

2016

## The Unintended Consequences of the International Women's Movement: Medicalizing Rape in the Democratic Republic of Congo

Faye N. Forman  
*Bard College*

---

### Recommended Citation

Forman, Faye N., "The Unintended Consequences of the International Women's Movement: Medicalizing Rape in the Democratic Republic of Congo" (2016). *Senior Projects Spring 2016*. Paper 257.  
[http://digitalcommons.bard.edu/senproj\\_s2016/257](http://digitalcommons.bard.edu/senproj_s2016/257)

This Open Access is brought to you for free and open access by the Bard Undergraduate Senior Projects at Bard Digital Commons. It has been accepted for inclusion in Senior Projects Spring 2016 by an authorized administrator of Bard Digital Commons. For more information, please contact [digitalcommons@bard.edu](mailto:digitalcommons@bard.edu).

The Unintended Consequences of the International Women's Movement:  
Medicalizing Rape in the Democratic Republic of Congo



Senior Project submitted to  
The Division of Social Studies  
of Bard College

by  
Faye Forman

Annandale-on-Hudson, New York  
May 2016

## **Acknowledgements**

This project is dedicated to Bethany Nohlgren, for believing in my capability when I didn't believe in it myself. For teaching me the power of radical gratitude and self-love. Thank you.

This project would absolutely not have been possible without the enormous support, generous flexibility, and brain power of my advisors:

Peter Rosenblum, for gently guiding me in the “left” direction with kindness, compassion, and rich anecdotes of field experience that bring my ideas to life.

Drew Thompson, for opening up my world. For teaching me the transformative power of an education in history and for pushing me to think critically, but not over-think.

Gregory Moynahan, for advising me each semester since my transfer in Fall 2013.

To Bard faculty whom I'm indebted to for their wisdom, guidance, and kindness: Thomas Keenan, Robert Weston, Amii LeGendre, Danielle Riou, Nuruddin Farah, Susie Brown, and Betsy Cawley.

To the Manor staff: Linda, Abdul, Faith, Roy, and Sean, for feeding me egg white omelets, peanut butter bars, and nourishing my soul with conversation.

To new and old friends whom I want to radiate endless beams of love and gratitude toward: Nicole Iorio, Dana Leuffen, Alexis Bass, Kristy Maier, Omar Forrest, Molly Livingston, and Jody Wissner.

To my family, particularly Sharon, Scott, Glenn, and Helen, for supporting me with visits and pumpkin muffins.

A special thanks to my parents: Joanne and Mark, for patience, understanding, and love as we learn about each other and grow along the way.

For Parsnip and Tina, for filling my life with unconditional love and fuzz.

## **Abstract**

The legal advancements made by western feminists from the 1960s continuing today mark a distinct shift for both the women's movement and mainstream radical feminist philosophy. This project examines the unintended consequences of the rise of the international women's movement as American feminists brought the law to bear as the primary instrument for reform to eradicate rape and violence against women. As contemporary political scholars demonstrate, legal remediation further codifies gender inequality and protective tropes that sexualize women's injury. Chapter 2 and 3 examines the intensified feminist efforts to criminalize domestic abuse at an international level, first at the United Nations (1980s) and later, sexual violence during wartime in international criminal law (1990s).

In practice, state legislation to protect women from violence is often used as a vehicle to advance conservative political agendas. Two anthropological case studies explore these policies in action: Algerian women's access to humanitarian asylum in France and specialized humanitarian medical care provided to raped women in the Democratic Republic of Congo. One pressing conclusion to draw from both studies is that women's full citizenship status is being threatened by conservative notions of women's worth being defined in terms of her chastity.

Chapter 4 examines the highly publicized humanitarian medical response to mass rape in Congo and explores the colonially derived racial hierarchy that underlies many humanitarian missions. In the interest of circumventing state power over sexuality and therefore removing the sexual stigma from rape in legal terms, this paper engages with Michel Foucault's philosophical argument that the crime of rape be desexualized and placed on a spectrum of degrees of assault.

## Table of Contents

<b>1. Framing Rape in the United States (1870 – 1980)</b> .....	<b>1</b>
Catharine A. MacKinnon: Radical Feminist Reforms (1970).....	7
A Critique of Feminist Theory.....	15
A Philosophical Reconceptualization: Desexualizing Rape (1971).....	22
<b>2. Violence against Women at the UN (1980s)</b> .....	<b>23</b>
A Brief History of Women's Organizing.....	25
The Rise of Violence against Women.....	27
The Boundary Between Citizen and Patient.....	35
<b>3. Radical Feminism's Rise to Power in International Law (1990s)</b> .....	<b>37</b>
Governance Feminism in Power.....	39
GFeminists in IHL/ICL 1990s +.....	44
Defining Rape in the ICTs.....	48
Unraveling Humanitarian Aid in Congo.....	55
<b>4. Humanitarian Medical Care in the Democratic Republic of Congo</b> .....	<b>62</b>
 Bibliography.....	 66

## P I. Framing Rape in the United States (1870s – 1980s)

As a legal term, rape encompasses a malleable and culturally determined perception of an act. The meaning of rape is fluid as different societies over time define which non-consensual sexual acts to criminalize, which to condone, and how forcefully to prosecute.<sup>1</sup> The criminal history of rape in America consists largely of tracking the changing narratives that define which actors' injuries could be recognized by the state as being worthy of legal justice.

Legal definitions play an essential role in understanding how the treatment of rape has evolved over time. In British law, which provided the basis of most American statutes, rape originally referred to the non-sexual crime of violent theft, particularly referring to the “rape” of the land or violation of national sovereignty. By the fifteenth century, the legal definition of rape in England had narrowed to apply to the theft of a woman's chastity.<sup>2</sup> The crime appropriated the sexual rights of white, heterosexual male citizens, and so the husband or father of the raped woman would receive compensation being that women did not have legal rights. It is in this way that historians and legal scholars have understood the definition of rape as one based on dynamics of political power to ensure the social privilege of lawmakers.

Take for example the marital rape exemption in law, which survived in the U.S. into the 1990s under the assumption that no crime is committed when a man forces intercourse upon his wife. Similarly, the property status of enslaved women was thought to entitle their owners to unrestricted sexual access.<sup>3</sup> A further corollary of this view was that women who were *not* the private property of any individual man, prostitutes, were considered unrapeable.<sup>4</sup>

Historian Estella B. Freedman demonstrates in *Redefining Rape: Sexual Violence in the Era of*

---

1 Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* Harvard University Press 2013, 2.

2 Ibid., 10.

3 Ibid., 11.

4 Rebecca Whisnant, “Feminist Perspectives on Rape” Stanford Encyclopedia of Philosophy, 2013.  
<http://plato.stanford.edu/entries/feminism-rape/>

*Suffrage and Segregation* that criminal law was utilized to enforce entrenched racial, gendered, and socio-economic hierarchies at the expense of homosexuals, black men, and women.<sup>5</sup> While the legal codification of rape disenfranchised ethnic minorities and homosexuals in addition to women, the feminist movement of the 1960s framed rape as a crime distinctly affecting women.<sup>6</sup> While contemporaneous gay and African American social movements in the US rallied against this understanding of rape, the radical feminist perspective prevailed in domestic legal circles.

Second-wave feminists stressed the importance of recognizing abuse against women in the private sphere to recognize the restraints violence imposes on women's advancement and public participation. Popular conceptions of rape were transformed in fundamental ways. Within radical feminism, rape came to be seen not simply as an outcome of individual male deviancy, but as a wider structural injustice and an attack against women as a distinct social group. Critical to this new understanding of rape was the move toward seeing rape from a women's point of view.

Through the feminist practice of consciousness raising speak-outs in the 1970s, feminist politics and academic theory on rape emerged. Kathie Sarachild is credited with developing feminist consciousness raising by proposing that women meet in small groups to share their personal testimony and to unite in solidarity around experiences of violence. Testimony given in this form became the basis for feminist anti-rape politics as it was seen to reveal previously hidden commonalities. In this way consciousness-raising has occupied a central position within the feminist production of historical knowledge and is a foundational aspect of feminist methodology.<sup>7</sup> The feminist understanding of rape as a universally shared aspect of women's lives is seen to have arisen through the process of collective

---

5 Estella B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* Harvard University Press, 2013. Freedman chronicles rape accusations deployed against black men between the 1870s and the 1930s. Amid the campaign for woman suffrage, women's rights supporters and African American activists tried to expand understandings of rape in order to gain legal protection. By redefining rape, they sought to redraw the boundaries of citizenship.

6 Rebecca Whisnant, "Feminist Perspectives on Rape" *Stanford Encyclopedia of Philosophy*, 2013.

7 Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State" *The University of Chicago Press*, 1982. MacKinnon asserts that "consciousness raising is central to feminist theory."

storytelling.

First-wave feminists of the suffrage era used the language of “rights and equality,” but in the late 1960s “oppression and liberation” became the key words for the political activists of the new left. The change in language reflects a significant development in the political perspective of contemporary feminism. Talk of oppression and liberation introduces not just a new political terminology but a new perspective on political phenomena. It is a perspective that presupposes a dynamic rather than a static view of society influenced by Marxist ideas of class struggle.<sup>8</sup>

Since oppression is the imposition of constraints, feminists suggested that the problem is not the result of ignorance but is caused by one group (the perpetrator) actively subordinating another group (the victim) to its own interests. Thus to talk of oppression seems to commit feminists to a world view that includes at least two groups with conflicting interests: the oppressors and the oppressed. It is a world view that strongly suggests that liberation is unlikely to be achieved by rational debate and instead must be the result of a political struggle.

As the New York Radical Feminist Manifesto declared in 1971, “When more than two people have suffered the same oppression, it is no longer personal but political – and rape is a political matter.”<sup>9</sup> The authors identify rape as an omnipresent phenomenon, defining the act as a crime of power that surpassed the distinctions of race and class. From the radical feminist standpoint, the omnipresence of rape is not expressive of a universal human drive, but of particular arrays of political relations.<sup>10</sup> Women of the feminist movement declared that the claim on their body is a political claim, insisting that it will be respected not because of its purity, but because of its new political status. The reality that women had to make this claim repeatedly reveals that their full integration into the political community of citizenship had yet to be completed.

---

8 Catharine A. MacKinnon, “Feminism, Marxism, Method, and the State”, The University of Chicago Press 1982, 235.

9 New York Radical Feminist Manifesto, *Rape: The First Sourcebook for Women*, New American Library 1974.

10 Ariella Azoulay, "Has Anyone Seen a Photograph of a Rape?" In *The Civil Contract of Photography* Zone Books 2008, 218.

An entirely new vocabulary on sexual injury emerged as women united on their shared experiences of violence. The massive data produced through personal testimony provided a distinct visibility of rape for public consumption.<sup>11</sup> Rape became an independent category of knowledge that made it possible to think of in politically actionable terms. The category of 'rape' became an object of research in various disciplines – history, philosophy, critical theory, statistics, and psychology. Rape had become the target of governmental and public intervention and an object of examination, treatment, police investigation, rehabilitation, and bureaucratic categorization.<sup>12</sup>

A direct product of the '70s speak-outs is Susan Brownmiller's publication of *Against Our Will: Men, Women, and Rape* (1975) which is widely credited as the founding text of feminist anti-rape theory. Brownmiller argues that rape is “nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear.”<sup>13</sup> Brownmiller came to this definition through her quest to “discover the truth and meaning in our [women's] own victimization.” Turning to history, she asserts that “critical to our study is the recognition that rape has a history, and through the tools of historical analysis we may learn what we need to know about our [women's] current condition.”<sup>14</sup> Brownmiller's conception of history as central to her project was by no means unique, as the rewriting of history is a central feature of second-wave feminist politics.

As feminist scholarship and politics evolved, *Against Our Will* has been subjected to numerous critiques. American historian Joan W. Scott writes in *Feminism's History* of the feminist historian's desire not simply to inject women into a historical framework of storytelling, but to actively shift the authority of historical narration to women's voices and experiences.<sup>15</sup> The desire described by Scott is reflected in Brownmiller's attempt to tell women's story of rape, one that could encompass the reality of

---

11 Ariella Azoulay, "Has Anyone Seen a Photograph of a Rape?" In *The Civil Contract of Photography* Zone Books 2008, 240.

12 Ibid., 241.

13 Susan Brownmiller, *Against Our Will: Men, Women and Rape* Simon & Schuster 1975, 230.

14 Ibid., 207.

15 Joan W. Scott, "Feminism's History." *Journal of Women's History* 2004, 5.

“all women” through the reframing of traditional historical sources such as archives and legal records.<sup>16</sup> According to Scott, Brownmiller did not just wish to tell a new story, but to change the way stories would be told by recognizing survivors of rape as the source of these stories.

Anti-rape campaigns featuring women's stories, or “(her)stories,” have focused on the ability of women to speak out about violence in various forms. While feminists have credited these practices with substantial successes, they are reflective of the movement's homogenous demographic – white middle-class women – and feed into the erasure of experiences that do not fit into this narrow category. These distinctions proved to be a major point of contestation by African American feminists such as Angela Davis and Gloria J. Watkins who criticized the ways in which the largely white, middle-class feminist movement tended to leave existing racist myths of black men as rapists unchallenged and failed to address the racial bias of the legal system. This is a particular criticism of Brownmiller's work and more broadly of the feminist attempt to theorize “women's” social condition which has been complicit in erasing crucial differences around ethnicity, class, and sexuality.<sup>17</sup>

Despite initial fractures in feminist perspective, the radical feminists gained enormous momentum in American legal circles. The new radical feminist political consciousness is practically evidenced in women's entry into the legal arena in the 1970s and reflects the broader social movement for women's rights. Law is recognized by feminist legal theorists as a fundamental factor in the historical subordination of women, and uncovering the ways in which law has privileged male citizenship over female is of immediate concern of much feminist legal writing.<sup>18</sup>

In 1978, Ann C. Scales coined the term “feminist jurisprudence” which in the broadest sense seeks to analyze and redress traditional legal theory by focusing on the ways in which law is structured to deny the realities of women.<sup>19</sup> Scales admits that the risk of calling her project 'feminist' is that the

---

16 Susan Brownmiller, *Against Our Will: Men, Women and Rape* Simon & Schuster 1975.

17 Alison Edwards, “Rape, Racism, and the White Woman's Movement: An Answer to Susan Brownmiller, 1980.

18 Ann C. Scales, “The Emergence of Feminist Jurisprudence: An Essay” *The Yale Law Journal* 1986, 33.

19 *Ibid.*, 32.

work might be misunderstood as a politically motivated argument for special laws favoring women. As the famous feminist legal debate goes, should women be treated differently or as equal to men?

Scales argues that incorporating women into the traditionally male-dominated legal system represses crucial gendered contradictions. An incorporationist legal approach would at best merely institutionalize a familiar feminist critique – a steady but ultimately ineffectual method of change.<sup>20</sup> Instead Scales posits that feminists must aim to affirm differences as emergent and infinite: “We must seek a legal system that works and, at the same time, makes differences a cause for celebration, not classification.”<sup>21</sup> Feminist methodology requires that the law be conscious of its role in enforcing female loyalty to men: “We must look for that which we have been trained not to see. We must identify the invisible, and take responsibility for the violence built into a genderized world.”<sup>22</sup>

While radical feminists were extremely critical of the law and its abstract “point of viewlessness,” Scales emphasizes that feminists are committed to legal reform by imbuing law with a radical feminist perspective.<sup>23</sup> Legal feminism was hopeful in this sense. The energy and optimism pulsing through early legal texts helped to carry a message of hope, suggesting that transformation and social change were possible through collective action and new feminist approaches. Though no feminists posited any easy solutions, the implicit message in this early scholarship was that by chipping away together over time, the reformation of existing power dynamics and structures of exclusion would be inevitable.

According to scholar Patricia A. Cain, it was this optimism in part, that led some feminists away from legal realism. For instance, Ann Scales dismissed male-dominated legal realist thought as being insufficiently radical in its thinking and inadequately revolutionary in its efforts. Scales claimed legal realism failed to deliver change as promised, instead leading followers down a dead-end path of theory

---

20 Ann C. Scales, “The Emergence of Feminist Jurisprudence: An Essay” *The Yale Law Journal* 1986, 1393.

21 *Ibid.*, 1376.

22 *Ibid.*, 1394.

23 *Ibid.*, 1398.

and abstraction.<sup>24</sup> It is perhaps for this reason that radical feminists saw classical legal reform as a practical, “real world” approach to advance women's cause.

