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INTERNATIONAL LAW AND ETHICS

Primarily, international law is the 'law of nations'; it is the law between states that they create and obey or disobey. It constitutes a system of rules and principles that are regarded as binding on states and which prevail over national laws. Its main focus is on rights and duties of states and the relations between them. It was initially established by states to bring some order into the relations between them, while at the same time preserving their independence as sovereigns.

International law does not have the same features that characterise domestic legal systems (e.g. enforcement mechanisms such as Courts or police forces) and it is therefore sometimes criticized for not being 'law' in the strict sense, but rather a set of moral statements that express general political obligations for states. H.L.A. Hart, one of the most prominent legal philosophers of the 20th century, argued that in order to determine whether or not certain rules can be considered to constitute 'law', it is important to look at their functions and conditions on the international level. He argued that "It is clear that in the practice of states certain rules are regularly respected even at the cost of certain sacrifices; claims are formulated by reference to them; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. These, surely, are all the elements required to support the statement that there exist among states rules imposing obligations upon them. The proof that 'binding' rules in any society exist, is simply that they are thought of, spoken of, and function as such."[1]

Though international law is not 'soft' law - it provides more than just guiding principles in a complementary fashion - it has no independent powers of enforcement and is therefore reliant on states' political will to co-operate. International law is not imposed on states, but decentralized and founded on consensus. It is based on reciprocity, which means that states see it as in their mutual interests to obey the established rules. Most norms of customary international law are non-controversial as they confirm powers that states already exercise, such as sovereignty over their territory. Other norms, such as justice and human rights, are more problematic, however, because they are based on differing cultural or moral values and there is no clear agreement on their content.

International Law is created in one of two ways: it is either formulated as treaty law in international agreements that create rules that are binding on all signatories or it is created by state practice (customary law) that is recognized by the international community as providing rules that have to be complied with.[2]

Traditionally, debates in the legal literature have focussed on discussions surrounding the nature of international law, focusing on divisions between positive law and natural law. Natural law is based on the idea that there is a kind of perfect justice given to man by nature and that man's laws should conform to this as closely as possible. This includes a strong moral

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[1]H.L.A. Hart, *The Concept of Law*, 2nd edition ed. (Oxford: Clarendon Press, 1994), 231.
[2]For discussions on the distinction between treaty law and customary law see for instance Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. ed. (London, New York: Routledge, 1997). or Antonio Cassese, *International Law* (New York: Oxford University Press, 2001).

element in theorising law and a belief in 'God-given' principles of higher values mankind should aspire to. On the other side, positive law is the body of law imposed by states; the empirical focus of this approach is on existing law and on what *is* rather than what it ought to be. In terms of a positive law approach, law is seen as separate from morality.

Debates in International Law have changed in recent years to shift away from its state-centrism towards an increased focus on individuals as well as moral and ethical considerations. Debates have therefore moved away from the natural/positive law division to focus more on issues such as human rights in constitutional law, domestic and international humanitarian law etc. As Teitel for instance argues: "The emerging legal order addresses not merely states and state interests and perhaps not even primarily so. Persons and peoples are now at the core, and a non-sovereignty-based normativity is manifesting itself, which has an uneasy and uncertain relationship to the inherited discourse of sovereign equality."[3]

Such an increased focus on individuals and their rights led to a so-called 'turn to ethics' in International Law discourse, opening up new ethical and moral agendas that are reflected in more recent debates in the legal field. The remainder of this chapter will look at four such developments:

Firstly, this chapter will look at the idea of global constitutionalism that allows for the integration of politics, law and ethics. Constitutionalism focuses on legal and institutional structures of certain norms (such as rights, rules and responsibilities). Global constitutionalism is based on the idea that a global constitutional order exists that includes international norms and rules that enable and constrain international actors.

Secondly, this chapter will examine institutions that develop to take account of the increased importance of the individual in global politics, using the idea of cosmopolitanism to frame these developments. This tradition of thought not only puts the individual at the centre of its arguments, but also bases this on a belief in universalism of the normative substance of law. Cosmopolitan theorists advocate notions of a universal morality, universal human rights etc.

The third section will include a discussion of critical legal theory, which is sceptical about notions of such 'universal' values of justice and human rights in the international community. Critical legal theorists argue that international law is embedded in a specific context that reflects and reinforces existing power relations between states that has been developed in international politics over the past decades.

And finally, the chapter will look to how feminist perspectives also challenge underlying power relations and normative assumptions of International Law.

Global Constitutionalism
Constitutions include norms, principles and practices that organise political life and can be understood as an operating system behind political decisions. To follow Hans Kelsen's distinction between constitutions in material and formal sense, a constitution in a material sense can be seen as "those rules, procedural or substantive, that regulate the creation of

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[3]Ruti Teitel, "Humanity Law: A New Interpretive Lens on the International Sphere," *Fordham Law Review* 77, no. 2 (2008): 667-68.

general legal norms establish organs, and delimit their powers."[4] In a formal sense, constitutions are written texts that can only be changed according to special procedures that are designed to make changing those norms difficult. "The formal constitution serves to safeguard the norms determining the organs and procedure of legislation (the core features of the material constitution)."[5] Constitutions include checks and balances that are aimed at preventing the abuse of power by individual institutions.

