the birth of the IHL, apparently women had the same general legal protection as men. There were, however, no special provisions in relation to women in the regime determining the legitimate conduct of hostilities.[26] This is probably because historically remedy for victims of armed conflict has not been a priority of the international legal regime.

From 1929 onward, women have enjoyed special protection under international humanitarian law. There are provisions dealing specifically with women in all of the four Geneva Conventions and both the Additional Protocols. The starting point of the system of special protection for women is the provisions that deal with the "regard" or "consideration due to women on account of their sex", and require that they be accorded special respect and protection. These provisions are described as having the purpose of preserving the "modesty" and "honour" or "weakness" of women. For example, the first modern conventional reference to women in Article 3 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, require that "women shall be treated with all consideration due to their sex." The Conventions and Protocols contain a number of provisions to the same effect.[27] The commentaries on these provisions give an indication of what is intended by such phrases. For example, in the context of Article 14 of the Third Geneva Convention, the phrase, "women shall be treated with all the regard due to their sex...", has been described in the following terms: "it is difficult to give any general definition of the 'regard' due to women. Certain points should, however, be borne in mind; these points are the following:

> *A. Weakness- this will have a bearing on working conditions... and possibly on food;*
> *B. Honour and modesty- The main intention is to defend women prisoners against rape, forced prostitution and any form of indecent assault...*
> *C. Pregnancy and Child-birth- If there are mothers with infants among the prisoners, they should be granted early repatriation...women who have given birth*

[26] J. G. Gardam, and M. J. Jarvis (2011), *Women, Armed Conflict and International Law*, The Hague/ London/ Boston: Kluwer Law International, p. 54.

[27] See Article 12 of the First Geneva Convention, Article 12 of the Second Geneva Convention, Article 14 of the Third Geneva Convention, and Article 76 of Additional Protocol I.

*should be repatriated with their child, if their state of health permits, should also be repatriated.*"[28]

Standing alone, the provisions in relation to "regard" or "consideration" or "special respect", are statements of general principle and impose no concrete obligations. They are supplemented by more detailed rules, such as those mandating separate quarters and sanitary conveniences for women and prisoners of war; those directly protecting women from sexual assault; and those dealing with pregnant women. Overall the rules are designed to either reduce the vulnerability of women to sexual violence, to directly prohibit certain types of sexual violence, or to protect them when pregnant or as mothers of young children.[29]

The various rules of IHL that deal with women can be discussed under the following heads:

### *4.2.1 Separate quarters and conveniences for women prisoners of war and internees*

The four Geneva Conventions and the Additional Protocols provide for separate quarters and facilities for women prisoners and those detained by the occupying power, and moreover, that they should be under the supervision of women. For example, Article 25 of the Third Geneva Convention requires that "in any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them",[30] and by Article 29 "in any camps in which women prisoners of war are accommodated, separate conveniences shall be provided

[28] Commentary, Third Geneva Convention, published under the general editorship of J. S. Pictet (1960), ICRC, Geneva, pp. 147- 148, [Online:web] Accessed on 02 March 2011, URL: http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf.

[29] Commentary Fourth Geneva Convention, published under the general editorship of J. S. Pictet (1958), ICRC, Geneva, p. 385, [Online:web] Accessed on 03 March 2011, URL: http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf.

[30] Commentary Third Geneva Convention, published under the general editorship of J. S. Pictet (1960), ICRC, Geneva, p. 195, [Online:web] Accessed on 02 March 2011, URL: http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf and also Article 75 (1) and (5) of Additional Protocol I.

for them".[31] Similarly, Article 85 of the Fourth Geneva Convention requires separate quarters for women internees and is described as: "a particular application of the general principle laid down in Article 27, paragraph 2, concerning the respect due to women's honour."[32]

In the context of non- international armed conflicts, Additional Protocol II requires separate quarters for women internees or detainees, (unless accommodated as a family), and that they be under the immediate supervision of women.[33]

### *4.2.2 Protection against sexual assault*

The provisions dealing with sexual assault against women are also based on the specific application to them of the general notion of respect for the person, honour, and family rights.[34] Article 27 (2) of the Fourth Geneva Convention is the first express conventional reference to rape and other forms of sexual mistreatment. It reads "women shall be especially protected against any attack of (sic) their honour, in particular against rape, enforced prostitution, or any form of indecent assault." These acts are described as incompatible with the honour, modesty and dignity of women.[35]

[31] See also Article 75 (5) of Additional Protocol I (in relation to persons in the power of a party to the conflict).

[32] Commentary Fourth Geneva Convention, published under the general editorship of J. S. Pictet (1958), ICRC, Geneva, p. 388, [Online:web] Accessed on 03 March 2011, URL: http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf

[33] Article 5 para 2 (a) of Additional Protocol II.

[34] Commentary Fourth Geneva Convention, published under the general editorship of J. S. Pictet (1958), ICRC, Geneva, p. 205, [Online:web] Accessed on 03 March 2011, URL: http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf.

[35] Ibid. p. 206.

Article 27 (2), however, does not protect individuals from the activities of the State of which they are national.[36]

Additional Protocol I extend the scope of certain fundamental protections to all persons in the territory of a Party to the conflict. For example, Article 75 (2) of the Additional Protocol I prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault", whether committed by military or civilian personnel. "Rape" is not expressly included in Article 75 (2). However, Article 76 of Additional Protocol I, dealing specifically with women and children, extends the protection in the Fourth Geneva Convention against rape, so as to include all women who are in the territory of Parties involved in the conflict.

In the context of non-international armed conflicts, Article 4 (2) (e) of Additional Protocol II prohibits, in relation to "persons who do not take a direct part or who have ceased to take part in hostilities", "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".