Many radical feminists share the view that women's inequality can be remedied by incorporating women's – though a distinctly radical feminist – perspective into legal reform. Even Susan Brownmiller avoids the conclusion that women are doomed to a fate of subordination by advocating that they be fully integrated into the state apparatus for protection. This approach has been popularized and legally codified largely thanks to the activism of U.S. feminist legal scholar Catharine A. MacKinnon, whose research has propelled specific doctrinal changes in justifying the recognition of sexual harassment in the workplace and schools (Title IX), on pornography, and rape law.<sup>25</sup>

### ***Catharine A. MacKinnon: Radical Feminist Reforms***

#### ***On Sexual Harassment:***

Catharine MacKinnon was a law student at Yale University in the 1970s with a radical idea: sexual harassment on campus was discrimination based on sex and it interfered with women's ability to attend college. MacKinnon applied this theory in the court case *Alexander v. Yale* (1977), and although the court did not recognize MacKinnon's claims and the female students did not receive compensation, the research behind the case would be used as a framework for the argument that sexual harassment is a form of sex discrimination.<sup>26</sup> The dismissal of the case in 1980 prompted Yale to establish a mechanism for students to report sexual harassment and the American Civil Liberties Union later declared *Alexander* a “pivotal moment in Title IX history.”<sup>27</sup>

---

In recent months, the issue of sexual harassment on college campuses has attracted national

24 Patricia A. Cain “Feminist Legal Scholarship” *Iowa Law Review* 1992, 114.

25 Catharine MacKinnon, *Sexual Harassment and the Working Woman: A Case of Working Women* 1979, 243.

26 The court ruled the female students did not have standing to bring the suit because they had graduated, and one student’s claim of a quid pro quo case was denied because she never actually received better grades. Students claimed at the time that male professors had propositioned female students for sex in return for better grades, according to *Alexander* plaintiff. But the women had no recourse through the university. In fact, the students were threatened with arrest for libeling one of the professors by reporting his advances to Yale administrators.

27 Catharine MacKinnon and Reva B. Siegel, *Directions in Sexual Harassment Law* Yale University Press, 2004.

attention, including intense scrutiny from the White House and Congress. However, about four decades ago, the gender equity law on which many federal inquiries into college sexual assault are now based pertained primarily to sports. Most recently, federal lawmakers have been focusing their attention to advance Title IX, with Senators Claire McCaskill (D-Mo.) and Kirsten Gillibrand (D-NY) suggesting that they want a more realistic punishment for colleges that violate Title IX.<sup>28</sup> Right now, the most an institution can expect of federal penalties for violations is bad public relations and a resolution agreement requiring new policies on sex assault.<sup>29</sup>

In 1977, MacKinnon graduated from Yale Law School and two years later published *Sexual Harassment of Working Women* (1979), arguing that sexual harassment is a form of sex discrimination under Title VII of the 1964 Civil Rights Act. The argument understands sexual harassment as a pervasive social problem and presents a legal argument that it is discrimination based on sex. In *Sexual Harassment* MacKinnon argues that men exercise control over women's jobs through pervasive coerced sexual relations. Beginning with an analysis of women's testimonial, MacKinnon examines sex discrimination doctrine as a whole and its potential in prohibiting sexual harassment. Here's MacKinnon's male/female model:

"...conceiving sexual harassment as sex discrimination: a crime of sex *is* a crime of power. Sexual harassment has everything to do with sexuality. Gender is a power division and sexuality is one sphere of its expression. One thing wrong with sexual harassment (and with rape) is that it eroticizes women's subordination. It acts out and deepens the powerlessness of women as a gender, *as women*.<sup>30</sup>

---

MacKinnon argues that sexual harassment is sex discrimination because the act reinforces the

---

28 A bipartisan group of 36 Senators have proposed the *Campus Accountability & Safety Act (S. 590)* to protect students and boost accountability and transparency at colleges and universities. In addition to other reforms, this Act requires a uniform student disciplinary process across campuses and coordination with law enforcement.

29 See bad press on Bard College published by Huffington Post, Poughkeepsie Journal, and BuzzFeed.

30 Catharine A. MacKinnon, *Sexual Harassment of Working Women* Yale University Press 1986, 220.

social inequality of women to men.<sup>31</sup> She distinguishes between two types of sexual harassment “quid pro quo,” meaning sexual harassment “in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity the type of harassment that “arises when sexual harassment is a persistent condition of work.”<sup>32</sup> In 1980, the Equal Employment Opportunity Commission followed MacKinnon's framework by adopting guidelines that prohibit sexual harassment, both quid pro quo and hostile work environment harassment.

In a two-part article, “Toward a Feminist Theory of Jurisprudence,” appearing in 1982 and 1983, MacKinnon reiterates women's subordinated social condition and the feminist vision of a complete structural overhaul.<sup>33</sup> The main takeaway on sex harassment, which MacKinnon extends to pornography and rape, is that sex discrimination must be seen as barriers to women's full equality and as questions that can be remedied through criminal law.

---

### ***On Pornography:***

In the 1989 publication of *Toward a Feminist Theory of State*, MacKinnon argues that pornography is a visual manifestation of sex discrimination. Both MacKinnon and radical feminist activist Andrea Dworkin maintain that, “pornography is a form of forced sex, a practice of sexual politics, and institution of gender inequality.” MacKinnon opposes traditional arguments against pornography that are based on notions of women's sexual innocence and characterizes pornography as discrimination and sought to give women the right to seek damages under civil rights law.<sup>34</sup>

MacKinnon's theory analyzes the sexual subject positions of male and female, with the consequence that male and female subjectivities are totalized, dichotomized, and pervasively sexualized. MacKinnon states, “A woman is a being who identifies and is identified as one whose sexuality exists for someone else, who is socially male. What is termed women's sexuality is the

---

31 Ibid., 116–18.

32 Catharine A. MacKinnon, *Sexual Harassment of Working Women* Yale University Press 1986, 32.

33 Catharine A. MacKinnon, “Feminism, Marxism, Method and the State: An Agenda for Theory,” *Signs* 1982, 515.

34 Catharine A. MacKinnon, *Toward a Feminist Theory of State* Harvard University Press 1989, 197.

capacity to arouse desire in that someone. Considering women's sexuality in this way forces confrontation with whether there is, in the possessive sense of “women's” any such thing. Is women's sexuality its absence?”<sup>35</sup>

Curiously, in the 1990s when western feminists invested in international law, MacKinnon makes a similar argument about the use of pornography by Serbian soldiers as a means of inciting genocide.<sup>36</sup> MacKinnon argues that the use of pornography in the Balkans made it the first “truly modern war” and draws a connection between the U.S. porn star Linda “Lovelace” and women who have experienced sexual abuse in war propelled by pornography.<sup>37</sup>

The period of intense acrimony between sex-positive and anti-pornography feminists during the early 1980s is part the so-called “feminist sex wars.” During this period, sex-positive feminists, such as Carole Vance and Gayle Rubin argue that feminists’ emphatic insistence that sex is hazardous to women has thwarted the development of female empowerment. The feminist tendency to unite women on the common ground of gender and potential victimization resurrects the conservative notion that women are in distress and require protection.

A “law in action” analysis notes that anti-pornography ordinances put forth by MacKinnon and Dworkin called for the removal, censorship, or control over sexually explicit material. Indeed, of primary concern to sex-positive feminists is that the enforcement of anti-porn laws target the gay community. In 1983, the Minneapolis city government hired MacKinnon and Dworkin to draft an anti-pornography civil rights ordinance as an amendment to the Minneapolis city civil rights ordinance. The amendment defined pornography as a civil rights violation against women, allowing those who claimed harm from pornography to sue the producers and distributors for damages in civil court. The law was passed twice by the Minneapolis city council but vetoed by the mayor. Another version of the

<sup>35</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of State* Harvard University Press 1989, 118.

<sup>36</sup> Catharine A. MacKinnon, “Rape, Genocide, and Women's Human Rights” in *Are Women Human?* Harvard University Press 2006, 208.

<sup>37</sup> Catharine A. MacKinnon, “Turning Rape into Pornography” in *Are Women Human?* Harvard University Press 2006, 162.

ordinance passed in Indianapolis, Indiana in 1984 but was ruled unconstitutional by the Seventh Circuit Court of Appeals.

Later in 1992, the Supreme Court of Canada supported the MacKinnon/Dworkin theory and attempted to eliminate “hate propaganda” through the seizure of sexually explicit visual texts. The Canadian Supreme Court ruled that although the nation's criminal obscenity law infringed on the freedom of expression, it was legitimate to outlaw pornography that was harmful to women. In a unanimous decision, the court also redefined obscenity as sexually explicit material that involves violence or degradation. “This makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values,” said MacKinnon. Yet the Butler decision was controversial, it is sometimes alleged that shipments of Dworkin's book *Pornography* was seized by Canadian customs agents under this ruling, as well as novels by Marguerite Duras and David Leavitt.

Successful Butler prosecutions have also been undertaken against the lesbian sadomasochistic magazine *Bad Attitude*, as well as the owners of a LGBTQ bookstore for selling it. Many free speech and gay rights activists have alleged that the law is selectively enforced to target the LGBTQ community. Civil libertarians also largely find MacKinnon's theories objectionable, arguing there is no evidence that sexually explicit media encourages or promotes violence against women.

The argument for and against pornography is a concrete example of the polarization of the sex positive/negative debate. American cultural anthropologist Gayle Rubin notes that when any discourse is polarized, those not directly involved in the debate tend to assume that the truth lies somewhere in the middle of the extreme opinions posed.<sup>38</sup> In “Misguided, Dangerous, and Wrong” (1993) Rubin argues that this is a dangerous tendency that gives more credibility to hate-mongering groups than they deserve. Rubin challenges the feminist assumption that pornography is so much more sexist than mass

---

<sup>38</sup> Gayle Rubin, "Misguided, Dangerous, and Wrong: An Analysis of Anti-pornography Politics." In *Deviations: A Gayle Rubin Reader*, Duke University Press, 2011.

media; is pornography any more violent than the undemocratic way in which women are represented in media? Pornography is also sexist, but treated differently by feminists. Pornography has become an “easy, pliant, and overdetermined scapegoat”<sup>39</sup> for problems it is not responsible for. Instead, Rubin argues that we must support feminist porn, and decriminalize prostitution.

More recently, visual theorist Ariella Azoulay observes in “Has Anyone Seen A Photograph of a Rape?” (2008) that images of the act of rape are not represented in mass media as other “non-sexual” crimes, such as torture or bodily mutilation are.<sup>40</sup> It's not that images of rape don't exist, these visuals can be found in the unregulated corners of the internet where, Azoulay argues, the restriction imposed on their accessibility further eroticizes the act. This observation indicates that rape is not just a matter of violence employed against an ordinary citizen. As such, discussing the absence of images of rape leads directly to the question regarding the restriction imposed on their accessibility.

The dispute on the absence of rape images is connected to the historical contention regarding the transient state of the rape image in the public sphere.<sup>41</sup> The explicit purpose of feminist activists who fought to make rape manifest in public discourse was to detach rape from its sexual context and fix it in public consciousness as an act of violence. Yet detaching rape from its sexual context was not unanimously agreed upon as many argued that sex is a central component to understanding rape. A fierce second-wave feminist controversy ensued over the representation of rape: to show photos of victim's faces or not? The conservative feminists held that there is a need to protect the survivor and avoid the possibility of pornographic appropriation. The debate raged on and gradually turned into the dominant chorus, voiced by treatment centers for victims of sexual assault. Rape became established as

---

39 Gayle Rubin "Misguided, Dangerous, and Wrong: An Analysis of Anti-pornography Politics." In *Deviations: A Gayle Rubin Reader*, 254-75. London: Duke University Press 2011, 257.

40 Ariella Azoulay, "Has Anyone Seen a Photograph of a Rape?" In *The Civil Contract of Photography* Zone Books 2008, 250.

41 Ibid., 251.

a violent crime, with the liberal term “consent” at the heart of the issue.<sup>42</sup> The focus on the sexual aspect of rape is what Catharine MacKinnon, in her analysis of the obscenity law, presents as a moral or “moralistic context.”<sup>43</sup> The injury is the stain that accompanies a woman's identification in public with the act of rape.

Azoulay draws upon the thinking of Michel Foucault, who observes that the category of rape remains trapped in the problematic framework of the confessional, “placing the confessor in the nonpolitical position of a woman who must confess to her actions.”<sup>44</sup> Testimony is further sensationalized on TV through talk shows, while talking about rape in 1970s was meant to be a revolutionary speech act, has turned into a repetitive ritual.<sup>45</sup>

As Azoulay notes, the visual presence is the other side of what's missing on images of rape. The conservative argument on censorship reinforces the stereotype that raped women are non-political actors in need of being shield from public view. Instead, we are an audience to the omnipresence of the female body shown as abandoned and exhibited: “You don't see rape, you don't see any woman being raped; what you do see are lots of abandoned female bodies, susceptible to rape.”<sup>46</sup> As mass media censorship of rape has shown, visually at least, it's impossible to rid of the sexual aspect of rape because rape looks like sex.<sup>47</sup> This is in part what makes the issue of the representation of rape so politically charged, as Azoulay explains, “When rape images lie outside the sphere of discussion, we are completely unable to manufacture the boundaries of our agreement or disagreement in regard to them, and we are prevented from negotiating over turning at least some of them into emergency

---

42 Ibid., 250.

43 Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* Harvard University Press, 1987, 231.

44 Ariella Azoulay, "Has Anyone Seen a Photograph of a Rape?" In *The Civil Contract of Photography*, New York: Zone Books, 2008, 256.

45 Ibid., 257

46 Ibid., 264.

47 Ibid., 250.

claims.”<sup>48</sup> The act of rape is cut off from public eye and therefore is not open to the transformative power of discourse. We need to increase education on sex to relinquish the taboo of rape.

### ***On Rape and Consent:***

Mackinnon criticizes rape law, which she defines as “intercourse with force or coercion without consent.”<sup>49</sup> According to MacKinnon, “Whose subjectivity becomes the objectivity of 'what happened' is a matter of social meaning, that is, a matter of sexual politics.”<sup>50</sup>

Ultimately, MacKinnon argues that there is a problem with the way rape law is structured, in that even the ideal sexual encounter between a man and a woman is not mutual.<sup>51</sup> MacKinnon expands the scope of her argument, stating that we cannot tell the difference between rape and heterosexual sex due to pervasive conditions of male domination.<sup>52</sup> Sexual intercourse must be understood in the context of patriarchal society, under these conditions genuine consent is difficult to be given.

At a 2015 panel conference at Stony Brook University, “Yes Means Yes? Conceptualizing Consent” Janet Halley analyzes the California Statute that requires all parties must obtain consent before sexual intercourse. Halley offers the clarification that, “good sex has to be consented (verbally) and asented (mentally) to.” This emphasis is made to highlight the feminist distinction that all sex women have is under coercive circumstances. These occasions are termed “conditions of unequal bargaining power” which are progressive in the sense that they assume dominated women have bargaining power.<sup>53</sup>

As the radical feminist movement has demonstrated, the liberal legislation against rape has placed women's consent to have sexual relations with men at the center of the debate on the assumption

---

48 Ibid., 261.

49 Catharine A. MacKinnon, “Rape: On Coercion and Consent” *Applications of Feminist Legal Theory* 1996, 172.

50 Ibid., 654.

51 Ibid., 174

52 Ibid., 175.

53 Janet Halley “Yes means Yes, Conceptualizing Consent” Stony Brook University, 32:00.

that women are ordinary citizens, and that rape is an expressive violation of women's rights.<sup>54</sup> This has aroused widespread criticism from those who have shown that consent doesn't always stem from volition and that coercion doesn't always entail physical violence. Radical feminists have demanded that lack of consent be recognized even when coercion is perpetrated symbolically.

### *A Critique of Feminist Theory*

“What if, as well as *describing* and *opposing* this social and psychic event [rape], feminism *helps to produce it*? What if the politics of injury and of traumatized sensibility which have almost completely occupied the space cleared by MacKinnon's politics of domination and subordination are helping to authorize and capacitate women as *sufferers*?”<sup>55</sup>

The attempts by the radical feminist movement to uncover *the* universal truth of women's social condition has been extensively deconstructed by scholars who reflect on the problematic of using criminal law to “end” women's subordination. While intense feminist efforts beginning in the 1960s to criminalize sexual violence, first domestically and later internationally, are considered successful by feminist majority,<sup>56</sup> these developments demand scrutiny. This section is not intended to discount or minimize the gains the women's movement has made. It is with immense intellectual labor and activism that feminists have been able to climb into real legal power and influence institutions in a noble attempt to improve women's condition. The purpose of critiquing this state-feminist alliance then, is to acknowledge both the given strengths and unintended consequences of radical feminism's rise to institutional power. This analysis extends to Chapter 3, as western feminists became involved in the naming and legal codification of mass rape first in the Balkans and then Rwanda.

This section focuses on what U.S. legal scholar and Royal professor of law at Harvard

---

<sup>54</sup> Ariella Azoulay, "Has Anyone Seen a Photograph of a Rape?" In *The Civil Contract of Photography*, New York: Zone Books 2008, 232.