Constitutionalism sits at the intersection between law and politics. It is "a political theory that protects individuals from arbitrary exercise of power through the rule of law and a system of checks and balances."[6] Constitutionalism assumes that political power is used by political actors through law and institutions which are enabling as well as constraining: it enables the creation of institutions and laws but at the same time limits those who lead those institutions and execute those laws. This is achieved through principles of the rule of law, the protection of fundamental rights, the separation of power as well as constitutent power (i.e. giving a voice to those affected by the constitution).

Domestically, constitutions create institutions that balance power and (at the same time) protect rights. Global constitutionalism takes this further by looking at such norms and rules beyond the state level, analysing international law and how it affects international actors. It assumes the existence of a global constitutional order and involves the study of changing norms that are important for international relations between states. Global constitutionalism can therefore be understood as a theoretical framework that brings together law, politics and ethics, based on the idea that a constitutional order at the global level exists. It is concerned with implementing the rule of law on a global level but it is more than that: it focusses on individuals as the ultimate constituent power and not just states and is therefore concerned with the protection of individual human rights.

Global constitutionalism takes into account that even though international law has no overarching enforcement mechanism (such as a global police force that enforces law between and among states consistently), governance structures exist that are relevant to actors and influence their choices of action. Global constitutionalism can be used as a reference frame to establish questions of legitimacy of international laws that are then not dependent on a state-like government or governance structure in the international sphere. As Koskenniemi argues: "what is important is the use of the constitutional vocabulary to express a fundamental critique of the present politics." The universalising focus of constitutionalism allows "extreme inequality in the world to be not only shown but also condemned. (…) individual suffering [is transformed] into an objective wrong that concerns not just the victim, but everyone. If calculation is needed, then "all" must be counted as cost."[7]

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[4]Jean L. Cohen, "Constitutionalism Beyond the State: Myth or Necessity? (a Pluralist Approach)," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2, no. 1 (2011): 130.
[5]Ibid.
[6]Anthony F. Lang Jr., "Global Constitutionalism as Middle Ground Ethic," in *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, ed. Cornelia Navari (London: Palgrave, 2014), 109.
[7]Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," *Theoretical Inquiries in Law* 8, no. 1 (2007): 35.

One instance that is brought forward as evidence for the importance of global constitutionalism[8] , is the so-called *Kadi* case that was decided by the ECJ in 2008. In short, following a UN Security Council Resolution to deal with terrorism in the aftermath of 9/11, Yassin Kadi, a Saudi national, was placed on a list of individuals suspected of having links to Al Qaeda. Being placed on that list resulted in freezing most of his assets and restricting his abilities of free travel. Article 103 of the UN Charter sets out supremacy of UN Chapter VII resolutions over any other legal obligations. The EU was therefore required to adopt the UN resolution without any alteration. The resolution impinged on some of Kadi's fundamental human rights, however, such as a right to be heard, respect for the rights of the defence and the right to effective judicial protection. Such rights of due process are fundamental rights which means that they are part of the European constitutional order and enshrined as such in EU law. According to the UN resolution, however, Kadi had no right to challenge being placed on the list and be subject to the imposed sanctions. The case therefore involved a conflict between different legal orders: European, national, and international law.

Kadi brought his case before the ECJ and won on appeal. The ECJ decided that "The European Union may not impose restrictive measures on Mr Kadi, without evidence to substantiate his involvement in terrorist activities."[9] The ECJ ruled that Kadi's rights to a fair trial and due process had been violated and that it could not uphold the UN Resolution. In terms of global constitutionalism, this case is instructive as the ECJ "highlighted the constitutional dimension that results from the interaction between different political and legal arenas in the global system."[10] The existing order is based on the UN having the "final normative authority"[11] but that the ECJ in this case emphasised the rule of law and the protection of human rights over that order. The ECJ ruling was therefore hailed by constitutionalists as having "promoted the constitutionalisation of the global system."[12] The case is important in showing how human rights in international law are affected by the interaction between different legal system and thereby raises constitutional questions beyond the state on a global level.

This is in line with global constitutionalism's idea that individuals are the primary agents in the international order and that their rights need to be protected. This approach is similar to cosmopolitanism that makes an even stronger case for the link between law and universal morality as well as the central role individuals play in the global order.

Cosmopolitanism
Ideas of cosmopolitanism are based on individuals being citizens of the cosmos, citizens of the world regardless of their belonging to particular states. It is also based on a belief in a

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[8]See for instance Antje Wiener et al., "Global Constitutionalism: Human Rights, Democracy and the Rule of Law," *Global Constitutionalism* 1, no. 1 (2012), Anthony F. Lang, Jr. "Global Constitutionalism as Middle Ground Ethic" In *Ethical Reasoning in International Affairs: Arguments from the Middle Ground*, edited by Cornelia Navari, 106-26. London: Palgrave, 2014. (2014) and Cohen, Jean L. "Constitutionalism Beyond the State: Myth or Necessity? (a Pluralist Approach)." *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2, no. 1 (2011): 127-58.
[9]Court of Justice of the European Union, "Judgment in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P," news release, 18 July, 2013, http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-07/cp130093en.pdf.
[10]Wiener et al., 1.
[11]Ibid.
[12]Ibid.

universal morality, universal values and a normative substance of law. Other chapters in this Handbook focus on cosmopolitanism more generally, but in this chapter the focus is on how this framework relates to international law and legal principles such as *jus cogens*. Cosmopolitanism is a move even further away from the traditional state centric view of international law towards a greater recognition of human being as the ultimate subjects of it.