***4.2.3 Pregnant women (expectant mothers) and maternity cases***

There is a range of provisions that deal with pregnant women, maternity cases, and mother of children less than seven years respectively. Throughout the conventional rules, these categories of women are equated with the wounded, sick and aged,[37] and enjoy particular protection and respect. They are accorded special treatment in the context of such matters as medical care, food stuffs, physical safety and so on. For

[36] J. G. Gardam and M. J. Jarvis (2001), *Women, Armed Conflict and International Law*, The Hague/ London/ Boston: Kluwer Law International, p. 64.

[37] "Expectant mothers are included as persons in a state of weakness which demands special consideration", in Commentary Fourth Geneva Convention, published under the general editorship of J. S. Pictet (1958), ICRC, Geneva, p. 134.

example, Article 91 of the Fourth Geneva Convention provides that maternity cases along with other serious diseases must be admitted to any institution where proper treatment can be given and shall receive care not inferior to that provided to general population. In so far as food is concerned, Article 23 of the Fourth Geneva Convention requires that Parties allow the free passage of essential food stuffs, (and clothing and medicines) to expectant mothers and maternity cases. Coming to physical safety, Article 14 of the Fourth Geneva Convention provides that Parties to the conflict may establish safety zones[38] for pregnant women and mothers of small children. Furthermore, Article 17 of the Fourth Convention requires that in besieged and encircled areas, the Parties may attempt to conclude agreements for the evacuation of maternity cases.

The above-mentioned rules do not impose any obligation and their violation is also not seen as serious offence. They are merely protective in nature meant to reduce vulnerabilities of women.

## 5. International Humanitarian Law: A Gendered Regime

Gender is a useful vehicle for the analysis of international law. What it does is to demonstrate how the law creates and reinforces a certain type of gender differentiation. Examining IHL from the perspective of gender, and how it constructs the category "women", can help in avoiding the trap of assuming a pre-existing category of women.

IHL, in common with law generally, is believed to be a thoroughly gendered system. It accepts the social construction of the masculine and feminine as a given. Thus, certain characteristics of men and women are assumed and serve as a basis on which to construct the regime. Built into the rules is the preference historically accorded to

[38] Safety zones are generally of a permanent character, established outside the combat zone in order to shelter certain categories of the civilian population, which owing to their weakness require special protection.

the characteristics that represent the masculine. As such, the foundations of IHL are seen as "structures of systemic inequality and discrimination against women."[39] IHL both perpetuates and further constructs a particular vision of men and women. In fact, one of the fundamental critiques of IHL is that the rules that are theoretically equally applicable to combatants and civilians in general, are gendered, in that they take a certain male view of armed conflict as their norm.

While discussing the IHL as a gendered regime, it is essential to first analyse the term 'gender'. It is often advanced that "gender is more than just biological". In fact, the ICRC while 'Addressing the Needs of Women Affected by Armed Conflict' (2004) maintains that "The term 'gender' refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex."[40] In short, the concept of gender was found to be based both on biological differences and social constructions, where male and female attributes play a prominent role.

IHL is supposed to be gender neutral. However, a critical analysis reveals the difference in the application of the law with respect to men and women. It is essential to note here that IHL makes a distinction between international armed conflict and non international or internal armed conflict. International armed conflict refers to wars involving two or more states. Whereas non international armed conflict includes civil strife, internal disturbances and so on. IHL provides extensive protection to combatants during international armed conflict and a relatively less protection to civilians during non international or internal armed conflict. A noteworthy point here is that women and girls predominantly experience armed conflict as civilians. They are often exposed to violence, which include death and injury from indiscriminate military attacks and the prevalence of mines; lack of basic means of survival and

[39] See Report of the Expert Group Meeting, "Promoting Women's Enjoyment of their Economic and Social Rights", Abol/Turku, Finland, UN Doc EGM/WESR/1997/Report (Dec 1997) Preface (making this argument in the context of the human rights of women generally), [Online:web] Accessed on 10 December 2010, URL: http://www.un.org/documents/ecosoc/cn6/1998/hrights/egmwesr1997-rep.htm.

[40] Addressing the needs of women affected by armed conflict: an ICRC guidance document, ICRC, 2004, [Online:web] Accessed on 12 January 2011, URL: http://www.icrc.org/eng/resources/documents/publication/p0840.htm.

health care; limitation on their means of support themselves and their families. In so far as international armed conflict is concerned, the Geneva Conventions and their Additional Protocols, there are frequent references to the fact that IHL is based on equality of protection. The rules appear to deal equally with both combatants and non combatants, with different rules protecting both categories. Such a division clearly warranted by the different issues raised in relation to those directly involved in armed conflict and those who are not. It is at this point, however, that the distinctive gender perspective of armed conflict which informs the regime becomes apparent. As combatants are predominantly male and the majority of non combatants are women.

Apparently, the Four Geneva Conventions of 1949 and their Additional Protocols of 1977 protect women both as member of civilian population not taking part in hostilities and also as combatants, fallen into the hands of the enemy. However, women are just subsumed in the category of male civilians, despite the fact war impacts on them in distinctive ways. The principle of equal treatment is extended by the principle that "Women should be treated with all regard to their sex."[41] However, this particular regard is not legally defined, but only covers certain concepts such as physiological specificity, honour and modesty, pregnancy and child birth. In short, the existing rules of IHL protect women in terms of their relationship with others, such as when pregnant or as mother, not as individual in their own right.