<sup>55</sup> Brenda Cossman, Dan Danielson, Janet Halley, and Tracy Higgins, "Gender, Sexuality, and Power: Is Feminist Theory Enough?" *Columbia Journal of Gender and Law* 2003, 35.

<sup>56</sup> Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law" *Michigan Journal of International Law* 2008, 105.

University, Janet Halley terms a “law in action” examination of the distributive consequences of the rapid institutionalization of feminist ideology in law. Chapter 3 focuses primarily on Halley's interpretation of the new IHL legislation on wartime rape and secondarily on the feminist sister project in prostitution and trafficking to highlight the contrast of feminist response, though both conservative and criminal in their nature.<sup>57</sup>

As demonstrated in the prior section on MacKinnon, radical feminists continue to influence real time legal changes. New bureaucratic codes and institutions have been implemented in the “peacetime”<sup>58</sup> arenas of work places and educational settings. The recent intensification of attention given to sex harassment policy on college campuses across the country, including Bard, under Title IX illustrates how close to home these developments are occurring.<sup>59</sup> These legal changes demonstrate how deeply engrained conservative feminist ideology has become in law and the totalizing degree to which feminists have impacted both “peacetime” and wartime spheres. A notable and provocative takeaway on this point is a conclusion drawn from Halley's contribution to the collaborative article, “Gender, Sexuality, Power: Is Feminist Theory Enough?” (2008). In the piece, Halley argues that radical feminism's drive for legal power mirrors the hegemonic nature of the masculine state. Ironically, feminism is a dominator.

Halley disapproves of the growing state-centeredness in feminism that looks to public policy and the legal solutions to remedy abuse against women; also troubling are feminist arguments that consider criminal law to be a fixed entity. While many acknowledge that the criminal structure can change over time despite the system's noted drawbacks, feminists continue to work within the system

---

57 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law*, 2008.

58 Peacetime is accompanied by scare quotes – a distinctly feminist alternation – to scorn the idea that women are free from coercion in everyday life.

59 At the end of the 2015 Spring semester, Bard president Leon Botstein addressed two federal complaints against Bard College for allegedly violating Title IX. Botstein's role was scrutinized in internet news articles published by Huffington Post, BuzzFeed, and the Poughkeepsie Journal for the college's lax attitude toward rape in the wake of charges brought against a male by a female student. Botstein addressed the college in a series of two emails assuring Bard's compliance with legal standards and noting the “changing attitude toward rape.”

in the hopes that feminist efforts will eventually result in adequate reform.

This analysis of feminism is situated from the perspective of an American legal realist, where MacKinnon could be said to draw her claims from classical legalism. Legal realism, the study of “law in action,” challenges the classical claim that orthodox legal institutions provide an autonomous system of legal discourse unaffected by political sway. As Halley demonstrates in “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law” (2008), feminists advanced their claims at the Rome Conference and at the ICTs by utilizing politics, later termed '*expertise*,' as one of the primary means of integrating feminist ideology in ICL.<sup>60</sup> Halley highlights the questionable degree of neutrality exhibited by what one would ideally believe to be even-handed, justiciable legal institutions.

In *Gender, Sexuality, and Power: Is Feminist Theory Enough?* (2003) Brenda Cossman, Dan Danielsen, Janet Halley, and Tracy Higgins re-assess the evidence of a 1994 Texas Supreme Court Case, *Twyman v. Twyman* which involve the plaintiff Sheila Twyman and defendant William Twyman through a divorce, sadomasochistic sex, and claims of emotional distress. The authors engage the case as a focal point to explore how feminism deals with gender, sexuality, and power. Halley and Cossman offer their own re-readings of the Twyman facts, intended as a way to “Take a Break” from radical legal feminism’s confining constructs.

Cossman challenges Halley's claim, arguing that feminism is a strong tool for analyzing gender despite the limitations that feminism poses. Yet Halley makes a number of strong arguments as follows: The rigidity of academic feminism has alienated the possibility for feminism to evolve. One of the main concerns with feminist scholarship is that the dominance “m>f” formula has acted as a limitation on the analysis of existing and production of future scholarship, preventing feminists from exploring

---

<sup>60</sup> Janet Halley, “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law” *Michigan Journal of International Law* 2008.

beyond a gender-centric analysis.<sup>61</sup>

The existence of breakaway movements stand as stark examples of the problematic the feminist movement poses: exclusivity. Take, for example, anti-identity and queer theory, in addition to a number “hybrid feminisms”: socialist, antiracist, postcolonial, and sex-positive which propose theories of power along the lines of class, race, and empire where the heterosexual distinction of “m>f” is not presupposed. Halley argues further that feminism has acted on the behalf of women at the expense of men and elides the reality that men and boys who are raped experience physical and psychological injury.<sup>62</sup>

Judith Butler argues in *Gender Trouble* (1990) that the definitional stake of tying feminism to M/F ties feminism to a heterosexually-based theory of power. In direct reference to the Tywman case, Butler argues that legal recognition of emotional distress from sexual harm discursively produces women who do suffer these harms, it reiterates women as a subject who lacks agency.<sup>63</sup>

Butler argues further that feminism can't be expected to account for the reality of women outside of a western context. In particular accounts of FGM are used as an example because they tend to construct a "Third World Woman" as Gaytri Spivak has argued, in which gender oppression is explained as symptomatic of a barbaric culture. The feminist notion of a universal patriarchy has been widely criticized for its failure to account for gender oppression in varied cultural contexts. Butler argues that feminists ought to understand how the category of “women,” is produced and restrained by institutional structures of power through which emancipation is sought.<sup>64</sup> There is the political problem that feminism encounters in the assumption that the term women denotes a common identity and that

---

61 Brenda Cossman, Dan Danielson, Janet Halley, and Tracy Higgins. "Gender, Sexuality, and Power: Is Feminist Theory Enough?" *Columbia Journal of Gender and Law* 2003, 20.

62 Brenda Cossman, Dan Danielson, Janet Halley, and Tracy Higgins. "Gender, Sexuality, and Power: Is Feminist Theory Enough?" *Columbia Journal of Gender and Law* 2003, 21.

63 Judith Butler, *Gender Trouble*. New York: Routledge, 1990, 3.

64 *Ibid.*, 7.

women hold a common subjugated experience.<sup>65</sup> This radical form of feminist theorizing has come under criticism for its efforts to appropriate non-Western cultures to support highly Western notions of oppression, one which must be found in an “identity assumed to exist cross-culturally, which often accompanies the notion that the oppression of women has some singular form discernible in the universal structure of male domination.”<sup>66</sup>

To solidify this point, consider feminists in international law who sought to advance the “rape as genocide” understanding of war. Western conceptions of war that fall back on cultural explanations for violence against women perpetuate dangerous tropes that encourage a cultural supremacist view that women are more oppressed in the East than the West.

In *States of Injury: Power and Freedom in the Late Modernity* (1995) Wendy Brown, a professor of political science at Berkeley, highlights a major concern in the nature of the criminal system and its incongruence with feminist goals. The current justice system focuses nearly exclusively on individual punishment, not the improvement of socio-economic predicates to crime nor the reintegration of returning citizens to society.<sup>67</sup> Criminal law is traditionally and primarily structured as an adversarial power struggle which creates the identity-subjects 'bad' criminal and 'good' victim. By engaging in this dichotomy, criminal law has the effect of decontextualizing sexual abuse from the larger issue of gender inequality. The current dialectic of criminality and victimhood implies that crime is a problem of individual criminal pathology and not social hierarchy. As Brown notes, “the effort to 'outlaw' social injury powerfully legitimates the state as a protector and neutral arbiter.”<sup>68</sup> As such, feminists must recognize the state's capacity to injure.

Brown further argues that feminism treats women's injury as the focal point of identity in that

---

65 Ibid., 5

66 Ibid., 3.

67 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity*. Princeton University Press 1995, 430.; Aya Gruber, "Rape, Feminism, and the War on Crime." *Washington Law Review Association* 2009, 623.

68 Ibid., Brown, 431.

law reproduces rather than remedies the sexual nature of injury.<sup>69</sup> For example, Janet Halley writes in “Sexuality Harassment” of the *Oncale vs. Sundowner Offshore Services, Inc.* (1998) case in which oil-rig worker, Joseph Oncale filed a complaint against his employer, Sundowner Offshore Services, Inc., alleging that he was sexually harassed by co-workers in their workplace and in violation of Title VII of the Civil Rights Act of 1964.<sup>70</sup> MacKinnon filed a brief stating that Oncale was feminized, Halley pushed back citing a footnote where Oncale said he thought his attackers were homosexuals, and therefore deviant in the eyes of the law. As Halley writes, “subordination feminism makes policy choices that put gay and queer constituencies on the lines of regulatory fire.”<sup>71</sup> Halley expanded the scope of her critique on the feminist tendency to view women as victims.

As Karen Engle suggests, the appropriateness of criminal penalties should be assessed in the context of particular social and political systems. Human rights organizations have reported patterns of rape and sexual abuse by law enforcement officials in a number of countries. Histories of police violence against communities of people of color in the US and Europe mean that women in those communities often cannot rely on law enforcement in cases of domestic violence.<sup>72</sup> Perhaps by recognizing that advocates' work operates within matrixes of power, Brown suggests that skepticism about rights is especially appropriate in light of the unintended consequences of feminist efforts to engage the rhetoric of liberal rights on behalf of women.<sup>73</sup>

Brown challenges feminists' claims to rights in the most recent 2002 article, “Suffering the Paradoxes of Rights,” stating that while the quest for legal rights has been central to feminist political movements, it is also controversial because it is not clear that the language of rights is adequate to

---

69 Ibid., 35

70 Janet Halley, “Sexuality Harassment” In *Left Legalism/Left Critique* Duke University Press 2002, 80.

71 Janet Halley, “Sexuality Harassment” In *Left Legalism/Left Critique* Duke University Press 2002, 81.

72 Elizabeth Bernstein, “Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns.” *Journal of Women in Culture and Society* 2010, 12.

73 In *States of Injury: Power and Freedom in Late Modernity*, Brown's analyzes state power not as a monolithic masculine entity, but rather acknowledges that the state has many branches of power and can pursue masculine interests without an overtly masculine or dominating purpose.

achieve feminist objectives.<sup>74</sup> While rights are examples of “that which we cannot not want,”<sup>75</sup> Brown notes that feminists must reflect on the paradoxes of rights to better understand the constraints and possibilities that the feminist desire for rights creates. Brown posits, do rights “inevitably shape as well as claim our desire without gratifying it?”<sup>76</sup>

The quest for legal rights proves paradoxical when oppressed groups harness rights claims as vehicles for liberation. The more specified the right, the more likely that it will encode a definition of women premised upon their subordinate status.<sup>77</sup> So while the rights can work to alleviate subordination, they cannot in their nature, challenge the construction of a subordinate status. It will fence women into this status, and to use Brown's image, that fence will be the price women must pay to use the right to improve their situation. Such rights create a formal equality between men and women that coexists with the lived reality of substantial inequalities of power and privilege between them. The value of formal rights favors men over women, even though formal rights may rhetorically "offer something to all."<sup>78</sup>

How far do claims to equality actually improve the lives of women? “Rights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom [...] and rarely articulate or address the conditions producing or fomenting that violation.”<sup>79</sup> Brown states that ending suffering is a piecemeal goal, and addressing the preconditions which allow suffering is a far more complex question. Politics is an inherently messy and contested domain. It requires one to abandon the safety of moral purity and instead engage in the difficult and contradictory processes of experimentation and change: “Politics cannot be undertaken from the standpoint of victimhood but

---

74 Ibid., 60.

75 Wendy Brown, "Suffering the Paradoxes of Rights." In *Left Legalism/Left Critique* Duke University Press 2002, 231.

76 Ibid., 232.

77 Wendy Brown, "Suffering the Paradoxes of Rights." In *Left Legalism/Left Critique* Duke University Press 2002, 230.

78 Ibid., 232.

79 Ibid., 239.

only by those who refuse to be defined by victimhood.”<sup>80</sup> In other words, politics can be motivated by the desire to end suffering but it is always about reaching beyond suffering.

Instead, we must negotiate the terrain of capitalist and imperial power and recognize that sometimes our actions may, despite best intentions, work to reinforce rather than subvert that power. Brown argues that a feminist politics of change must eschew reliance on states or the UN for protection. Beyond the risks of possibly of causing further injury to women, what such a politics offers is the possibility of a world in which global politics is not built on the spectacle of women’s suffering.

### ***A Philosophical Reconceptualization: Desexualizing Rape (1971)***

In “Putting Sex to Work,” scholar Katharine Franke addresses the question of how we differentiate between sexual and non-sexual crimes, noting that the feminist influenced sex harassment laws are used as a mechanism of sex discrimination.<sup>81</sup> Franke argues that sexual harassment must be understood as a “technology of sexism, [...] an instrument of gender regulation which feminizes women as sexual objects and masculinizes men as sexual subjects.”<sup>82</sup>

Franke engages the thinking of philosophical historian Michel Foucault by observing that naming particular acts as “sexual” occludes the way in which sex mediates other relations of power. Foucault argues that we tend to ignore the ways in which “sex operates as an especially dense transfer point for relations of power” often gender, race, or sexual orientation-based dynamics of power. For example, rape is a crime that would be considered “sexual in nature” and receive special legal regulation by civil and criminal laws as sexual misconduct. Franke here argues that criminal codes make a mistake by interpreting certain behavior as primarily erotic.<sup>83</sup> In an attempt to mediate this tension, one option posed by Michel Foucault is to desexualize the crime of rape.

---

80 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* Princeton University Press 1995, 57.

81 Katharine Franke, “Putting Sex to Work” In *Left Legalism/Left Critique* 2002, 290.

82 Katharine Franke, “What’s Wrong with Sexual Harassment?” *Stanford Law Review* 1996, 17.

83 Katharine Franke, “Putting Sex to Work” In *Left Legalism/Left Critique* 2002, 292.

In a 1971 interview, Foucault argues that rape should be treated no differently than a crime of assault: “When one punishes rape one should be punishing physical violence and nothing but that [...] there's no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex.”<sup>84</sup> In this way, the aim of desexualizing rape would work to circumvent the disciplinary powers of the state over sexuality.

By making rape a “sex” crime, sexuality becomes anchored in certain parts of the body. Further, bestowing this special status, “sexuality [...], in the body has a preponderant place, the sexual organ isn't like a hand, hair, or a nose. It therefore has to be protected, surrounded, invested in any case with legislation that isn't that pertaining to the rest of the body.”<sup>85</sup> While it is the regulatory power of the state over sex that Foucault seeks to interrupt, the reality of differentiating between sex and violence continues to be a contested issue for feminists. It is in this way that Foucault's concern highlights one a major pressure point of the women's movement as activism merged with state power. The emphasis placed on the sexualization of women's injury obscures how violence is attended to in legislative and humanitarian terms.

As advocacy groups lobbied for the inclusion of violence against women, “gender-based violence” (gbv) was consolidated as a legal category through the language of human rights. 'Violence against women' emerged as a human rights issue in the 1980s at the UN and expanded in the 1990s. Rape in armed conflict played a central role in the recognition of gbv as feminists involved themselves in the conflicts. Human rights approaches forced the international community to understand rape as a particular form of violence. It is important to note that the changes that incorporated GBV into the human rights realm brought the law to bear as a primary instrument of change.

## **2. Violence against Women at the UN 1980s**

Violence against women is an issue that arrived late for the international women's movement

<sup>84</sup> Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977 – 1984* Routledge, 200.

<sup>85</sup> Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977 – 1984* Routledge, 200.

and is a radical departure from the past issues of suffrage, equality, and discrimination around which women have historically mobilized.<sup>86</sup> In the 1970s, violence against women was not on the international agenda of the women's movement nor was it a concern of global human rights groups. The central normative legal code on women's rights, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), drafted in the 1970s and adopted in 1979, does not mention violence against women until the later adoption of Article 12 in 1989 and Article 19 in 1992.<sup>87</sup> The modifications to CEDAW are illustrative of the larger thematic shifts made across the international board of advocacy as diverse women's groups converged on what they believed to be the most universally shared women's issue in the mid-1980s: violence.

Scholars Margaret E. Keck and Katharyn Sikkink describe the shift toward “violence against women” (vaw) in terms of how two previously separate transnational NGO networks around human rights and women's rights began to converge and mutually transform each other.<sup>88</sup> In this sense, the category of vaw had to be created and is largely a construction of women's lobbying efforts. In the early 1980s, violence against women became the umbrella topic for the transnational women's movement to unite under and became a primary focus of UN action in 1985 at a women's conference in Nairobi.<sup>89</sup> The issue moved rapidly to the fore as a theme that united women of diverse backgrounds to fight for a common cause.