The argument that rules of IHL are totally inadequate and incorporate a gendered hierarchy can be substantiated in the sense that the rules dealing with women are regarded as less important than others and their infringement is not taken as seriously. In fact, the preference given to the protection of the predominantly male combatants by the regime of the IHL clearly illustrates its gendered character. It is also noteworthy that the defect of the system from the perspective of women lay not so much in the fact that there are more rules protecting combatants, or even that their breach is not taken seriously, but in the balance within the rules themselves. It is here

[41] The principle is contained in Article 12 of the First and the Second Geneva Convention, and Article 14 of the Third Geneva Convention.

that the public/private dichotomy, used by feminists, can be helpful in demonstrating the assumption that leads to this imbalance.[42]

On a general level the operation of the gendered public/private distinction can be seen both in the decision-making in relation to the resort to war and in what restraints its conduct are acceptable. It is in the public world of men that these decisions are made. Women's voices are absent from these processes. Moreover, the framework of the rules of IHL protecting combatants and civilians is also based on the public/private split. In the activity of the armed conflict it is the combatant who represents the public face of the State and women are confined within the private sphere as civilians.[43] Sidelining women to the private sphere is therefore failing to acknowledge the existence of gender based problems in IHL.

The specific provisions dealing with protection of women are found in the four Geneva Conventions mentioned earlier. They are, however, drafted in different language from the provision protecting combatants and civilians generally. They are expressed in terms of protection rather than prohibition. For example, Article 76 of Additional Protocol I to the Geneva Conventions stipulates that women must be "the object of special respect and shall be protected against rape, enforced prostitution and any other form of indecent assault." Breach of the rules is also not treated as serious within the system itself. In fact, none of the treaty provisions specific to women imposes obligations the breaches of which are designated as "grave breaches."[44] "Grave breaches" refers to infractions of the rules which impose obligations on contracting parties to enact legislation to repress such breaches and in respect of which jurisdiction is conferred on all State parties to seek out and prosecute persons who commit such offences.

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[42] J. Gardam (1997), "Women and the Law of Armed Conflict: Why the Silence?", *The International and Comparative Law Quarterly*, Vol. 46, No. 1, p. 70.

[43] Ibid.

[44] Ibid. p. 57.

IHL is inadequate also because it has failed to recognise that women experience war differently from men. A critical examination of the approach taken to the regulation of sexual violence against women in war could very well illustrate this inadequacy on the part of IHL.[45] Sexual violence is a best chosen example as it encapsulates all the deficiencies of the IHL from the perspective of women. Sexual violence during armed conflict is the most obvious distinctive experience of women. It is not something that women experience to any degree in common with civilians generally. It results in immense suffering and trauma and is almost universal in all types of war. The law, however, has failed to reflect that reality. It may be claimed that the international community is now focussing seriously on the problem of sexual violence in armed conflict. However, the traditional silence of the IHL on the issue, the actual content of the current provisions regulating sexual violence and aspects of their enforcement illustrate a continuing failure of the law to deal equally with the unique ways in which women experience war. It is to be noted in this context that until recently sexual violence against women in armed conflict was barely regulated at all and these regulations were barely enforced. In fact, non- combatant immunity, the fundamental principle of the IHL designed to protect civilians in armed conflict does not include protection from rape. It was not until 1949 that the first attempts were made specifically to outlaw rape. However, it also did not directly prohibit rape unlike offences involving men.

Again, if we take a look at Article 27 (2) of the Fourth Geneva Convention which requires that "women shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." There are two significant aspects to this provision. Although nowadays rape is designated as war crime for which there is individual responsibility, it was not regarded so at the time of its adoption. Second, it specifies rape as an attack on women's honour. Such an approach has a great deal to do with male view of rape and very little to do with how women see it.[46] Moreover, women's honour has traditionally been equated with

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[45] The term 'Sexual Violence' is used to cover wide range abuses that women experience during armed conflict, rape being just one of them.

[46] According to feminists, rape is used by men in warfare to humiliate and bring dishonor upon the enemy men who have been unable to protect their women.

virginity or chastity. Loss of honour implies the loss of respect, reinforcing the social view that raped women is dishonourable.[47] Women experience rape as torture and it should be recognised as such by the legal regime. Although rape would be regarded by women as one of the worst practice of armed conflict, the law has not always shared this perception. As such, a comprehensive treaty provision in relation to rape in respect of all situations of armed conflict was not in place until adoption of Article 76 of Protocol I in 1977.

Turning to non international armed conflict, rape has been specifically outlawed in Article 4 (2) (e) of Protocol II. Alternatively, the so- called "convention in miniature" in common Article 3 of the Geneva Conventions may sometimes be applicable. There is no specific mention of rape in common Article 3, although its prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment" would include rape.

In order to substantiate the argument that IHL is essentially a gendered regime, it may be noted that IHL has always readily responded to harms typically sustained by men than to those directed against women. For example, IHL has responded to conditions of men that are targets of 'disappearance' in times of conflict, whereas it has failed to acknowledge the consequences of women family members of disappeared men.

To sum up, many of the defects of IHL in relation to women can be attributed to its inherently discriminatory nature. It is believed that in a world where women are not equals of men, a general category of rules that is not inclusive of the reality for women cannot respond to their situation. IHL, however, has a number of "special" provisions for women. There are serious drawbacks to adopting any legal model that singles women out for particular treatment. Any law that appears to give preference to any individual or group is open to the claim that it is discriminatory in itself.

[47] R. Copelan (1995), "Gendered War Crimes: Reconceptualizing Rape in Time of War" in J. Peters and A. Wolper (ed.), *Women's Rights Human's Rights: International Feminist Perspectives*, New York/ London: Routledge, p. 201.

## 6. International Criminal Tribunals and the International Criminal Court

While discussing women and the law of armed conflict, it becomes important to mention about international criminal tribunals and the international criminal court. This is because international criminal tribunals and more recently international criminal court have contributed to the development of IHL and more particularly to the development of gender-related issues in IHL. It is to be noted that historically rape and sexual violence have always been treated as inevitable or the 'spoils' of war. It was only in the international criminal tribunals and then international criminal court that the international community started to address gender based crimes committed in conflicts. In fact, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY) were instrumental in developing gender jurisprudence in international criminal law. For example, the ICTR in the landmark case of *Prosecutor v Akayesu*[48] recognised rape and sexual violence as constituting acts of genocide and of rape as a form of torture. Similarly, the ICTY also developed gender jurisprudence recognising the conspicuously bad nature of rape and sexual violence. Two important cases were *Celebici*[49] in which the ICTY held that rape constituted torture, and *Foca*[50] where it held that rape was a crime against humanity, and convicted the defendant of sexual enslavement.

Given the above account, it may be noted that the international criminal tribunal and international criminal court have been able to rework the traditional definitions and treatment of gender based crimes In fact, the precedents regarding rape as torture, as held by ICTR and ICTY is believed to provide a new avenue for remedy and

[48] ICTR-96-4-T (1998) For the judgment see: [Online:web] Accessed on 24 March 2011, URL: http://www.unictr.org/Portals/0/Case/English/Akayesu/judgment/akay001.pdf.

[49] IC-96-21-T *The Prosecutor v Zejnil, Deliac et al* (1998) („*Celebici* case) For the judgement see: [Online:web] Accessed on 24 March 2011, URL: http://www.icty.org/x/cases/music/tjug/en/cel-tj981116e.pdf.

[50] IT-96-23-T *The Prosecutor v Dragoljub, Kunarac et al* (2001) („*Foca* case) For the judgement see: [Online:web] Accessed on 24 March 2011, URL: http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.

protection for rape victims, which had not previously been available under international law.[51]

It is in the midst of developing gender jurisprudence in the international tribunals that the final drafting of the Statute of the International Criminal Court (ICC) took place.[52] In fact, ICTR and ICTY were seen as important foundation for the codification of sexual violence in the Rome Statute. The Statute was adopted in Rome on 17 July 1998 and the ICC came into force on 1 July 2002. The ICC is the world's first permanent international criminal tribunal set up to prosecute individuals for genocide, war crimes, crimes against humanity, and also aggression.[53]

During the early stages of the drafting of the Rome Statute, it was seen that both government and mainstream human rights groups were indifferent to gender issues. It was only because of the efforts of a group of women from different countries, regions, approaches and disclipines,[54] who founded the Women's Caucus for Gender Justice in the ICC that began lobbying government delegations to incorporate a gender perspective throughout the Rome Statute.[55]

In so far as Women Caucus is concerned, it was in 1995 that various nongovernmental organisations formed an official alliance for the ICC. The alliance consisted of human rights monitoring and advocacy groups, faith-based groups, victims/survivor advocacy groups, and several others. And in 1997, a substantial number of women advocates and activists joined this alliance and formed the Women

[51] R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, pp. 21-22.

[52]The United Nations International Law Commission submitted a draft Statute in 1994 and further drafting took place between 1996 and 1998.

[53] P. Spees (2003), "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power", *Signs*, Vol. 28, No. 4, p. 1234.

[54] Ibid. p. 1233.

[55] B. Bedont and K. H. Martinez (1999), "Ending Impunity for Gender Crimes under the International Criminal Court", *The Brown Journal of World Affairs*, Vol. VI, Issue 1, p. 2.

Caucus for Gender Justice in the ICC. They began the work of gender mainstreaming[56] in the creation of the ICC. They worked to reveal and correct the deficiencies in existing humanitarian law with respect to crimes of sexual and gender violence.[57]

Despite the major role played by Women's Caucus, the predominant voices within the institution are that of men. In fact, as in other courts the participants in the ICC as defendants, prosecutors and judges are men.[58]

In comparison to the Statutes of the ICTR and the ICTY, the Rome Statute was believed to be the 'most advanced articulation in the history of gender based violence'.[59] Rape has been interpreted by the ICC as constituting genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"[60] a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with

[56] The United Nations Economic and Social Council has defined gender mainstreaming as "the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and equality is not perpetuated. The ultimate goal is to achieve gender equality".

[57] P. Spees (2003), "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power", *Signs*, Vol. 28, No. 4, pp. 1236-38.

[58] Ibid. p. 1249.

[59] B. Inder (2010), "Women's Initiatives for Gender Justice", *Making a Statement: A Review of Charges and Prosecutions for Gender Based Crimes before the International Criminal Court*, (February 2010) [Online:web] Accessed on 29 March 2011, URL: http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf.

[60] Rome Statute Article 6 (defining genocide), cited from R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, p. 22.

knowledge of the attack,"[61] and a war crime "when committed as part of a plan or policy or as part of a large – scale commission of such crimes."[62]

Moreover, the statutes of the ICTR and ICTY did not list crimes of sexual violence other than rape. Even in case of rape, the statutes of the two ad hoc tribunals included it as a crime against humanity omitting it from the other categories of crimes. The Rome Statute, on the other hand, recognises a spectrum of gender based crimes in addition to rape, which include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and any other sexual violence of comparable gravity.[63] This separate identification was essential in order to recognise the distinct characteristics of the different crimes. In addition to the crimes of sexual and gender violence, persecution is included in the ICC Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution. The ICC Statute also includes trafficking as a crime against humanity as among the crimes of enslavement.[64] Thus, Rome statute is an improvement upon the statutes of the ICTR and ICTY as it specifically enumerates both rape and different forms of sexual violence as war crimes.