As the popularity of vaw expanded into the 1990s, the category became a human rights concern that could not be ignored as mass rape in the conflicts of Bosnia-Herzegovina and Rwanda spurred western feminist action and as a result, new legal codes on sexual violence. However of primary

---

86 Margaret E. Keck and Katharyn Sikkink, "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 166.

87 The convention mentions “discrimination” 29x, “equal” or “equality” 34x, “human rights” 5x, but makes no mention of violence, rape, abuse or battery. One exception is Article 6, with reference to trafficking and prostitution.

88 Margaret E. Keck and Katharyn Sikkink, "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 166.

89 *Ibid.*, 165.

interest to this chapter is the rapid emergence and massive attention now gathered from a variety of actors who would otherwise not be considered allies in other human rights framing battles. The Vatican, a coalition of Muslim NGOs, and population control advocates formed a partnership to promote the understanding of women's rights through a lens that would ensure the protection of women's bodies from sexual harm.<sup>90</sup> While Alice M. Miller notes that health and reproductive rights *are* women's rights, at the same time high-level calls for action to *protect* women from sexual harm perpetuates the notion that the most important thing about a woman is her chastity.<sup>91</sup>

### **A brief history of women's organizing**

The roots of current women's networks are located in the western abolitionist movement of the 1800s and subsequent international campaign for women's suffrage.<sup>92</sup> The emancipation of enslaved African peoples was used by women's rights activists to make the conceptual leap from bondage slavery to the 'enslavement' of women who did not have the same citizenship rights as their husbands.<sup>93</sup>

The first wave of women's organizing is considered as the campaign for suffrage. Like the suffrage movement, second-wave networks were fostered by international conferences and the emergence of modern international organizations provided more arenas for women's issues. The Inter-American Commission on Women founded in the 1920s was a group instrumental in getting the provision on equal rights for women into the UN Charter and recommending the formation of the UN Commission on the Status of Women (1946).

The second wave of international organizing began in the 1960s. Feminists put issues of rape and domestic violence on the agenda of the women's movement in the US and Western Europe in the

---

90 Elisabeth J. Friedman, "Gendering the Agenda: The Impact of Transnational Women's Rights Movement at the UN Conferences of the 1990s" *Women's Studies International Forum* 2003.

91 Alice M. Miller, "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection" *Health and Human Rights* 2004, 18.

92 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, 165-98. N.p.: Cornell University Press 1998, 180.

93 Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* Harvard University Press, 2013, 7.

mid-1970s, but violence tended to concern local rather than the main stream national women's organizations. The issue emerged locally as women organized in their communities to speak out against rape. These newly forming feminist world views on rape sparked global debate and introduced the notion of women's universal subordination.<sup>94</sup>

In 1967, the Commission on the Status of Women drafted the Declaration on the Elimination of Discrimination Against Women and later adopted CEDAW in 1979 which went into force in 1981. When first adopted, CEDAW dealt mainly with discrimination as explained above, defined as “any exclusion or restriction of women on the basis of sex in the political, economic, social, cultural, civil [...] field.” The 1967 declaration discusses women's situation in terms of discrimination and equality in almost every article, but does not refer to violence against women.

Discrimination and equality were what Elisabeth Friedman terms the “master frames”<sup>95</sup> of the women's movement in the United States, Europe, and by default the UN system. Yet the discrimination frame did not always include the concerns of third world women's organizations, as revealed in many of the debates at the International Women's Year Conference in Mexico City in 1975. Foundation funding introduces significant asymmetries into networks. Almost all the money for network activities comes from foundations in the United States and Western Europe.<sup>96</sup> One network activist from Nigeria noted that northern NGOs claim to represent southern groups when all groups are desperately seeking funding. She asked: “Why should we all link hands? Local NGOs cannot get support for their work so we have to affiliate with international NGOs. When the international NGOs arrive at the gate, they drop us and do the talking on our behalf.”<sup>97</sup>

The current wave of organizing internationally gained momentum during International Women's

---

94 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." Cornell University Press 1998, 175.

95 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." Cornell University Press 1998, 170.

96 Ibid., 182.

97 Joanna Kerr, “Strategies for Action,” in *Ours by Right: Women's Rights as Human Rights*, Zed Books 1993, 166.

Year and the UN Decade for Women (1976-85), which in turn catalyzed networks around women's rights. The conferences in Mexico City (1975), Copenhagen (1980), and Nairobi (1985) that spanned the UN Decade for Women served as locations to build and connect the emerging international network. Preparations for the population conference in Cairo (1994) and the women's conference in Beijing (1995) further extended and solidified connections among the advocacy networks. In each of the cities, increasingly large parallel conferences of NGOs took place at the same time as the official conferences. Keck and Sikkink report that more than 14,000 women from 150 countries attended the NGO forum in Nairobi and 20,000 attended the one in Beijing.<sup>98</sup> At the UN Conference on Women in Beijing in 1995, violence against women was a “centerpiece of the platform, one of four issues given special prominence” of the women's and human rights movement.<sup>99</sup>

Activists moved away from the thoroughly institutionalized frame of discrimination and toward the rights frame implicit in the language of violence against women. While rights issues are the bedrock of the UN system, human rights bodies and treaties paid little attention to women's rights and it was difficult for activists to get women's rights onto the agenda of human rights.<sup>100</sup> After sustained lobbying domestically and transnationally in the 1980s and 1990s, women's rights became institutionalized in the frame of “violence against women.”

### ***The Rise of 'Violence against Women'***

The issue of vaw was not squarely on the UN agenda until the Nairobi conference in 1985 at the end of the Decade for Women. Nairobi was the first step in securing agenda attention to the issue, initiating discursive change, and strengthening linkages among women's groups.<sup>101</sup> Local activists at the

---

98 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, 165-98. N.p.: Cornell University Press 1998, 180.

99 Steven Mufson, “UN Women's Meeting Settles Key Disputes” Washington Post 1995, A15.

100 Alice M. Miller, “Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection.” *Health and Human Rights*, 2004: Women and violence appeared prior to the 1980s in humanitarian law and in UN anti-trafficking convention.

101 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 180.

NGO tribunal at Nairobi formed the International Network against Violence against Women (INAVAW), a communication network for activists, yet the issue had yet to attract substantial international attention.

Networking revealed a major division about the interests of women's groups. At Mexico, the conference turned into a heated debate among feminists from western countries who emphasized discrimination, and women from the south who stressed issues of development and social justice that affected both men and women. Popularly portrayed as a north-south split, these divisions existed within northern and southern groups and beyond the conference at Mexico City. The tensions within the women's movement began to recede at the UN women's conference in Nairobi in 1985, the first conference to make substantial recommendations on the issue of violence against women.

“Violence against women” caught on because it was a uniting force that captured imagination. As a Latin American activist points out, “the violence theme is very evocative. No woman can help but feel it as her own. I don't think any one of us can say that she has never felt violence against her. It crosses all our lives.”<sup>102</sup> The category also served the strategic purpose for activists trying to build a transnational campaign because it allowed them to bridge cultural differences and ally with new groups. The focus forced activists to search for a basic “common denominator”<sup>103</sup> – the belief in the importance of the protection of the bodily integrity of women and girls.

Disillusionment with development projects led many activists to believe that women's economic position could not improve without addressing the root problems of women's subordinate status. Violence and development could also be linked, since in many cases violence against women limited the role women could play in development. In this way violence against women offered a clear

---

102 Susana Chiarotti, International Campaign for Women's Human Rights 1992-93 Report, Center for Women's Global Leadership, 25.

103 Alice M. Miller, “Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection.” *Health and Human Rights*, 2004.

avenue for activism.<sup>104</sup> The category “violence against women” is inclusive and encompasses a range of abuses in diverse locations, from domestic to state violence. The process through which women's networks helped “create” the issue, in part through naming, renaming, and defining the concept of “violence against women” unified abuses that in the early 1970s were not initially linked. The separate activist campaigns on specific practices – against rape and domestic abuse in US and Europe, FGM in Africa, trafficking and “sexual slavery” in Europe and Asia, dowry death in India, and torture and rape of political prisoners in Latin America<sup>105</sup> – had to be framed by feminists before the issues could be considered similar in any fundamental way.

The earliest official definition of the term “violence against women” was developed by the Organization of American States (OAS), which adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994. It defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual, or psychological harm or suffering to women, whether in the public or private sphere.”<sup>106</sup> This definition was considerably narrower than the one proposed in 1991 which included indirect acts that intimidated or humiliated women, maintained them in sex-stereotyped roles, or denied them human dignity, whether or not these acts caused physical or mental injury or suffering.<sup>107</sup> Like the inter-American convention, the non-binding UN declaration on violence against women stresses violence that results in physical, sexual or psychological harm occurring in public or private life.<sup>108</sup>

---

104 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 80.

105 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 81.

106 Suggested Preliminary Draft for the Preparation of an Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women,” in the “Report on the Results of the Meeting of Experts to Consider the Viability of an Inter-American Convention on Women and Violence,” 5-9 August 1991, Caracas, Venezuela, 17.

107 *Ibid.*, 18.

108 The OAS convention includes a list of types of violence against women, such as rape, battery, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping, sexual harassment, and violence perpetrated or condoned by the state. The UN declaration adds dowry-related violence, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation.

A new focus on violence in the private sphere was another major conceptual innovation that contributed to the creation of an international human rights discourse about vaw. One of the most dramatic developments in international law is the shift toward prosecuting individual actors. In the past international law primarily focused its energies on regulating state behavior and defining states rights. Recently however, IHL has increasingly been involved in identifying individual rights and holding individuals accountable. After WWII the identification of individual responsibility in the Nuremberg Trials after World War II was followed by the creation of the Universal Declaration of Human Rights by the United Nations in 1948. Feminists argue for the recognition that most violence against women is carried out by private individuals, within the household or community which, to feminists, implies a rethinking of the boundaries between public and private in IHL. This point will be further explored in Chapter 3.

The 1994 UN Declaration on vaw relied on a notion of state responsibility to protect and fulfill human rights work and built the case that a state could be accountable for abuses by individual perpetrators.<sup>109</sup> Additionally, the individual trying of ICTY and ICTR for rape resulted in specialized tribunal for crimes of sexual violence focusing specifically on individual convictions. The effectiveness of this method has been questioned by critics who assert that the individual conviction of rape won't stop rape or deter its future occurrence.<sup>110</sup> The individualization of the crime allowed rape to be scaled down to a focus on individual harm and conviction.

The next significant conference occurred at Vienna in 1993. Domestic violence was at the center of the theoretical debate in 1993, resulting in the feminist consensus over state responsibility for gender-based violence by non-state actors. In 1993, the UN General Assembly adopted the *Declaration on the Elimination of Violence Against Women*. The Declaration is the first to declare that the states

---

109 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 180.

110 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law* 2008, 23.

have human rights obligations to prevent gender-based violence and seek redress for harm. The aims of the Declaration are to answer the “need for a clear and comprehensive definition of violence against women, [and] a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms” and to establish a “commitment by states and by the international community to eliminate violence against women. The Declaration crystallizes a political and moral commitment to end gender-based violence, but does not fully clarify the scope of state obligations to eliminate violence or clarify the content of the category “violence against women.”

Efforts to eliminate violence against women are thus framed as policy initiatives rather than as measures pursuant to human rights standards and underscores the connection between gender-based violence and women's subordination in public and private life.<sup>111</sup> The link is more explicitly developed in CEDAW's general recommendation 19, which interprets the Women's Convention to prohibit violence against women in the family, including battering, rape, mental suffering, and other violence perpetrated by 'traditional attitudes about women's subordinate status.

The Committee has specified measures states should take to combat domestic violence, including criminal penalties and civil remedies, the abolition of the honor defense, and services to ensure women's security. The preparations for this conference strengthened connections between the international human rights network and the women's rights network.<sup>112</sup> The role women's organizations played at the World Conference on Human Rights in Vienna in 1993 is an example of a network's ability to draw attention to issues, set agendas, and influence the discursive positions of both states and international organizations.<sup>113</sup> Most conference participants agree that one major advance at Vienna in the international protection of human rights was integrating women's concerns into the human rights

---

111 Donna Sullivan, "The Public/Private Distinction in International Human Rights Law." In *Women's Rights, Human Rights*, Psychology Press, 1995, 132.

112 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 179.

113 Ibid., 180.

agenda, a direct result of lobbying by the women's rights network. Activist Arianne Brunet said at the Vienna World Conference on Human rights, “women's rights provided for the mainstreaming of feminism.”<sup>114</sup>

The main demand of the network petition campaign was that the UN “comprehensively address women's human rights at every level of its proceedings” and recognize gender violence as a human rights violation. The final document from Vienna explicitly recognized gender-based violence, including rape and sexual slavery, and all forms of sexual harassment and exploitation as human rights issues.<sup>115</sup> This was reflected in the conference document, the Vienna Declaration and Programme of Action adopted on June 25, the final day of the conference. The Vienna Declaration expresses concern about the “various forms of discrimination and violence, to which women continue to be exposed all over the world.” Another addition is the appointment of a special rapporteur on violence against women, an idea endorsed by the Vienna conference and mandated by the Commission on Human Rights.

At the time of the Vienna Conference, “mainstreaming” was widely viewed as a process of “just adding women,” of incorporating women into various bureaucratic aspects of the human rights system without making what many feminists critiqued as more transformative changes to addressing gender inequality.<sup>116</sup> Attention is slowly being directed toward 'transformative mainstreaming' which goes beyond the physical incorporation of women by demanding reappraisal of institutions and laws.<sup>117</sup>

The global campaign for women's human rights coalesced in the early 1990s around the Global Campaign for Women's Human Rights coordinated by the Center for Women's Global Leadership at

---

114 Alice M. Miller, "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection." *Health and Human Rights* 2004, 20.

115 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women" Cornell University Press 1998, 187.

116 Hilary Charlesworth, "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations" *Harvard Human Rights Journal* 2005, 257.

117 Anne Gallagher, "Ending the Marginalization: Strategies for Incorporating Women into the Human Rights System" *Human Rights Quarterly* 1997, 52.

Rutgers. The work of CWGL was crucial and cemented the focus on violence created by women's groups into a single symbolic and visible campaign.

The result was the application of human rights methodology to the cause of women's rights, and a fuller appreciation within mainstream human rights organizations of the problems with the public/private divide that had characterized advocates' work. As Miller writes, the health and human rights discourse, when joined to women's human rights and violence against women, strengthened the call for governments to take violence seriously.<sup>118</sup> This approach is summed up as “promoting change by reporting facts.”<sup>119</sup> Activists harnessed the factuality of injured bodies in support of medical care and reproductive services. In this way, women's rights were best articulated through the language of health rights.<sup>120</sup>

The CWGL chose the theme of women, violence, and human rights “because it crosses national, class, racial, age, and ethnic lines” and because working on it offers “unique opportunities to build bridges across cultures, to learn from similarities and differences, and to link strategies globally.”<sup>121</sup> In 1990 the director of CWGL, Charlotte Bunch, wrote an influential article, “Women's Rights as Human Rights” which made theoretical and practical linkages between violence against women and international human rights norms. The article circulated widely in activist networks and had profound impact on the evolution of activist strategy. As Bunch explains, violence worked in progressive and regressive ways simultaneously. Violence as a claim to women's rights embodied a horror that could not be ignored, and yet at the same time advanced the conservative notion that women be chaste.<sup>122</sup>

---

118 Alice M. Miller, "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection." *Health and Human Rights* 2004, 20.

119 Margaret E. Keck, and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, Cornell University Press 1998, 183. Aimed at holding governments accountable for abuses, it requires that NGOs: “a) carefully document abuses; b) clearly demonstrate state accountability for those abuses under international law c) develop a mechanism for effectively exposing documented abuse nationally and internationally.”

120 Ibid., 183.

121 Ibid., 184.

122 Charlotte Bunch, “Women's Rights as Human Rights: Toward a Revision of Human Rights” *Human Rights Quarterly* 1990, 486.

Stories of 'the victim' could enter mainstream representation and reaffirm the image of Southern women as without power and in need of protection.<sup>123</sup> Miller situates the discussion of the suffering body and pure victim as the locus of the VAW movement and the ways in which it operated within a paradox, propelling the women's rights movement forward and garnering global attention, all the while reducing women's rights to violence against the body, isolating vaw from its structural causes, and placing focus on the importance of a woman's sexual integrity.<sup>124</sup> Miller's thoughtful reflection grapples with whether the international women's rights movement and the dominantly health-based response to rape is ultimately a good thing. Initially stating that the work for women's rights was a success, Miller affirms that "our work is not disconnected from processes of power or subordination on the basis of nation, gender, race/ethnicity, sexuality, class [...] our work may disturbingly operate through these subordinations, not against them."<sup>125</sup>

The main actors intent on roadblocking advances for women's rights were led by conservative states and NGOs. In particular the Vatican and a coalition of Muslim countries engaged the transnational women's rights movement in what Elisabeth Friedman terms a "framing contest."<sup>126</sup> While claiming to promote an agenda that also supported gender equality, this coalition specifically attacked those rights that threatened the "traditional" male/female conception of gender relations.<sup>127</sup>

It is important to consider the inevitable exclusions that the process of framing would produce. While framing may well be the only way for a large scale international movement to gain an agreed upon face, it is also reductionist. A "frame" ultimately leaves groups and interests out and is largely the requirement to consolidate, organize information and secure political interests. Group of countries was

---

123 Alice M. Miller "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection" *Health and Human Rights* 2004, 21.

124 Alice M. Miller "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection" *Health and Human Rights* 2004, 20.

125 Ibid., 21.

126 Elisabeth J. Friedman, "Gendering the Agenda: The Impact of Transnational Women's Rights Movement at the UN Conferences of the 1990s" *Women's Studies International Forum* 2003, 315.