Rome statute also represents a historic development under international law. Previous international humanitarian law instruments failed to adequately address gender based violence. This becomes clear if we look at Geneva Conventions, Hague Conventions or even Nuremberg Charter contained in the Agreement for the Prosecution and Punishment of Major War Criminals after World War II. None of these international

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[61] Rome Statute Article 7 (1), cited from R. Manjoo and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, p. 23.

[62] Rome Statute Article 8 (2) (b) (xxii) (listing "rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7 (2), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention" as war crime), cited from R. Manjoo, and C. McRaith (2011), "Gender – Based Violence and Justice in Conflict and Post – Conflict Areas", *Cornell International Law Journal*, Vol. 44, No. 1, p. 23.

[63] Rome Statute Article 7(1) (g).

[64] "Gender Mainstreaming in the Statute of the International Criminal Court", *Prepared by the Women's Caucus for Gender Justice*, [Online:web] Accessed on 25 March 2011, URL: http://www.iccwomen.org.

instruments include any mention of gender violence.[65] Moreover unlike Geneva Conventions, Rome statute does not link sexual violence to an attack on a woman's honour. The Rome Statute cites rape and other forms of sexual violence as crimes in their own right, thereby emphasising the serious and offensive nature of the crimes, rather than reinforcing stereotypes of shame and honour.

Despite the fact that the Rome Statute has comprehensive provisions relating to gender crimes, it is failing to fulfil its obligation to investigate, charge and prosecute these crimes. This becomes evident if one looks at the ICC's first case, *Lubanga*,[66] in which no gender based charges were brought despite overwhelming evidence of such crimes. Again, in the case of *Katanga and Ngudjolo*,[67] despite the fact that charges of rape and sexual enslavement was confirmed, the analysis in the dissenting opinion in the Chamber casts some doubts on whether the evidence linking the accused to the charges will be sufficient at trial. Similarly, in another case, namely *Bemba*,[68] securing comprehensive gender based charges in the pre-trial chamber's decision has been problematic. As *Lubanga* has not been charged with any gender based crimes, and the charges against *Katanga* and *Ngudjolo* and *Bemba* are limited, it is hard to see exactly how these prosecutions will deter others from carrying out rape and other forms of sexual violence.

[65] B. Bedont and K. H. Martinez (1999), "Ending Impunity for Gender Crimes under the International Criminal Court", *The Brown Journal of World Affairs*, Vol. VI, Issue 1, p. 5.

[66] The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), [Online:web] Accessed on 29 March 2011, URL: http://icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo?lan=en-GB.

[67] The Prosecutorv v.Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07), [Online:web] Accessed on 29 March 2011, URL: http://icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/democratic%20republic%20of%20the%20congo?lan=en-GB.

[68] The Prosecutor v. Jean-Pierre Bemba Gombo (ICC – 01/05 – 01/08), [Online:web] Accessed on 29 March 2011,URL:http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/case%20the%20prosecutor%20v%20jean-pierre%20bemba%20gombo?lan=en-GB.

This failure on the part of the ICC to fully charge gender based crimes has repercussions beyond simply denying justice to the victims. If the ICC does not treat gender based crimes as grave violations, there is less impetus for States to do so. Encouraging States to meet their obligations under the Rome Statute is particularly important as in many of the countries women have limited legal rights. For example, the legal rights of women in the Central African Republic are very limited. The law does not afford women the right to inherit, marital rape is not seen as illegal, domestic violence is considered acceptable, female genital mutilation is still widely practiced especially in northern Central African republic.[69] Not only these, some states are also excluding some of the gender provisions in the Rome Statute when implementing domestic legislation.[70]

Reference is also to be made to the definition of "gender" adopted in the Rome Statute which has impact on the court's prosecution of gender based crimes. Article 7 (3) of the Rome Statute provides the following definition of 'gender': "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."[71] Various strongly negative reactions are expressed on this definition. Scholars like Oosterveld maintains that this definition of 'gender' served as a lightning rod for conservative concerns about sexuality, unlike other terms such as political, racial, national, ethnic, cultural, religious, age, wealth and birth included in the broad lists of prohibited grounds of persecution and discrimination under article 7 (1) (h), 21 (3).[72] Again, Charlesworth views this definition as one that elides the notion of gender and sex. In fact, she argues that the

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[69] B. Inder (2010),"Women's Initiatives for Gender Justice", *Making a Statement: A Review of Charges and Prosecutions for Gender Based Crimes before the International Criminal Court*, p. 31, [Online:web] Accessed on 29 March 2011, URL: http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf.

[70] S. O'Connell (2010), "Gender Based Crimes at the International Criminal Court", *Plymouth Law Review*, Volume 3, pp. 69-80.

[71] Rome Statute of the International Criminal Court, July 17, 1998, article 7 (3).

[72] V. Oosterveld (2005), "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?", *Harvard Human Rights Journal*, Vol. 18, pp. 56-57.

definition fails to recognise that gender is a socially constructed set of assumptions regarding the roles of males and females.[73]

ICC's narrow interpretation of the term 'gender' is believed to be problematic. This is because how the ICC define 'gender' actually have a direct impact on the kinds of cases of persecution that the Court may be able to prosecute, as well as the law applied, on how the Prosecutor undertakes his/her duties, and on the protection and participation of victims and witnesses.[74]

## 7. The way forward

It is now well proven that the existing provisions of the law of armed conflict are designed primarily to protect combatants and that those for the protection of civilians fail to recognise the different needs of women in times of armed conflict. This has made the international community to acknowledge that change is needed. However, strategies for change within the IHL are a challenging aspect of feminist work.

In the context of international armed conflict, scholars such as Gardam has advocated for a new protocol to protect women in times of armed conflict. Argument has also been made for redrafting all the conventions to overcome the inadequacies in them. But feminist scholars have accepted the fact that the latter argument is clearly unworkable as it does not reflect the realities of international law making. However, what is possible is to make states accept additional and more onerous obligation with

[73] H. Charlesworth (1999), "Feminist Methods in International Law", *The American Journal of International Law*, Vol. 93, No. 2, p. 394.

[74] V. Oosterveld (2005), "The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?", *Harvard Human Rights Journal*, Vol. 18, p. 57.

respect to women. In this light, a separate protocol dealing with protection of women in times of armed conflict seems achievable.[75]

Talking of the sexual abuse of women, the legal position in relation to rape needs to be put beyond doubt. Moreover, there are many other aspects to women's experience of sexual violence in armed conflict on which the law is silent. The language in which these provisions are drafted also continues to present a picture of women that is outdated and out of keeping with modern perceptions of women as individual in their own right. From this perspective, rules protecting women against sexual violence must mirror those that regulate the torture and mistreat of men. However, sexual abuse is not the only area of women's experiences of armed conflict that needs to be addressed. In fact, provisions are needed that will take women's lives as the starting point. The behaviour of peacekeeping forces and the mistreatment of women also need to be regulated. Undoubtedly inappropriate behaviour of these forces is a problem shared by all civilians but its manifestation in relation to women is unique.

On the topic of non international armed conflict, there is a need to recognise and deal with the vast difference between women from different cultural backgrounds. Otherwise IHL will remain a system of marginal relevance to the majority of those affected by the activity it purports to regulate.

It may seem naive and unrealistic to expect any specific concessions to women over and above those that relate to combatants and civilians generally. Yet attempt has to be made, as relegating the question of improving the law in relation to women to the existing law that prioritises combatants will defeat the very purpose of feminists to make IHL gender-neutral.

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[75] J. Gardam (1997), "Women and the Law of Armed Conflict: Why the Silence?", *The International and Comparative Law Quarterly*, Vol. 46, No. 1, pp. 77-78.

Turning to the ICC, there is a need to redefine the term 'gender' in a way that it does not conflate with the term 'sex'. The current definition of 'gender' in the Rome Statute is believed to be oddly worded and confusing. As such there is a need to redefine the term to make it clearer as the lack of clarity in the definition will leave the ICC in a weaker position to prosecute and convict gender based crimes as compared to other forms of crimes.

Lastly, there is a need to lower the social stigma attached to rape victims. This is because such stigma compels women to keep silent either out of shame or fear of police. As such, lowering such social stigma will hopefully lead to minimising the assault of rape and other gender based crimes during and after war.

8. **Summation**

From the above discussion, it can be concluded that as societies do not treat men and women alike, situation of armed conflict also impact upon men and women in unequal manner. Armed conflicts have the capacity to reinforce existing inequality in society. Despite this, IHL, which regulates the actual conduct of war, has failed to take account of the reality of warfare for women. In fact, impact of gender is one area which has so long been overlooked in the analyses of IHL.

IHL is believed to be a thoroughly gendered regime. It not only accepts the social construction of the masculine and the feminine as given, but also perpetuates and constructs a particular vision of men and women. Rules of IHL are gendered as they take a certain male view of armed conflict as their norm.

There is no denying of the fact that women have enjoyed special protection under IHL. There are provisions dealing specifically with women in all of the four Geneva Conventions and both the Additional Protocols. However, careful examination of these provisions reveals that they are just statements of general principles and impose

no concrete obligation. In fact, most of the provisions are merely protective in nature and their breaches are not designated as 'grave breaches'.

Rape as war crime has been unable to drawn adequate international attention. In fact, international humanitarian law has failed to acknowledge rape as one of the worst practices of armed conflict. This failure on the part of international humanitarian law is critical to the traditionally lesser or ambiguous status of rape within humanitarian law itself.

Like in all other areas, the public/private distinction which feminists talk about is also evident in the rules of IHL. Combatants (who are mostly men) represent the public sphere, whereas women are relegated to the private sphere. This sidelining of women to the private sphere has resulted in failure to acknowledge the existence of gender based problems in IHL.

As such, many defects of IHL which feminists have pointed out is because of its inherently gender discriminatory nature. In a world where women are not equal of men, a general category of rules that is not inclusive of the realities of women cannot respond to their situation.

Although, the regime of IHL needs to be reformed immediately, yet changing the system will not be an easy task. Still scholars have indicated for certain strategies. The most feasible of them seems to be the argument for adoption of a new protocol to protect women during times of war.

Coming to the role of the ICC and the ICTY and the ICTR, it cannot be denied that these institutions have been instrumental in developing gender jurisprudence. Yet close analysis of cases reveals that these institutions have not been able to come up to the high expectation as regard prosecuting gender based crimes. The failure on the part of these institutions to prosecute gender crime raises question as to how these

institutions will deter others from carrying out rape and other forms of sexual violence. One probable reason for failure on the part of ICC to prosecute gender crimes adequately is because of the narrow interpretation of the term 'gender'. As such, redefining the term might make the ICC more effective in dealing with gender crimes.

To sum up, the need of the time is to shift focus towards the effective implementation of existing legal instruments to combat gender based violence. And for this, there is a need to take measures to increase reporting of gender based crimes. Complicated reporting procedures must be eliminated and prompt and thorough investigation must be encouraged so that women does not avoid reporting due to low possibility of action to be taken on the case.

# CHAPTER – V

# CONCLUSION

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# CONCLUSION

The general survey of feminist approaches to international law shows how a multipronged feminist approach questions, challenges and rebuts the universal applicability of international law with respect to women. It elaborates the ways in which feminist scholarship challenges the limited base of international law's claim to universality and neutrality, by arguing that international law has failed to adequately address the concerns of women. In this background, the dissertation has analysed the history, structure and process of international law and institutions from feminist perspective. The attempt has been to foreground the long ignored category of gender to analyse international law.