127 Ibid., 323.

brought together by a common framing of women's rights as a threat to national and religious values.<sup>128</sup> Conservative groups succeeded in specifying in the Vienna Programme of Action's implementation was to be “consistent with full respect for the various religions and ethical values and cultural backgrounds” of nations.<sup>129</sup>

The health frame rose as activists harnessed women's personal testimonial to persuade the human rights community that women have an especially unique biological experience in war, as feminists argue, women can get pregnant and need special legal consideration. Women's rights advocates did succeed by advancing rights as distinctly as health concerns. Yet the success of the campaign to protect against bodily violation is not without consequence. Miller reaffirms that by communicating the issues of women's sexual injury through health-based initiatives, women are viewed as victimized and in need of assistance rather than as agents in their own struggle for claiming rights. Of prime importance to this essay, Miller asserts that the “focus on the body tends to disempower 'treated' persons, moving them from citizen to patient,”<sup>130</sup> ultimately paralyzing women in the state of an injured identity.

### ***The Boundary Between Citizen and Patient***

In “Sexual Violence as a Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet” (2008), anthropologist Miriam Ticktin analyzes the French state's sudden focus on sexual violence in Muslim suburbs. Ticktin locates the larger context of debates in France about immigration, national security, and a growing national sense of Islamophobia, arguing that in its more institutionalized and dominant form, sexuality is recognized through the framework of racial, cultural, and religious difference

---

128 Ibid., 324.

129 Hilary Charlesworth, “Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations.” *Harvard Human Rights Journal* 2005, 543.

130 Alice M. Miller “Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection.” *Health and Human Rights* 2004, 40.

Immigrant-feminist activists are concerned that such violence is portrayed either as unique to the Muslim neighborhoods or as more prevalent there.<sup>131</sup> These feminists condemn the instrumentalization of women's suffering for political ends. They do not necessarily blame the conservative initial message but, instead, the cultivation by the French media and state to produce a violence that is racialized.

Anti-discrimination feminists are reworking the idea of what it means to be emancipated, bringing notions of race and racism to an intersectional analysis of gender, sexuality and class.<sup>132</sup> Feminists bump up against the ways that structural feminist actions taken in the name of protecting women from sexual violence cultivate anti-immigrant sentiment. This in turn permits certain types of action by the state that completely skirt what these feminists see as the real questions of structural and racial inequality that shape various forms of violence.<sup>133</sup> Tickin argues that by fighting over what performances are allowed or required by the state and what is permitted to constitute the public sphere, "women of immigrant origin end up marking the boundaries of the nation-state, both internal and external, metaphorical and literal: they are the grounds on which these debates are occurring."<sup>134</sup>

Through the French state's discourse against sexual violence, men of North African and Muslim origin are type cast as uncivilized violators of women's human rights. This is because the debates and policies on sexual violence function according to logics of cultural otherness, condemning violence primarily when it is attached to readily recognized tropes of alterity, such as forced marriage, honor killings, or excision.<sup>135</sup> Sexual violence is noted primarily when it is attached to other types of difference, used as a vehicle to advance state-based and conservative political agendas.

---

131 Miriam Ticktin, "Sexual Violence as the Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet." *The Journal of Women in Culture and Society* 2008, 20.

132 Miriam Ticktin, "Sexual Violence as the Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet." *The Journal of Women in Culture and Society* 2008, 20.

133 Ibid., 17.

134 Ibid., 18.

135 Ibid., 20.

Ticktin provides an example of Zina, a French-Algerian woman who is seeking French citizenship through humanitarian asylum which is illustrative of a sexually abused woman's exceptional status. Taken back from France to Algeria and forced into marriage and motherhood, Zina's story fits well within dominant western narratives of the intense patriarchal oppression that exists within Islamic societies. Ticktin notes, "making an exception for her fulfills the original civilizing mission of saving the natives from barbarity—all in the name of care and protection—and it fulfills the well worn practice of defining Western women as free by representing women elsewhere as enslaved."<sup>136</sup>

Zina's case walks the line of a "pure victim" in that she is "respectable," her innocence and helplessness preserved as well as her "distance" from being an active political agent making demands. Furthermore she can be saved without requiring that any of structural causes – such as the residual effects of French colonialism – of her plight be addressed. It is within the sentiment and act of humanitarianism, and France's verdict in the name of human dignity, that the power dynamics and subordinations that Miller is concerned with are reified.

The politics of sexual violence and immigration in France enables us to see a central paradox of transnational discourses on violence against women: while they allow women to name and struggle against violence, they can also serve to perpetuate such violence as part of larger nationalist and imperial projects.<sup>137</sup>

After sustained lobbying domestically and transnationally in the 1980s and 1990s, the transnational discourse on 'violence against women' was created as the lowest common denominator of the women's movement in the north and south. It was only later translated into 'gender-based violence' in the '90s in an attempt to broaden the lens to recognize violence done to transgendered peoples and men.

---

136 Ibid., 15.

137 Miriam Ticktin, "Sexual Violence as the Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet." *The Journal of Women in Culture and Society* 2008, 14.

### ***3. Radical Feminism's Rise to Power in International Law (1990s)***

The decisive turn in American feminism to criminal and social control-based visions of law is traceable in feminist legal theory from the 1970s to 1990s. As explored in this essay, radical feminist ideology is persisting today and being implemented domestically and internationally at a rapid pace. The legal changes are evidenced at federal, national, and international levels. Take for instance education on sex harassment in schools, from the intensification of Title IX on colleges across the country, sex harassment policy in the workplace, and new international laws on rape and sexual violence in wartime.<sup>138</sup>

Many feminists wholly regard the advancement of feminist ideology in law as an exemplary example of humanitarian progress<sup>139</sup>, but details of the alliance are worth dissecting further. The reality is in fact far more contested than feminists outrightly portray it to be, as much has been smoothed over in the name of bureaucratic codes and feminist academic solidarity.<sup>140</sup> In an effort to repoliticize feminist thought and law reform action on rape and sexual violence, Janet Halley explores in a number of articles what it means for 'governance feminists' (GF) to wield legal power. The analysis stems from a legal realist "law in action" take on feminist developments in IHL/ICL primarily on rape and sexual violence in wartime.

The reports of rapes in Bosnia in the early 1990s captured the attention of feminists in the United States and Europe. Feminist involvement is most evidenced in ICTY, where every step required a lobbying campaign. When the UN established the ICTs for the former Yugoslavia and Rwanda, feminists successfully lobbied for rules of evidence and prosecutions that would ensure individual responsibility for sexual violence against women as crimes of war, crimes against humanity, and in the

---

138 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict" *Melbourne Journal of International Law* 2008, 57.

139 Karen Engle, "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina" *The American Journal of International Law* 2005, 50.

140 Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law" *Michigan Journal of International Law* 2008, 102.

case of Rwanda, as genocide.<sup>141</sup> Questions about the relationship between nationalism and feminism split feminists early on the question of whether rape should be treated as genocide or in line with the everyday rapes.<sup>142</sup>

Of primary concern is the extent to which feminists have set the terms for debate on rape: what is at stake in the naming of rape either 'genocidal' or in line with 'everyday' violence? As Karen Engle notes, the naming process itself is problematic, as violence becomes disconnected from power dynamics that inform violence and controls the dominant political possibilities for response. As will be argued, the humanitarian-based response to sexual violence place women in non-political position of a patient receiving care rather than citizen in demand of rights.

### ***Governance Feminism in Power***

Janet Halley chronicles the distinct installation of feminists and feminist ideas in legal-institutional power at the Rome Conference.<sup>143</sup> Halley notes how GF legislation “piggy backs” on already existing forms of power, influencing them noting the formative influence feminists had in crafting the Rome Statute, the ICTs, and the prohibition of sexual violence in ICC. The Rome Statute process was an important part in the institutionalization of GF partly because of the inclusion of NGOs as legitimate, governance institutions at the UN.

What are the distributive consequences of some feminist projects? Many feminists attribute as the success of their campaign to the elimination of consent defense, making it 'easier' to convict and hold the perpetrator accountable. Yet this notion relies on solid belief of male domination and female subordination. Additionally the implementation of Actus Reus and Mens Reas introduced by western feminists and the nature of the judgments are similar to moves made in domestic courts. As both Halley

---

141 Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting." *Michigan Journal of International Law* 2005, 50.

142 Karen Engle, "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina" *The American Journal of International Law* 2005, 779.

143 Treaty est. by ICC, promulgated 1998, enters force 2002.

and Engle note, the rape debate has roots that connect directly back to the US sex wars.<sup>144</sup>

While designations of genocidal rape aggrieved feminists in the early 1990s, in discussions that prefigured and ultimately resulted in the establishment of the ICC, feminist participants suspended efforts to classify rape alone as a form of genocide.<sup>145</sup> Halley views the failure of the Women's Caucus for Gender Justice (WCGJ), a global feminist network seeking the uptake of women's human rights and gender justice within the Rome Treaty, to promote the "rape as genocide" frame advocated for by Catharine MacKinnon. Instead, a consolidating GF alignment with attorney Rhonda Copelon and scholar-activist Hilary Charlesworth's re-imagining of conflicts in which rape occurs as continuous with a male war against women going on all the time, everywhere. Halley terms this coalescing perspective 'feminist universalism', in which "women are not a particular group of humanity, but a universe of their own."<sup>146</sup> In this way, ICL/IHL norms relating to armed conflict shifted away from war and toward injury to women.<sup>147</sup>

Simultaneously separate feminist developments were occurring regarding laws on prostitution and sex trafficking. Feminists continued to focus on "sexual slavery" and it is now ensconced in the Rome Statute as a war crime and crime against humanity.<sup>148</sup> Yet Halley and others ask, is all prostitution necessarily coercive and a form of trafficking or is it possible for a woman to meaningfully consent to being a prostitute?<sup>149</sup> The structure of this query mirrors feminist efforts to eliminate the consent defense in wartime rape: can women meaningfully consent to sex during the coercive circumstances of war? Gfeminists would unwaveringly answer "No" for rape and sexual violence, but

---

144 Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law." *Michigan Journal of International Law* 2008, 100.

145 Ibid., 100.

146 Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law." *Michigan Journal of International Law* 2008, 107.

147 Ibid., 54.

148 Rome Statute of ICC, Art 8(2)(b)(xxii) 2002.

149 Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas. "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism." *Harvard Journal of Law and Gender* 2006, 338.

there is intense difference of opinion in debates on prostitution and sex trafficking. Unlike the feminist consensus on rape, feminists involved in prostitution/trafficking have a spectrum of legal political possibilities they seek to achieve for prostitution: decriminalization, legalization, total abolition, and partial criminalization, whereas legislation pertaining to sexual violence aims for complete eradication.<sup>150</sup>

During the Rome process, feminists were concerned about the laws of war and the extent that international legal doctrine offered protection to women. Many argued that it did so for the wrong reasons or with the wrong intent. Hilary Charlesworth has argued that law was concerned about women's honor – and therefore about the men who were harmed by the attack on this honor – not about women as subjects of international law.<sup>151</sup>

Former judge for the ICTs, Theodor Meron cites the earliest legislative action against rape as a war crime under the national military codes of Richard II (1385) and Henry V (1419) in which perpetrators were subject to capital punishment<sup>152</sup> and later The Lieber Instructions (1863), which prohibit rape as a capital crime.<sup>153</sup> In 1907, the Hague Convention codified rape as a "violation of family honor and rights," simultaneously invoking male entitlement and female chastity. Rape was thus explicitly cast as a moral offense. The 1949 Geneva Conventions did not name rape, but absorbed it in other offenses. Rape was specifically mentioned, along with enforced prostitution and indecent assault, as among the "outrages against personal dignity" in the 1977 Second Geneva Protocol relating to non-international armed conflict.<sup>154</sup> Halley ends with a chilling observation, that while the GF intent to use criminal punishment to put an end to rape through codification as a crime against humanity, it is

---

150 Ibid., 340.

151 Hilary, Charlesworth, Christine Chinkin, and Shelley Wright. "Feminist Approaches to International Law" *American Society of International Law* 1991, 614.

152 Theodor Meron, "Rape as a Crime under International Humanitarian Law" *American Journal of International Law* 1993, 425.

153 Instructions for the Government of Armies of the United States in the Field, Art. 44

154 Theodor Meron, "Rape as a Crime under International Humanitarian Law" *American Journal of International Law* 1993, 425.

paradoxical that feminists engage in IHL, an institution which legitimates war.<sup>155</sup>

Though rape in and of itself was not the original concern, violence perpetuated within the confines of the household was paramount issue. Early feminists argued that domestic violence was essentially condoned because of the state's hands off policy regarding private life. Feminists argue that the demarcation of public and private life in society is an inherently political process with the private sphere as a site of significant disempowerment and vulnerability for women.<sup>156</sup> Feminists have long emphasized the gendered nature of this division.

A structural critique of the public/private distinction in international law is “Feminist Interventions into International Law” (1991) by Hilary Charlesworth, Christine Chinkin and Shelly Wright. Charlesworth, Chinkin, and Wright suggest that a reordering of international legal doctrine would be required to accommodate women. Access to economic, social, and political power adheres in the public realm, to which women have limited access and control over.<sup>157</sup>

Wright and Chinkin tend not to see the public/private distinction as embedded in the doctrine of international law. Rather, the public/private distinction was more a problem of ideology than of doctrine. For example, the distinction was broken down in international law all the time in the prohibition on slavery, but not when doing so would offer protection to women, argues Wright. For some, the distinction actually existed: international law only applied to the public sphere. Take torture, for example, which might well lie outside international law to the extent that it involved private individuals. And while state *action* might bring torture within the scope of human rights law, state *inaction* with regard to violence against women was likely to leave women outside international law’s scope.<sup>158</sup> A radical reordering of the international legal order was called for. In particular, human rights

---

155 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law*, 2008, 57.

156 Donna Sullivan, “The Public/Private Distinction in International Human Rights Law” 131.

157 Hilary, Charlesworth, Christine Chinkin, and Shelley Wright. "Feminist Approaches to International Law" *American Society of International Law* 1991, 615.

158 Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting." *Michigan Journal of*

law needed to apply to non-state actors. For example, Charlesworth, Chinkin, and Shelley Wright, in their article essentially inaugurating feminist interventions in international law, draw a world in which international law and feminism were distinct sources of normativity, the former in need of reform from the latter. Though the authors invoke international law as a source not only of legal but also of normative authority, they also denounce it as “a thoroughly gendered system.”<sup>159</sup>

More recently, scholar Donna Sullivan argues that rights approaches need to consider placing gender-based violence within the context of women's structural inequality as a means of breaking down the public/private distinction that operates to exclude gender-based violence from the human rights agenda.<sup>160</sup> By focusing on women's ‘private’ lives, dominance feminists treat the private as the locus of women's oppression. As the argument goes, women are more directly oppressed by their families than by their governments, although governmental inaction facilitates the perpetuation of domestic oppression. It is partly through this feminist lens that culture is considered a factor that perpetuates female subordination.<sup>161</sup>

It is true that western feminists have been accused of attempting to locate commonalities among women at the expense of universalizing women and essentializing cultural distinctions. Chandra Mohanty writes, "Women are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not “women”, a coherent group solely on the basis of a particular economic system or policy.”<sup>162</sup> Cultural essentialism has been a major debate within feminist theory.

---

*International Law* 2005, 53.

159 Hilary, Charlesworth, Christine Chinkin, and Shelley Wright. "Feminist Approaches to International Law" *American Society of International Law* 1991, 614.

160 Donna Sullivan, *The Public/Private Distinction in International Human Rights Law.* In *Women's Rights, Human Rights* Psychology Press 1995, 127.

161 *Ibid.*, 128.

162 Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" *Duke University Press* 1988, 333.

A favored context for discussion of essentialist approaches to women's human rights are the debates surrounding female genital mutilation (FGM). While many feminists have urged strong national and international action against these practices, often through the elaboration of the right to health, others have cautioned against absolutist positions that sensationalize the issue and present “us versus them” positions. From an international perspective, essentialism does not account for the historical and social differences between women of different cultures.<sup>163</sup> The term “essentialism,” and its cognates, biologism, and naturalism have become, in Elizabeth Grosz's words, “labels for theoretical pitfalls” in feminist theory from an intellectual and political perspective.<sup>164</sup>

### *GFeminists in IHL/ICL 1990s +*

Janet Halley questions the state-feminist alliance: Where does feminism succeed in mainstreaming its policies? What are the costs? Are they systematic or incidental? Can feminism foster a critique of its own successes?<sup>165</sup> By examining two main GF projects: making rape a war crime, and criminalizing sex trafficking and prostitution, this section emphasizes the shared features of criminal prohibition and differences in terms of the nature of approach.

In the ICTY feminists made a concerted effort to influence 1. the rules of evidence under which rape and other crimes of sexual violence would be prosecuted, 2. the form the indictments of crimes of sexual violence would take, and 3. the strategies and legal argumentation made at both the trial and the appellate levels.<sup>166</sup> For the most part, feminists have been successful. The ICTY's treatment of rape however, resulted from more than just the work of feminist activists. Attention to the rapes in Bosnia

---

<sup>163</sup> Elizabeth Grosz, "A Note on Essentialism and Difference" In *Feminist Knowledge: Critique and Construct* Routledge 1990, 337.

<sup>164</sup> Elizabeth Grosz, "A Note on Essentialism and Difference" In *Feminist Knowledge: Critique and Construct* Routledge 1990, 338.

<sup>165</sup> Janet Halley, "A Map of Feminist and Queer Theories of Sexuality and Sexual Regulation." Lecture, Duke University School of Law, 36th Annual Brainerd Currie Memorial Lecture 2002, 34:20.

<sup>166</sup> Karen Engle, "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina" *The American Journal of International Law* 2005, 778.

and Herzegovina coincided with increasing support in general for an international criminal law that could be enforced through tribunals and courts.<sup>167</sup>

Rape had long been considered a violation of international law, and so its inclusion per se was not that radical.<sup>168</sup> Although rape has not always been explicitly listed in war crimes treaties, many states and intergovernmental organizations argued in the context of Bosnia-Herzegovina that the Geneva Conventions and customary ICL provided a legal basis for criminalizing rape.<sup>169</sup> Curiously, fierce feminist debates about whether rape was genocidal or part of the everyday continuum of violence tend to focus mainly on the Balkans, rather than Rwanda where rape was found to be part of genocide.

In "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict" (2008), Halley asks, are these new ICL/IHL laws good for women? We must explore how rape is talked about, the "discursive investments" we make into its patterned condemnation.<sup>170</sup> An understanding of these linguistic repetitions will help to interrupt the feminist consensus on the idea that making sexual violence in war more criminal is a positive thing to do.

The category "rape" has baggage, there are ideological, nationalist, and political discourses that are attached the meaning of rape to justify war and rape in retaliation.<sup>171</sup> Halley poses to readers a paradox, or the "war-rape antimony" in regards to international feminist debates to define wartime rape in relation to these feminist developments in the Kunarac case: 1. The effort to move sexual crimes 'up' the hierarchy of crimes and to particularize them specially in feminist terms, 2. concentrate specific prosecutions exclusively on charges involving sexual violence, and 3. the effort to minimize the evidentiary requirements for proof of rape or other crimes of sexual violence by eliminating or

---

167 Ibid., 778.

168 Ibid., 780.

169 Theodor Meron, "Rape as a Crime under International Humanitarian Law" *American Journal of International Law* 1993, 3.

170 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law* 2008, 58.

171 Ibid., 59.

modifying the defense of consent.<sup>172</sup>

Six cases in total: Tadic, Akayesu, Furundzija, Kunarac, and Kvocka are marked with the influence of radical feminist advocacy. Feminists intervened as ICTs were establishing themselves and as the Rome Statute was forming, in this way the feminist reform agenda grew out of hands-on experience in ICTs. There were both successes and defeats of the vertical and horizontal reform projects. For example, feminists were in disagreement over whether to seek prosecutions against Serbian militants for “rape as genocide camp” where feminists in the framed Serbian rape of Muslim and Croat women as part of a larger genocidal project that colluded with nationalist understandings of war. The “everyday rape camp” objected to this and argued that feminists should detest all rapes in wartime and peacetime, treating all as equally grave.<sup>173</sup>

To illustrate the ambiguity of sexual encounters during wartime, Halley engages a literary analysis of *A Woman in Berlin* into the legal discussion of the unyielding feminist efforts to criminalize sexual violence in the ICTs and the Rome Statute processes.

The trope that rape is “a fate worse than death” both Halley and Engle expose this phrase as a masculine construction. If we look the text, this is not the definitive expression of the narrator who records having been raped five times. The *Woman in Berlin* does not express that attitude toward her multiple rapes. The most negative emotional experiences she has are not her rapes, but other events which relate to the death and struggle and a quest for food. Indeed Halley points out the most quoted sentence of the Diary is, “it [rape] seems like the worst thing, the end of everything – but its not.”<sup>174</sup>

The 'authenticity' of the text is not what we should be focusing on, argues Halley. Controversy over the literariness of the text is an irrelevant debate, the text is indeed literary; it makes its fabrication self-evident by communicating the act of rape through representation. For example, the woman narrator

---

172 Ibid., 50.

173 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law* 2008, 31.

174 Ibid., 30.

recalls a chilling moment when she is sleeping and a soldier pries open her jaw and drops a wad of spit into her mouth, which Halley notes both “is and isn't a rape.”<sup>175</sup>

The Tribunal chose not to focus exclusively on the sexual nature of these crimes. Instead, the courts treated sex-related violence as the actus reus of torture, genocide, and crimes against humanity. The Tribunal exercised jurisdiction over rapes as violations of international humanitarian law and in turn balanced the tension between both feminist camps. For example, the pattern of the ICTY cases shows that the court recognized rape occurred on all sides, and also saw Serbians as constituting a higher order crime and crimes against humanity.<sup>176</sup>

In this way the prosecutors have the ability, on a case-by-case basis, to fashion their arguments in a way that highlights the gendered nature of the crimes without perpetuating the essentialization of certain body parts and human behaviors as fundamentally sexual.<sup>177</sup> Foucault would be pleased, as the prosecutor resisted the feminist pull to characterize the wrong of rape as predominantly sexual in nature, and has rather demonstrated how sex can be used as a tool in the service of race, ethnicity or religious-based war crimes.

Yet prosecuting rape as a subset of 'ethnic violence' in this way is not without consequences, as sexual violence then becomes defined and rooted in colonially based ethnic and religious terms. The term “ethnic cleansing” used to describe the events in Bosnia-Herzegovina for example, presumes a male-defined ethnicity of the child, an understanding which provides the mother with no agency.

After the war, western feminist legal activists focused on prosecuting the mass rapes of women, sometimes at the expense of putting the simultaneous mass killings in the background. At times, courts have held that for a combatant to have sex with a civilian from the opposing side is almost always rape despite consent, due to the extremely coercive circumstances. Feminists sought to lower the evidentiary

---

175 Ibid., 35.

176 Karen Engle, *Calling in the Troops: The Uneasy Relationship between Women's Rights, Human Rights and Humanitarian Military Intervention* 2007, 220.

177 Katharine Franke, “Putting Sex to Work.” In *Left Legalism/Left Critique* Duke University Press 2002, 293.

requirements and consider wartime rape as part of a larger historical continuum of violence against women. They also sought to specifically criminalize sexual violence, these changes have dangerous implications as they legally remove women's role as making an active choice to consent.

The final dilemma Halley addresses is the sexual and ethnic domination antinomy. In the aftermath of the war in the former Yugoslavia, Serbians were portrayed as a distinctively evil group because of the rapes of Bosnian women. The domestic anti-nationalist feminists in Bosnia-Herzegovina, however, did not want to see the violence against women in ethnic terms, as it would reinforce the nationalist hatred that had started the war. This raises the question of whether post-war prosecutions of war-time rape will also be "playing the law of the victor."<sup>178</sup>

The ethnically-focused view of wartime rape can also often enforce the separation between ethnic groups by portraying any sex between the groups as an automatic war crime. Not all women in Bosnia-Herzegovina appreciated the representation of their experience through a western feminist lens and were also bothered by their marking primarily as "raped women." This sense is most expressed by Judge Nusreta Siva, "Generally it bothers me when someone says raped women – that hurts a person, to be marked as a raped woman, as if you had no other characteristic, as if that were your sole identity."<sup>179</sup>

### *Defining Rape in the ICTs*

The genocidal/everyday rape debate poses significance. When considered within the genealogy of the U.S. Sex Wars, the naming processes are not a deviation from feminist universalism, but re-workings of what universalism could mean in the face of vast differences among women.<sup>180</sup> The underlying view of women as a group united through shared sexual vulnerability is enhanced by the bare acknowledgement of ethnic-religious difference. Halley notes that while feminist activists have

---

178 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law* 2008, 48.

179 Ibid., 45.

180 Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. Belknap Press 2006, 208.

been focusing on reforms in the international law on war, many radical activists also see this as a way to influence change in domestic law. The debate over whether war-time rape and sexual enslavement are continuous with sexual violence against women that occurs on a regular basis stems from the larger, unresolved debate in feminism about the nature of sexual violence.<sup>181</sup>

Catharine MacKinnon was one of the most vocal proponents of the position that the rape in the Balkans constituted genocide. In this view, mass rape in the former Yugoslavia were genocidal due to the ethnic and religious targeting of particular women and independently tantamount to what MacKinnon refers to as “femicide” – a crime against women as a globally subordinated group.<sup>182</sup>

MacKinnon was retained pro bono to represent several women’s groups in Croatia and Bosnia-Herzegovina for survivors who sought legal redress. That redress eventuated in a complex of cases within U.S. federal courts, culminating in *Kadic v. Karadzic*<sup>183</sup>. This case supplied a template for international jurisprudence of what arguments could find purchase in a reputable domestic court. Questions involving the nature of consent, the limits of state sovereignty in effectively guaranteeing human rights, and the notion of sexual assault as a collective versus individual offense first find legal articulation in this suit. They do so through ethnic-religious-based charges of gendered sexual violence.

As Engle interprets, aspirations toward a universalized, “global sisterhood” and the legacy of the struggle with racial, sexual and other forms of difference within the U.S. feminist movement motivated radical feminists like MacKinnon to conceive of mass rape in the Balkans in ways that aimed for specificity in representing the experience of other women. That representation in turn helped justify ‘ethnic’ as a descriptor of these conflicts.<sup>184</sup>

Further problematic is the feminist ideological partnership with nationalists inside the former

---

181 Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting." *Michigan Journal of International Law* 2005, 36.

182 Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. Belknap Press 2006, 229-230.

183 *Ibid.*, 231.

184 Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting." *Michigan Journal of International Law* 2005, 37.

Yugoslavia who largely supported military intervention and insisted on distinguishing victims from perpetrators. Patriotic women's collectives in Bosnia and Croatia such as Kerata, Trasnjevka, Biser and Bedem Ljubavi urged consideration of mass rape in the former Yugoslavia not only as war crimes and human rights violations, but as genocidal acts, part of a concerted Serbian campaign of "ethnic cleansing" waged against Muslim people and women specifically. To insist that rape as a weapon of war could occur on any side, they argued, obscured and trivialized the genocidal nature of these particular rapes. In response, the feminist antiwar group Women in Black argued that distinguishing between perpetrators and victims was problematic and counter to women's interests, the group "refuse[d] the politics of instrumentalization of victimhood."<sup>185</sup>

Yet for MacKinnon and others, rapes in the former Yugoslavia were "part of an ethnic war of aggression being misrepresented as a civil war," a situation that left Bosnian Muslim and Croatian women doubly imperiled: at risk of rape in the way that all women were at risk, but also in danger of ethno-religious targeted rape that expressly sought their extermination.<sup>186</sup> To shore up the connection she made between human rights, rape and genocide, MacKinnon compared rape in the Balkans to the Holocaust.<sup>187</sup>

In the Spring of 1993, Catharine MacKinnon was instrumental in bringing a civil action against Radovan Karadzic for his alleged participation in and instigation of a campaign to eliminate non-Serbs.<sup>188</sup> MacKinnon characterized the proceeding as an attempt to seek "relief specifically for injuries of genocidal sexual atrocities perpetrated as a result of Karadzic's policy of ethnic cleansing in collaboration with Slobodan Milosevic's administration in Belgrade."<sup>189</sup>

---

185 Karen Engle, "International Human Rights and Feminisms: When Discourses Keep Meeting." *Michigan Journal of International Law* 2005, 31.

186 Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. Belknap Press 2006, 27.

187 Ibid., 8. "these rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible, but anyone who has lived through a pogrom knows the difference."

188 *Kadic v. Karadzic*, 70 F.3d 232 [2d Cir. 1995], 518 U.S. 1005, 1996.

189 Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. Belknap Press 2006, 205.

In September of 1994, the plaintiffs' allegations were dismissed because the district court did not believe that a private individual could violate customary international law and be subject to the workings of a U.S. federal court. The following June however, the appellate court found that Karadzic's planning and ordering of "a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats" clearly state a violation of the international law norm proscribing genocide.<sup>190</sup>

The ruling marks a shift in the course of U.S. legal history: the first instance where a federal court explicitly established valid federal jurisdiction for suits alleging torts committed anywhere in the world by states, state actors or private individuals against non-U.S. citizens in violation of the laws of nations. The Kadic court reached this conclusion given the material facts of the case (extensive allegations of mass rape and murder) within the context of how it understood the conflict in the former Yugoslavia as ethnic warfare, that by definition predisposed these conflicts to charges of genocide.<sup>191</sup> That "genocidal rape" and "forced impregnation" were used as factual vehicles to convince the Second Circuit ruling that private individuals are indeed able to author human rights violations speaks to the work of feminists in publicizing the violence in the Balkans and global media attention given to the mass rapes.

Three years after Kadic, the 1998 ICTR case, *Prosecutor v. Jean-Paul Akayesu* took up the matrix of rape, sexual violence, and genocide within international law. The Akayesu case became the first successful prosecution of rape as an act of genocide. Western feminists and human rights activists hailed the conviction as a landmark moment in the campaign to end violence against women.

In a move unprecedented within the international legal arena, the ICTR in Akayesu explicitly defined rape in conjunction with a crime against humanity and not as an element of genocide. The

---

<sup>190</sup> Ibid., 200.

<sup>191</sup> *Kadic v. Karadzic*, 70 F.3d 232 [2d Cir. 1995], 518 U.S. 1005, 1996.

association of rape with genocide and war transformed the debate around consent and coercion. Akayesu decoupled the traditional linking of coercion and force, stating that “coercive circumstances need not be evidenced by a show of physical force [and can instead] be inferred as inherent in circumstances of armed conflict or military presence.” Akayesu advanced a portrait of rape and sexual violence as endemic to the coercive context of wartime sex. The emphasis on the material fact of violent war couched as ethnic conflict segues ineluctably into dominance feminist theory claims on sexuality, reinvigorating the logic of gender subordination in which women are at the mercy of men.

Both Kadic and Akayesu provide legal models that effectively dislocate the traditional primacy of individual consent from the definitional heart of rape by focusing on the presence of social coercion rather than the absence of individual consent.<sup>192</sup> This an element many domestic courts had previously found to be present without a demonstrable, often physical, show of resistance. MacKinnon lauded Kadic and Akayesu, greeting them as landmark decisions that, “for the first time accurately defined rape in law as what it is in life.”<sup>193</sup>

In the competing “everyday rape” feminist camp, human rights lawyer Rhonda Copelon has argued that feminists must resist the classification of rape as instrument of persecution based on ethnicity. Instead, Copelon argues that if feminists were to accurately understand the rapes that happened in the Balkan War, they had to “identify rape as a crime of gender as well as ethnicity [...] that women are too the enemy [...] because rape embodies male domination and female subordination.”<sup>194</sup>

In Copelon’s account, objections to the feminist agenda were vanquished by the participation of women from the former Yugoslavia: “That women were being raped systematically in Bosnia just

---

192 Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. Belknap Press 2006, 205.

193 *Ibid.*, 200.