The feminist scholarship within international law emerged as a natural and integral part of the larger feminist movement. Legal scholars in the 1960s-70s were influenced by the development in other disciplines, like sociology, psychology, philosophy and so on. Feminist international law scholarship started in the 1970s but its expression and articulation took another decade. For example, the term 'feminist jurisprudence' was used for the first time only in 1980s.

The feminist approach to international law is expressive of a diversity of thought. There are different strands of feminist international law scholarship and these include liberal, cultural, radical, post-modern and third world feminism. Liberal feminists emphasise the need for equality and non-discrimination between men and women. Cultural feminists, on the other hand, point to the dominance of men within international legal order. Radical feminists such as Catherine Mackinnon stress the importance of legal action for remedying wrong against women. Post-modern feminists emphasise the fractured identities of women and stress the need for diversity of thought within feminist scholarship. Third world feminists are concerned with factors like race, class, religion, national, culture and so on that goes on to aggravate

women's sub-ordinate position, more particularly in the developing countries. Despite this diversity, the different feminist approaches are concerned with the situation of women and failure on the part of the traditional system of international law to respond to women's experiences.

Sometimes a conceptual link is attempted to be established between TWAIL and feminist approach. Often, it is assumed that women's voices and values are already present through the medium of TWAIL. For long TWAIL was as gender blind as other approaches to international law. But in recent years this situation has been corrected by TWAIL feminist scholars, as also the increased sensitivity of TWAIL in general to the feminist critique. Power imbalances between states are the primary concern of TWAIL but power imbalance between women and men within state have begun to acquire prominence.

The initial reactions to the feminist approach within the literature on international law have been in the forms of allegations from the mainstream scholars that it is too political to be scholarly; it lacks academic rigour and objectivity; and also that feminism fails to work within accepted framework of legal doctrine. However, with time, feminist legal scholarship has begun to be accepted as a part of the international legal academy. In fact, the increasing literature in the last few decades has led to feminist ideas being absorbed into the rhetoric of international law and institutions. Despite this, one can see inadequate progress in many areas. For instance, mainstream international law scholarship is more concerned to identify the flaws and fault lines of feminist works than to use it to reflect on its positions. Feminist critiques appear as a token offering, and are confined to a chapter or two within mainstream scholarship. But to make international law neutral and universal in true sense, there is a need to take feminist scholarship seriously. As feminist scholarship represents the scholarship of half of the human population, carrying feminist ideas through all areas of inquiry will help rectify the gender bias character of international law.

The application of feminist perspective is characterised by a focus not just on international law as a reform mechanism but rather it brings a different epistemological outlook to the table. For example, feminists bring a different theory of knowledge as regards dispute settlement. In fact, alternative dispute settlement procedures such as non-litigious and non-confrontational negotiation techniques are based on insights drawn from what might be called feminist epistemology that is distinct from the traditional or mainstream scholarship. It is thus not merely about representation of women but also about recognition of their values and experiences.

The feminist epistemology, first, deconstructs the international law doctrines, concepts and also particular legal regimes. Second, it is concerned with reconstruction of international legal order in accordance with the feminist perspective so as to neutralise the gender discrimination. It critiques various concepts, doctrines and regimes of international law from the perspective of feminist epistemology that rewrites the theory of gender in order that it may efficiently deal with the status of women. This, in a sense, can be seen as reconstruction of international law as it provides with alternative epistemology in order to achieve gender equality in this sphere.

The traditional focus of feminist international law scholarship has been the so-called 'soft areas of international law', like international human rights law, international humanitarian law, international refugee law and so on. This is because women are the most obvious victims when it comes to violation of human rights law or humanitarian law. These areas are called 'soft areas' not because the issues they deal are soft in nature but because they lack hard enforcement or implementation mechanism. However, in recent time, feminists have extended their critique to areas like international environmental law, international economic law and so on.

In their attempt to reconstruct international law, feminist scholars have challenged the very foundation of the discipline. The patriarchal outlook and gendered foundation of international law are established and exposed with reference to subjects of

international law. Traditionally, states and international organisations are the primary focus of international law. According to feminists, both states and international organisations are patriarchal in nature. For instance, an entity to be state only needs to fulfil certain requirements in the form of population, territory, government and capacity to enter into relation with other states. As long as an entity fulfils these prerequisites, its statehood is undeniable under international law. There is no problem, if a state restricts its population to entirely adult men, as is the case with Vatican City. Moreover, a state which discriminates on the basis of race is known as racist state, but no state is labelled as "gendered state" when it makes discrimination based on gender. Talking about international organisations, it may be noted that women are almost always underrepresented, be it UN, ILC, ICJ or international economic institutions like IMF and World Bank. For example, since its inception ICJ has witnessed just five female members in all. ILC presently has just two women members. Reference may be made to the selection of Christine Lagarde, from France as the first woman to be the Managing Director of the International Monetary Fund. Participation of women in international organisations is important. This is because an international organisation is reflective of the society for whom it lays down rules. As such, people will put more confidence in an organisation that represents all individuals that make up a society. In so far as court is concerned, it is believed that a court comprised of judges of both the sexes will provide a more balanced and gender impartial perspective on matters before it.