194 Copelon, Rhonda. “Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law” *McGill Law Journal*, November 2000, 19.

hours from the site of the Conference prevailed over objections to incorporating gender violence as a human rights problem.”<sup>195</sup> Women's stories of rape camps and military orders to rape belied the fiction that rape was solely a private matter beyond the scope of international law and challenged those who did not believe that violence in the home should be absorbed within the human rights frame.<sup>196</sup> Those who called to testify against sexual violence were primarily Bosnian and Croatian women which served to strengthened feminist appeals.<sup>197</sup>

The debates over the nature of the rapes proved controversial, provoking complex assessments of international legal prohibitions against genocide and the relationship of those prohibitions to gender – a category (unlike religion, race and ethnicity) not explicitly protected by international prohibitions against genocide.<sup>198</sup> To Copelon, the exaggerated distinctiveness of genocidal rape masked the atrocity of “regular” rape and hindered efforts to recognize and address persecutions based on gender both in and out of war.<sup>199</sup> Copelon instead defines genocidal rape in expansive terms, downplaying fixations on war and specific ethnic/national/religious balances of power in order to emphasize that rape can occur on all sides, both in and out of war. In doing so, Copelon joins those who note that “rape as genocide” can lead to dangerous assumptions that resonate with orientalist fantasies that turn on the idea that Muslim cultures are more patriarchal and violent than Western ones.<sup>200</sup>

Karen Engle voices a related concern in the 2007 article, "Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention." Engle cautions that the legal conceptualization of “rape as genocide” is the fastest route for feminists to justify

---

195 Ibid., 17.

196 Ibid., 17.

197 Janet Halley, “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law.” *Michigan Journal of International Law* 2008, 138.

198 Karen Engle, "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina" *The American Journal of International Law* 2005, 778.

199 Ibid., 770.

200 Miriam Ticktin in *Sexual Violence as a Language of Border Control* points out how difficult it is for Muslim women to tell their stories of sexual violence without having them reimagined and translated into orientalist fantasies: “Personal stories are often codified as larger narratives, particularly in the case of traumatic events for which there may be no easy words” 880.

humanitarian intervention, which fits in with the emerging global norm of military intervention. Also, those who seek redress from military intervention are pressured to couch their problem in terms that are intelligible to western institutions. This distorts the nature of the violation and displaces awareness of the extent to which colonialism, military intervention, and an unbalanced economic system for example, have produced the crisis.<sup>201</sup>

In the article *Women's September 11<sup>th</sup>* MacKinnon proposes that the treatment of women “be injected into all levels of discussion of humanitarian intervention.” Yet MacKinnon significantly understates the extent to which women have been used as a justification for intervention.<sup>202</sup> Gayatri Spivak examines how the English justified colonialism to “save brown women from brown men” and Deborah Weisman explores U.S. military intervention in Cuba, the Phillipines, and Hawaii, all in the name of protecting women.

In an attempt to explain what is at stake in the feminist naming of rape, I present the perspective of Mahmood Mamdani in the 2007 article, “The Politics of Naming: Civil War, Genocide, Insurgency.” Mamdani compares the violence in Iraq and Darfur, noting the similarities but ultimately different outcomes based upon the U.S. response to how the crises are named. In Iraq, it is said to be a cycle of insurgency and counter-insurgency; in Darfur, it is called genocide.<sup>203</sup> But why the difference? And who does the naming? Mamdani argues that the ambiguity lies in the politics of violence. Crises are named to fit stereotypes the west has a stake in perpetuating.

Mamdani's article make us rightly suspicious of the naming process. The history of colonialism should teach us that every major intervention has been justified as humanitarian, a “civilizing mission.” Colonial officers recorded the details they perceived as barbaric among the colonized – sati, widow burning, the practice of child marriage in India, and FGM in Africa. Not to suggest that this was all

---

201 Karen Engle, “Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention” *The Harvard Human Rights Journal* 2007, 190.

202 Mahmood Mamdani. "The Politics of Naming: Civil War, Genocide, Insurgency." *London Review of Books* 2007, 218.  
203 Ibid., 218.

invention, but to point out that the chronicling of atrocities had a practical purpose: it provided the moral pretext for intervention.<sup>204</sup> As Mamdani powerfully argues, the realization is needed that peace cannot be built on humanitarian intervention, which is the language of big powers.<sup>205</sup>

Mamdani's article shows us that the implications of naming highly politically charged conflicts do hold the resonance of colonial power. Therefore attempts to fully understand, label, and categorize violence inevitably leads to narrowly boxing in political possibilities and aiding the perpetuation of insidious stereotypes. This is part of the problem in understanding rape as analogous to ethnically-incited genocide. Further, both Halley and Engle note that the radical feminist project to universalize women's injury by reifying, though ultimately subordinating women's difference, through a notion of women's human rights serves the trend of seeking criminal solutions to global problems.<sup>206</sup>

As evidenced in the IHL/ICL processes, feminists who ultimately sought to redefine rape did indeed transform the vocabulary to a language of bodily trauma.<sup>207</sup> Fresh categorical descriptors such as "sexual violence" and then later "gender-based violence" were thrust to the forefront of major international policy initiatives beginning in the new millennium. The UN Security Council has passed three main resolutions condemning sexual violence during wartime: 1325 (2000), 1820 (2008) and 1888 (2009). Resolution 1325 declares that women's role during war is that of the peacemaker, a theme which is a significant departure to the later resolution 1820 which engages the rhetoric of protection and 'womenandchildren' rhetoric.<sup>208</sup>

### **Unraveling Humanitarianism and Medical Care in Congo**

"A [...] politics of humanity that focuses on care and rescue, serving to reproduce the social order, not challenge

---

204 Ibid., 219.

205 Ibid., 218.

206 Karen Engle, "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina" *The American Journal of International Law* 2005, 816.

207 Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law." *Michigan Journal of International Law* 2008, 59.

208 Dianne Otto The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade" *Melbourne Journal of International Law* 2009, 21.

it.”– Miriam Ticktin.<sup>209</sup>

The role of humanitarian organizations grew exponentially during the period after the 1994 Rwandan genocide. In general, NGOs were becoming important international actors and aid was becoming a key part of democratic politics in the west.<sup>210</sup> While some scholars consider humanitarianism a benevolent concern for the suffering of distant strangers, others frame their view through the critical lens of colonial intervention.

Miriam Ticktin examines the non-political roots of French humanitarian group, Médecins Sans Frontières (MSF), founded by anti-Marxist practitioners in 1971. The founding ideology of MSF did not endorse the notion of collective struggle against imperial power. Instead, the humanitarian organization performs in the name of urgent and temporary care. Indeed a major appeal of humanitarianism is that it exemplifies moral certainty by saving lives and alleviating suffering instantaneously. This form of aid has gained enormous traction in the west as it relies on promises of immediate action and is ultimately uncomplicated by politics. As Ticktin notes, what mobilizes action is the universally relatable, ahistorical victim, “this is a body outside time and place, outside history and politics, [...] there is a common denominator to being human located in our bodies, particularly in our bodies in pain”<sup>211</sup>

Since 2000, humanitarianism has become an increasingly dominant mode of intervention.<sup>212</sup> Take Kosovo, Somalia, and Darfur. The primacy placed on intervention has led humanitarians to develop their own government apparatus: a mixture of NGOs, state, and military, which are transported

---

209 Miriam Ticktin, “The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence” *Blackwell Publishing* 2011, 251.

210 *Ibid.*, 252.

211 Karen Engle, Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention." *The Harvard Human Rights Journal* 2007, 54.

212 Miriam Ticktin, “The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence” *Blackwell Publishing* 2011, 253.

from crisis to crisis.<sup>213</sup> Anthropologist Mariella Pandolfi terms this a form of “mobile sovereignty” that brings with it a universal standard approach, regardless of history or politics, focusing on micro-level medical care practices. Yet the nature of this kind of humanitarian engagement is highly contested as demonstrated in Ticktin's analysis of MSF's engagement with sexual violence in Congo.<sup>214</sup>

MSF's response to violence is not to reform or improve the life one leads, it is about preserving life. Yet as Ticktin notes, gender-based violence is about the *kind* of life one lives.<sup>215</sup> Gender relations are relations of power, so how do gendered humans fit into 'non-political' humanitarian missions? As demonstrated in MSF's intervention in Congo from 1998 to 2000, the organization was still coming to terms with how to deal with sexual violence in the context of universal modes of aid delivery.

The organization's response to rape in the Congo in 1998 was the first of its kind, and MSF quickly came to the conclusion that a focus on women's reproductive health was necessary. After realizing the severe lack of medical care accorded to rape survivors, MSF established itself after the Congo war ended to address the rise of HIV/AIDS, unwanted pregnancy and births, reproductive health and STDs.<sup>216</sup> The organization's experience in the DRC began their process of medicalizing gender-based violence. This is not the first time Congolese, particularly women and girls, have dealt with western medicine practices.

In 2001, WHO began an initiative to strengthen the health sector in response to sexual violence. The organization published guidelines for medico-legal care in 2003 and have developed a policy framework intended to coordinate efforts of police departments, health services, prosecutors, social welfare agencies and rape crisis centers in various countries around the world. WHO's medicalization

---

213 Ibid., 253.

214 Ibid., 251.

215 Ibid., 254.

216 Miriam Ticktin, “The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence” *Blackwell Publishing* 2011, 254.

follows in line U.S. programs, which joined health-based responses with forms of law enforcement and policing.<sup>217</sup> As Aya Gruber has shown, in the US these alliances have penalized those who are most disenfranchised – low-income women of color.<sup>218</sup> Ticktin argues that these conservative alliances “haunt” the humanitarian incorporation of gender-based violence as medicalization for both WHO and MSF was facilitated in part by the creation of the category of violence against women, with a primary focus on bodily integrity.

Acknowledging gender-based violence as a medical issue alters how violence is both approached and understood. Rather than comprehending gender violence in the context of larger histories of inequality which are inseparable from class, race, or colonialism, medicalization transforms gender-based violence into an emergency illness that requires immediate intervention.<sup>219</sup> Here, the belief in sex as a set of fixed biological characteristics gets translated to understandings of sexual violence. That is, the belief that we can always know what sexual violence is and what it looks like.

The American Journal of Public Health published a story on rape in the Congo, releasing the now well-quoted statistic that 48 women are raped per hour. This statistic is followed by a question, “is there anything that can be done to stop it?” Founder of V-day and City of Joy, activist Eve Ensler responded to the report with an angry editorial, in which she argues that the time for studying rape in the DRC is over: “We already *know* that the Congo has a rape crisis,” Ensler writes (emphasis mine), and should focus instead on ending the violence.<sup>220</sup>

As Judith Butler points out in relation to the U.S. response to September 11<sup>th</sup>, a consensus emerged “arising out of hegemonic discourses” on the telling of familiar narratives. Story lines and

---

217 Ibid., 255.

218 Aya Gruber, “Rape, Feminism, and the War on Crime” *Washington Law Review Association* 2009, 59.

219 Miriam Ticktin, “The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence.” *Blackwell Publishing* 2011, 255.

220 Laura Seay, “Do We Have the Congo Rape Crisis All Wrong?” *The Atlantic* 2011, 2.

images are produced and reproduced in such a way that the narrative implies itself. This mode of storytelling allows the reader to “know” the conflict, its actors, and context based off the repetitive narrative framing of disaster.<sup>221</sup>

In light of the power of visibility and representation, we might briefly reengage with Ariella Azoulay's argument on the visibility of battered women explored in Chapter 1. To reiterate, the kind of visibility draws the boundaries of the political possibilities for how we understand and respond to violence. The repetitious framing of women-victims of rape and the “legacy of rape” in Congo is the overwhelmingly dominant frame we, as westerners are thrust into.

Maria E. Baaz and Maria Stern suggest that we must reflect on our own complicity in terms of reproducing familiar subjects of violence. Stern suggests that we might acknowledge injury to the person committing the violent act. The structural feminist focus on sexual violence serves to make women the main victim-subjects of intervention. While “gender” allows violence against men or transgendered people to be considered, reports of sexual violence against men are usually exceptions.<sup>222</sup>

A shift in language helped to make sexual violence into both a public health and a humanitarian problem, it was termed an 'epidemic', a 'plague', a 'pandemic'. While these terms render sexual violence treatable through medical care, Ticktin argues that they remove the “gendered scaffolding of rape.”<sup>223</sup> To elaborate, “Epidemics of rape are not placed in the context of gendered regimes of property for instance, or of inheritance, they are not approached as possible effects of structural adjustment or imperialist policies which play out in gendered ways.” While conceptual shifts work to transform sexual violence into a contagious disease to be treated with special care, this takes on additional

---

221 Maria Baaz and Maria Stern, *Sexual Violence as a Weapon of War: Perceptions, Prescriptions, Problems in the Congo and beyond*. New York: Zed Books, 2013.

222 Miriam Ticktin, "The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence." *Blackwell Publishing* 2011, 255.

223 *Ibid.*, 256.

significance when noting the colonially derived racial hierarchy that underlies many humanitarian missions.<sup>224</sup> The language of epidemic combined with this history transforms gender-based violence and isolates it in ethnic and racial terms.<sup>225</sup> Photos used to mobilize aid generally repeat this “racialization of violence”<sup>226</sup> as images from major aid programs feature women of color, most often African women, on cover reports and entry pages on gender-based violence.

How might gender-based violence shape humanitarianism? Ticktin argues that the politics of gender-based violence creep back into humanitarian missions that have worked to apply a “universal aid kit” to the situation. Most recently, MSF’s concept of “new humanitarianism” combines the International Committee of the Red Cross’s principle of neutrality with the “duty to bear witness” to human rights abuses, primarily through media. By applying this tension between neutrality and the duty to bear witness to sexual violence, when does the nature of the emergency turn humanitarians political?<sup>227</sup>

Two examples of MSF’s engagement with rape demonstrates the ways in which gender “haunts” humanitarianism missions. First, the complications of treating gender-based violence were raised by Marc LePape in an essay on his mission with MSF in the Congo Republic. In the piece, LePape describes how MSF vehicles aided in the transport of militiamen who brought with them ‘spoils’ of women and children. As LePape points out, in no way does this exhibit the neutrality or goodwill of MSF.<sup>228</sup> The second incident occurred after the head of MSF Holland was arrested by the Sudanese government for “espionage, publishing false reports, and crimes against the Sudanese state.” The arrest was in response to the March 2005 MSF article, “The Crushing Burden of Rape: Sexual Violence in

---

224 Ibid., 255.

225 Ibid., 257.

226 Ibid., 256.

227 Miriam Ticktin, "The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence." *Blackwell Publishing* 2011,250.

228 Ibid., 257.

Darfur” which called for justice for those who were raped and an end to impunity for those raping.<sup>229</sup> As LePape's unease and the arrest reveals, MSF forfeits its esteemed position of neutrality and falls into political engagement when addressing sexual violence.

Mass rape elicits a distinct form of moral outrage in the MSF report on Darfur. The question on how to justify condemning the perpetrators in cases of rape more so than other forms of violence vexed doctors and aid workers: Should raped women be treated as an independent category? Are women in need of special protection? These questions are reminiscent of the second-wave feminist debate: Should women be treated equally to men or exceptionally, with laws that pertain specifically to women's biological needs? MSF answered this question by focusing on the reproductive health crisis in Congo. However as Ticktin notes, “we must ask at what point identifying sexual violence as special or different (for women in particular and men exceptionally) threatens to reproduce belief systems that see sexual integrity as the most important thing about a woman.”<sup>230</sup> Alice Miller concurs, writing that traditional health-based approaches to sexuality colluded with this paradigm, treating the female body as vessel, not actor: “She is a patient, seen in isolation from other injustices or forms of exploitation, and she requires care, not justice.”<sup>231</sup> This transformation was aided in the context of humanitarianism by stereotypes of women in need of protection. In this way, the larger political context of gendered forms of subordination and political struggle disappears, and a focus on sexual harm predominates.<sup>232</sup>

While children are commonly used as icons of innocence by humanitarian campaigns, upon closer inspection the treatment of women victims of rape is historically relevant where women are still seen as responsible for consenting to their own rapes through dress or attitude. What is similar between the child and woman image is that both lack agency. These beliefs are present within current

---

229 Ibid., 258.

230 Miriam Ticktin, "The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence." *Blackwell Publishing* 2011, 259.

231 Ibid., 260.

232 Ibid., 261.

discussions addressing sexual violence. The past treatment of rape tells us the responsibility was on the woman to prove she had not consented. Today however, innocence is tied to conservative notions that women must be chaste.<sup>233</sup>

I conclude this chapter by summarizing the two case studies Ticktin presents of what is at stake in the structural feminist approach to intensify the criminalization against rape and in promoting the agenda of 'violence against women.' In the case of France/Algeria and Congo/The West, both examples operate on the contingency of political policy decisions that allow for humanitarian exceptions to be made for women who have experienced sexual violence of a culturally distinct kind. Algerian women's access to humanitarian asylum in France and specialized medical care provided to raped women in Congo are similar in that exceptions are made for women's injury. One pressing conclusion to draw from both studies is that women's full citizenship status is being threatened by conservative notions of women's worth being defined in terms their chastity.

I transition to Chapter 4 with the idea that as westerners, we are thrust into a highly politically charged violence in Congo without context that does justice to the historical complexities and framings that implicate the perpetuation of violence in structural power-based terms. Rape being one aspect under the umbrella of different kinds of violence, but indeed the most dominant form audiences engage with from a distance. Massive medical resources have been channelled by international donors into sexual violence, particularly providing services to rape survivors.<sup>234</sup> As scholar Severine Autesserre notes, donors seem uninterested in other forms of aid empowerment. Women's political participation and economic power, particularly inheritance and property rights, are of utmost importance according to women's organizations, yet donor funding is ear-marked for rape victims.<sup>235</sup>

#### ***4. Humanitarian Medical Care in the Democratic Republic of Congo***

---

<sup>233</sup> Ibid., 260.

<sup>234</sup> Severine Autesserre "Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences" *Oxford University Press* 2012, 202.

<sup>235</sup> Ibid., 99.

The first international report on sexual violence in the DRC was published in 2002 by Human Rights Watch entitled “The War Within the War.” Soon after, sexual violence emerged as the issue to engage with for a range of actors, from politicians, journalists, and donors to international NGOs. “Raped women” as a category was singled out as precious bodies to be mended and saved before others.<sup>236</sup> As Autesserre argues, the “Rape Story” provided the quintessential simple and seductive narrative needed for successful fundraising and advocacy in Congo. The global attention to rape soon became a lucrative source of attention and resources and where NGOs flocked.<sup>237</sup> “Sexual violence” became the buzzword to insert in project proposals to increase chances of funding.<sup>238</sup>

This preoccupation with political relevance and funding is emphasized in the documentary, *The Greatest Silence* (2008) which is an account of mass rape in Congo by producer and rape survivor, Lisa Jackson. The film is ultimately a piece of political propaganda, illustrative in how easily the topic of rape is subject to co-option as Jackson overshadows the narrative of women's collective empowerment and community-based healing processes with a political and victim-centered message.<sup>239</sup> In a final scene Jackson asks Congolese women to address Hilary Clinton. While the film was released in 2008, it is a timely piece of political propaganda in light of the 2016 election. What are the underlying motivations of this film? Jackson does not leave much to the imagination, humanitarian intervention being the desired political objective. Further, using Congolese woman as the voice for political purposes is hauntingly reminiscent of the colonial tendency to utilize a 'middle figure' in the colonial politics of indirect rule. But would more U.S. attention to the situation of Congo improve the situation? It is unlikely.

We are bombarded by specific and repetitious framings of rape as information on sexual violence is channeled through humanitarian organizations such as “ENOUGHproject,” whose activism

---

236 Ibid., 91.

237 Ibid., 97.

238 Ibid., 13.

239 *The Greatest Silence*. Directed by Lisa Jackson. HBO, 2007.

is responsible for making weak (albeit popular) conceptual links between mineral exploitation and rape. This directs our focus onto the electronics industry, prompted by celebrity personality and ENOUGH representative, Robin West, to advertise a “conflict-free” cell phone brand worthy of our consumption.<sup>240</sup> While armed conflict is trivialized by electing celebrity personalities as representatives of this crucial yet historically devoid framing, Congo is personified through statistics on sexual violence, and is promoted as being “*the* most dangerous place to be a woman or girl.”<sup>241</sup>

While rape in Congo has gained an enormous amount of publicity, there are a limited number of frames that have been popularized to explain the reality of violence.<sup>242</sup> As anthropological historian Nancy Rose Hunt powerfully argues, it is no longer plausible to imagine that one can write an effective history about violence in Congo without tethering it to the past, to the last decades of postcolonial war, death, and sexual violence.<sup>243</sup>

In particular, the visual evidence on violence in Congo, for example what western observers such as Alice Harris wrote about seeing in Leopold's Congo and the kinds of photographs that circulated, initially oriented humanitarian, scholarly, and popular attention toward severed hands.<sup>244</sup> The mutilation photographs have directed interest away from what was more hidden, tactile, and away from another modality of violence, the sexual.<sup>245</sup>

It is important to observe that images of mutilated hands have not been repeated in the Congo despite their early ubiquity in media representations. Humanitarians E.D. Morel and Roger Casement put forth shocking statistics and “shock-photos” to produce revulsion and pity among western

---

240 In an interview, Robin West addresses her audience by saying “take out your cell phones..” in an attempt to make audience members somehow feel directly responsible for mineral exploitation and rape in Congo. This elides the reality that many industries are corrupt and rely on the disenfranchisement of Southern workers. This is global capitalism.

241 “Conflict Minerals 101” ENOUGHproject.

242 Nancy Rose Hunt, *A Colonial Lexicon* Duke University Press 1999, 238.

243 Nancy Rose Hunt, “An Acoustic Register, Tenacious Images, and Congolese Scenes of Rape and Repetition.” *The American Anthropological Association* 2008, 244.

244 Ibid., 245.

245 Ibid., 246.

spectators and generate massive funding.<sup>246</sup> Now however, the signature visual that occupies the humanitarian imagery on Congo is the figure of a raped woman.<sup>247</sup>

Today, alongside these representations, Hunt notes that humanitarian intervention is highly medicalized and bureaucratized.<sup>248</sup> In the Congo, it involves all kinds of national humanitarian workers in the field. In the case of rape, these workers are applying and adjusting imported gynecological, trauma, and gender sciences in ways that have not yet been studied for the Congo.<sup>249</sup>

Also as Ticktin argues of MSF, while humanitarianism in conjunction with certain feminist movements may work to medicalize and depoliticize gender-based violence through a non-political aid approach, the politics of gender actually creep back in, revealing problems at the heart of the humanitarian mission.<sup>250</sup>

Both Ticktin and Hunt problematize the humanitarian response to violence in the Congo by noting the colonially derived racial hierarchy that underlies many humanitarian missions. In campaigns against gender violence, politics are shallowly represented and graphic accounts contribute to the larger narrative of general chaos and violence. As Ticktin and Miller argue, the international concern to provide medical care specifically to female victims of rape not only obscures how violence is understood and responded to, it urgently places women in the non-political position of a patient receiving care rather than a citizen in demand of her rights and justice.<sup>251</sup>

While recognizing the significant advancements the women's movement has made over the past four decades, we must consider the possibility that sometimes our actions may, despite best intentions, work to reinforce rather than subvert injurious power dynamics. What this critical politics offers is the

---

246 Sharon Silwinski, "The Kodak on the Congo: 1904." In *Human Rights in Camera* U of Chicago Press 2011, 59.

247 Nancy Rose Hunt, "An Acoustic Register, Tenacious Images, and Congolese Scenes of Rape and Repetition." *The American Anthropological Association* 2008, 244.

248 Ibid., 245.

249 Ibid., 256.

250 Miriam Ticktin, "The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence" *Blackwell Publishing* 2011, 259.

251 Ibid., 262.

possibility of a world in which global politics is not built on the spectacle of women's suffering.

### Bibliography

Autesserre, Severine. "Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences." *Oxford University Press* 111, no. 443 (February 2012): 202-22.

Azoulay, Ariella. "Has Anyone Seen a Photograph of a Rape?" In *The Civil Contract of Photography*, 217-87. New York: Zone Books, 2008.

Baaz, Maria Eriksson, and Maria Stern. *Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond*. New York: Zed Books, 2013.

BBC News. "DR Congo: 48 rapes every hour, US study finds." *BBC*, May 12, 2011.

Bernstein, Elizabeth. "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns." *Journal of Women in Culture and Society* 36, no. 1 (2010): 1-27.

Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity*. N.p.: Princeton University Press, 1995.

———. "Suffering the Paradoxes of Rights." In *Left Legalism/Left Critique*, edited by Janet Halley and Wendy Brown, 420-34. London: Duke University Press, 2002.

Bunch, Charlotte. "International Networking for Women's Human Rights." *Lynne Rienner Publishers*, 2001, 378-84.

———. "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights." *Human Rights Quarterly* 12, no. 4 (November 1990): 486-98.

Bunch, Charlotte, and Samantha Frost. "Women's Human Rights: An Introduction." *Routledge International Encyclopedia of Women: Global Women's Issues and Knowledge*, 2000, 1-7.

Charlesworth, Hilary. "Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations." *Harvard Human Rights Journal* 18, no. 1 (Spring 2005).

Chinkin, Christine. "Feminist Interventions into International Law." *Adelaide Law Review* 19, no. 1 (1997): 14-24.

———. "A Gendered Perspective to the International Use of Force." *Australian Yearbook of International Law* 12, no. 297 (1988): 1-13.

Conrad, Joseph. *Heart of Darkness*. N.p.: Blackwood's Magazine, 1899.

Copelon, Rhonda. "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law." *McGill Law Journal*, November 2000, 1-19.

Cosman, Brenda, Dan Danielson, Janet Halley, and Tracy Higgins. "Gender, Sexuality, and Power: Is Feminist Theory Enough?" *Columbia Journal of Gender and Law* 12, no. 3 (2003): 1-37.

Engle, Karen. "Calling in the Troops: The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention." *The Harvard Human Rights Journal* 20, no. 189 (Spring 2007).

———. "Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina." *The American Journal of International Law* 99, no. 4 (October 2005): 778-816.

———. "International Human Rights and Feminisms: When Discourses Keep Meeting." *Michigan Journal of International Law*, 2005, 1-47.

Franke, Katharine. "What's Wrong with Sexual Harassment?" *Stanford Law Review* 49, no. 691 (1996): 1-82.

Franke, Katherine M. "Gendered Subjects of Transitional Justice." *Columbia Journal of Law and Gender* 15, no. 3 (2006): 1-16.

———. "Putting Sex to Work." In *Left Legalism/Left Critique*, edited by Janet Halley and Wendy Brown, 290-330. N.p.: Duke University Press, 2002.

Freedman, Estelle B. *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation*. N.p.: Harvard University Press, 2013.

Friedman, Elisabeth J. "Gendering the Agenda: The Impact of Transnational Women's Rights Movement at the UN Conferences of the 1990s." *Women's Studies International Forum* 26, no. 4 (2003): 313-31.

Gallagher, Anne. "Ending the Marginalization: Strategies for Incorporating Women into the Human Rights System." *Human Rights Quarterly*, 1997, 283-333.

Gardam, Judith, and Hilary Charlesworth. "Protection of Women in Armed Conflict." *Human Rights Quarterly* 22, no. 1 (February 2000): 148-66.

Goldstone, Richard J., and Estelle A. Dehon. "Engendering Accountability: Gender Crimes under International Criminal Law." *New England Journal of Public Policy* 19, no. 1 (2003): 1-27.

*The Greatest Silence*. Directed by Lisa Jackson. HBO, 2007.

Grosz, Elizabeth. "A Note on Essentialism and Difference." In *Feminist Knowledge: Critique and Construct*, edited by Sneja Gunew. London: Routledge, 1990.

Gruber, Aya. "Rape, Feminism, and the War on Crime." *Washington Law Review Association* 84, no. 581 (2009): 1-78.

Haag, Pamela. "Putting Your Body on the Line: The Question of Violence, Victims, and the Legacies of Second-Wave Feminism." *Feminist Cultural Studies* 8, no. 2 (1996): 23-65.

Halley, Janet. "A Map of Feminist and Queer Theories of Sexuality and Sexual Regulation." Lecture, Duke University School of Law, 36th Annual Brainerd Currie Memorial Lecture, November 7, 2002.

———. "The Move to Affirmative Consent." *Currents: Feminist Key Concepts and Controversies*, 2015.

———. "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law." *Michigan Journal of International Law* 30 (2008): 3-120.

———. "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict." *Melbourne Journal of International Law* 9 (2008): 1-47.

———. "Sexuality Harassment." In *Left Legalism/Left Critique*, edited by Janet Halley and Wendy Brown, 80-104. London: Duke University Press, 2002.

Halley, Janet, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas. "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism." *Harvard Journal of Law and Gender* 29 (2006): 336-423.

Hilary, Charlesworth, Christine Chinkin, and Shelley Wright. "Feminist Approaches to International Law." *American Society of International Law* 85, no. 4 (October 1991): 613-45.

Hochschild, Adam. *King Leopold's Ghost*. N.p.: Mariner Books, 1998.

Hunt, Nancy Rose. "An Acoustic Register, Tenacious Images, and Congolese Scenes of Rape and Repetition." *The American Anthropological Association* 23, no. 2 (2008).

———. *A Colonial Lexicon*. London: Duke University Press, 1999.

———. "Noise over Camouflaged Polygamy, Colonial Morality Taxation, and a Woman-Naming Crisis in Belgian Africa." *The Journal of African History* 32 (1991).

Keck, Margaret E., and Kathryn Sikkink. "Transnational Networks on Violence against Women." In *Activists beyond Borders: Advocacy Networks in International Politics*, 165-98. N.p.: Cornell University Press, 1998.

MacKinnon, Catharine. *Are Women Human? And Other International Dialogues*. Cambridge: Belknap Press, 2006.

———. *Feminism Unmodified: Discourses on Life and Law*. Cambridge: Harvard University Press, 1987.

———. "Rape: On Coercion and Consent." *Applications of Feminist Legal Theory*, 1996, 471-83.

———. *Toward a Feminist Theory of the State*. Cambridge: Harvard University Press, 1989.

MacKinnon, Catharine A., and Reva B. Siegel, eds. *Directions in Sexual Harassment Law*. N.p.: Yale University Press, 2004.

Mamdani, Mahmood. "The Politics of Naming: Civil War, Genocide, Insurgency." *London Review of Books* 29, no. 5 (March 2007): 1-9.

Marcus, Sharon. "Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention." In *Feminists Theorize the Political*, edited by Judith Butler and Joan W. Scott, 385-403. New York: Routledge, 1992.

Meron, Theodor. "Rape as a Crime under International Humanitarian Law." *American Journal of International Law* 87, no. 424 (July 1993): 1-5.

Miller, Alice M. "Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection." *Health and Human Rights* 7, no. 2 (2004): 17-46.

Mohanty, Chandra. "Under Western Eyes: Feminist Scholarship and Colonial Discourses." *Duke University Press*, 1988, 333-58.

Nordstrom, Carolyn. "Girls and Warzones: Troubling Questions." *Life & Peace Institute*, 1997, 1-37.

Nussbaum, Martha. "The Professor of Parody." *The New Republic*, November 28, 2000, 1-13.

Otto, Dianne. "The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade." *Melbourne Journal of International Law* 10, no. 1 (2009): 1-15.

Oyewumi, Oyeronke. "(Re)constituting the Cosmology and Sociocultural Institutions of Oyo-Yoruba: Articulating the Yoruba World-Sense." In *African Gender Studies Reader*, 99-119. New York: Palgrave Macmillan, 2005.

———. "Visualizing the Body: Western Theories and African Subjects." In *African Gender Studies Reader*, 3-22. New York: Palgrave Macmillan, 2005.

Rubin, Gayle. "Misguided, Dangerous, and Wrong: An Analysis of Anti-pornography Politics." In *Deviations: A Gayle Rubin Reader*, 254-75. London: Duke University Press, 2011.

———. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In *Pleasure and Danger*, edited by Carole Vance. N.p.: Routledge and Kegan Paul, 1984.

Scales, Ann C. "The Emergence of Feminist Jurisprudence: An Essay." *The Yale Law Journal* 95, no. 7 (June 1986): 1373-404.

Scott, Joan W. "Feminism's History." *Journal of Women's History* 16 (2004): 10-29.

Seay, Laura. "Do We Have the Congo Rape Crisis All Wrong?" *The Atlantic*, May 24, 2011.

Silwinski, Sharon. "The Kodak on the Congo: 1904." In *Human Rights in Camera*, 57-81. N.p.: University of Chicago Press, 2011.

Sullivan, Donna. "The Public/Private Distinction in International Human Rights Law." In *Women's Rights, Human Rights*, edited by Julie Peters and Andrea Wolper, 126-34. N.p.: Psychology Press, 1995.

Ticktin, Miriam. "The Gendered Human in Humanitarianism: Medicalizing and Politicizing Sexual Violence." *Blackwell Publishing* 23, no. 2 (2011): 1-16.

———. "Sexual Violence as the Language of Border Control: Where French Feminist and Anti-immigrant Rhetoric Meet." *The Journal of Women in Culture and Society* 33, no. 4 (2008): 1-27.

UN General Assembly, Resolution 34/180, "Convention on the Elimination of All Forms of Discrimination against Women," Sept. 3, 1981,

<http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

UN General Assembly, "Vienna Declaration and Programme of Action" June 25, 1993

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

UN General Assembly, Resolution 48/104 "Declaration on the Elimination of Violence against Women"

December 20, 1993

UN General Assembly, "General Recommendation No. 19: Violence against women"

1992

UN General Assembly "General Recommendation No. 12: Violence against women"

1989

UN General Assembly "In-depth study on all forms of violence against women"

July 6, 2006

UN Security Council, "Resolution 1325" Oct. 31, 2000,

<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20SRES1325%20.pdf>

UN Security Council, "Resolution 1820", June 19, 2008,

<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>

Whisnant, Rebecca. "Feminist Perspectives on Rape." Stanford Encyclopedia of Philosophy. Last modified August 2013. Accessed April 30, 2016. <http://plato.stanford.edu/entries/feminism-rape/>.