The above account suggests that traditional subjects of international law has failed to take due account of women's experiences and their concerns. The irony is that over time other entities are being considered as subjects of international law. For example, modern international law includes individuals as its subject, but women continue to be marginalised within this arena. This is because specific categories of person, known as diplomat, are considered as individual subject of international law. A vast majority of such diplomats are men. Women are under-represented as diplomats. What is more the idea of diplomatic immunity, which has been invoked to avoid application of the receiving state's criminal laws to diplomatic personnel, has severely harmed women. This is because diplomatic personnel are free from legal proceedings of the receiving

state even in case of sexual abuse of women. Thus, in a sense, while accommodating new actors as subjects of international law, due care is taken to maintain the masculine character of international legal system. In other words, the discrimination that is carried out against women at smaller level is mimicked at the larger level also.

The discussion on subjects of international pay inadequate attention to women is partly because of the fact that the accepted sources of international law sustain a biased gender hierarchy. In fact, the distinction between hard law and soft law itself imply the superiority of 'hard' (male) over the 'soft' (female). The gender bias nature of customary international law can also be evidenced if one tries to assert, for example, that violence against women constitutes a breach of a customary norm. This is because state practice is not consistent with such a norm. Talking of treaties, there is the similar problem of under-representation. In fact, women are not allowed to take part even in those areas of international law-making which have great impact on their lives Even if women are represented in treaty- making bodies, they find it difficult to make their voices heard or to be taken seriously. Furthermore, the treaty doctrine of *jus cogens* also reveals a similar gendered character. The fact that gender equality norms do not constitute a norm of *jus cogens* indicates the peripheral role of women. The whole phenomenon of soft law further enhances the gender dimension of the sources of international law. For instance, issues concerning women are often dealt with through soft law, which do not incur legally binding obligation. As such, states appear to accept such principles with minimum legal commitments. In short, it may be noted that sources and subjects of international law are structured in a way so as to exclude women from their ambit.

Particular international legal regimes have also not taken adequate care of women's concerns. This fact becomes evident, for example, if we take a look at the international humanitarian law. International humanitarian law is the set of rules regulating armed conflict. Although women are the most understandable victims of armed conflict, international humanitarian law has failed to adequately address their concerns. In fact, throughout history, women's voices have often gone unheard or have been silenced when it comes to talking about their experiences of armed conflict.

Moreover, women have been stereotyped predominantly as 'victims' in wartime, with other roles played by women being regarded as exceptions to the norm.

International humanitarian law makes a distinction between international armed conflicts and non-international/internal armed conflicts. But ironically the rules of international humanitarian law safeguard and provide extensive protection to combatants during international armed conflicts. In contrast, it provides a fairly weak protection to civilians during non-international or internal conflicts. The distinction between the international and non-international has a gendered character and is deliberately made to provide a weaker protection to women who constitute vast majority of civilians. There is no denying of the fact that women have enjoyed special protection under IHL. There are provisions dealing specifically with women in all of the four Geneva Conventions and also both the Additional Protocols. However, careful examination of these provisions reveals that they are just statements of general principles with no concrete obligation. For example, Article 27 of the Fourth Geneva Convention places an obligation to protect women in international armed conflict "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". Similarly, Article 76 (1) of Additional Protocol I provide that "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". In this sense, most of the provisions are merely protective in nature and their breaches are not designated as 'grave breaches'.

Coming to the role of the International Criminal Tribunals and the International Criminal Court, there is no denial of the fact that these institutions have been instrumental in developing gender jurisprudence. Yet close analysis of cases reveals that these institutions have failed to fulfil their obligation to investigate, charge and prosecute gender based crimes. The failure on the part of these institutions to prosecute gender crime raises question as to how these institutions will deter others from carrying out rape and other forms of sexual violence. One probable reason for failure on the part of ICC to prosecute gender crimes adequately is because of the narrow interpretation of the term 'gender'. Article 7 (3) of the Rome Statute provides

the following definition of 'gender': "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above". This definition has failed to recognise gender as a socially constructed set of assumptions regarding the roles of males and females As such, redefining the term might make the ICC more effective in dealing with gender crimes. This is because how the ICC defines 'gender' will actually have a direct impact on how the court prosecutes cases.

In order to overcome the deficiencies in the existing international legal regime dealing with armed conflict, it is reasonable to concur with some scholars who have argued for a separate protocol which will deal specifically with protection of women. Taking such suggestion seriously will help in enhancing the effectiveness of international legal rules relating to protection of women during armed conflict.

There is also a need to shift focus towards the effective implementation of existing legal instruments to combat gender based violence. And for this, complicated reporting procedures must be eliminated and prompt and thorough investigation must be encouraged so that women does not avoid reporting due to low possibility of action to be taken on the case.

In addition, there is a need to lower the social stigma attached to rape victims. This is because such stigma compels women to keep silent either out of shame or fear. Lowering such social stigma will hopefully result in minimising the assault of rape and other gender based crimes during and after war. Moreover, the entire focus should not be on the sexual violence perpetrated against women during war, because of which other serious problem being faced by women are undermined. In fact, other problems, for instance, inappropriate behaviour of peace-keeping forces and their mistreatment of women, must also be given primacy and attention.

To conclude, it may be noted that international law do not address the gender discrimination against women. Unless international law adequately addresses the concerns and experiences of women, it cannot claim to be rational, neutral and universal in its applicability. An overview of the feminist approaches to international law reveals the commendable work that feminists have done in exposing and correcting the gender bias character of international law. In view of limited scope of the present study, it fails to analyse feminist critique of various international legal regimes. For instance, an attempt can be made to examine feminist contributions in the area of international refugee law and international economic law. Given the fact that women constitute a vast majority of refugees around the world, the area seems directly relevant for feminist inquiry. Likewise, the activities of international economic institutions have adversely affected women's lives. Moreover, the possibility of linking feminist international law scholarship with feminist international relations scholarship to reform the international legal order can also be explored.

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