Cosmopolitanism is (broadly) characterised by three concepts[13]: firstly *individualism*, which means that individual persons are the ultimate unit of concern. Secondly, *universality*, which is based on the idea that this "status of ultimate concern is attached to every human being equally – not merely to some subset."[14] Thirdly, *generality* which means that this special status that is attributed to individuals has global force and is not just confined to fellow nationals, likeminded individuals or such like. "In short, cosmopolitanism emphasizes the *moral worth* of persons, the *equal* moral worth of *all* persons and the existence of derivative *obligations to all* to preserve the equal moral worth of persons."[15]

Undoubtedly there have been developments in international law that can be seen as expressions of this cosmopolitan ideal. Some principles exist that are regarded to be so fundamental and important for the international community as a whole that they supersede all other norms in international law. These norms have *jus cogens* status and become peremptory norms that constitute obligatory law and are binding on all states. *Jus cogens* norms are seen as being fundamental to the interests all states. They are given special status in international law by imposing obligations on every state to assist in the trial and punishment of those offences. *Jus cogens* crimes "may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."[16] Such a commitment is found in international legal provisions such as the Torture Convention, the Genocide Convention or the definition of crimes against humanity, where a link to all states in international society exists through the notion of common humanity. This can then be seen as an expression of cosmopolitanism in international law because in that sense, "all human beings form a single moral community, and ... they owe each other certain obligations just in virtue of their being members of that single community."[17]

Jus cogens norms are special because they are binding on all states and allow no exceptions or contradiction by other treaty provisions or customary law. They constitute a new way of perceiving relations between states and individuals, because "for the first time, the international community has decided to recognize certain values (…) that must prevail over any other form of national interest."[18]

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[13]See Thomas W. Pogge, "Cosmopolitanism and Sovereignty " *Ethics* 103, no. 1 (1992).

[14]Ibid., 48.

[15]Roland Pierik and Wouter Werner, "Cosmopolitanism in Context: An Introduction " in *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*, ed. Roland Pierik and Wouter Werner (Cambridge: Cambridge University Press, 2010), 3.

[16]Ben Chigara, "Pinochet and the Administration of International Criminal Justice," in *The Pinochet Case: A Legal and Constitutional Analysis*, ed. Diana Woodhouse (Oxford, Portland Oregon: Hart Publishing, 2000), 118.

[17]Neil Walker, "Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law," *EUI Working Paper LAW* No. 2005/17 (2005): 4.

[18]Antonio Cassese, *Human Rights in a Changing World* (Cambridge: Polity Press, 1990), 168.

Offences against *jus cogens* norms create the possibility of universal jurisdiction by individual states. Universal jurisdiction means that crimes can be punished by any state, regardless of where they have been committed. Such procedures are then based not on nationalities of those involved but on the idea of a common morality. The crime is punished because of a moral wrong that has been committed against mankind, regardless of state borders. Universal jurisdiction does not presume a world government or a world court, but relies on national court systems to administer justice; it requires national systems to do the morally 'right' thing.

Such *jus cogens* norms have also found their way into independent international institutions such as the International Criminal Court (ICC) that has jurisdiction over genocide, crimes against humanity and war crimes. Even though the ICC's jurisdiction is not truly universal[19], the Court's Statute and ability to act still recognise that individuals have rights and duties under international law independently of states.

Despite being able to find such cosmopolitan ideas in international law, a number of criticisms can be brought forward. One of the most important is the question of universal enforcement: even though individual states (or particular institutions) have a *right* to punish *jus cogens* crimes, it does not necessarily mean that this will actually happen. Any exercise of jurisdiction (nationally or through an international court) is based on political cooperation and will. Critics would argue that states would only ever act to protect universal moral values if it would also serve their national interests. States would never act altruistically and solely motivated by ideas of a common morality. Such criticisms speak to a realist conception of international law which is very sceptical of law in the international sphere. Realists see law as a tool and as only serving the powerful. They argue that because international law is based on states voluntarily consenting to it, state will only accept those laws that serve their own interests. Realists argue that state power and national interests are the ultimate aspects when trying to understand state behaviour and compliance – not questions of universal moral values.

Cosmopolitanism also does not deal sufficiently with the difficult tension between moral unity (i.e. universal values and rights) on the one hand and institutional fragmentation on the other. Moral ideas need to be translated into rights and duties of individuals that can be protected by institutions. This is also linked to difficult questions of whether moral unity actually exists in international law. Are references to 'universal' values not just reinforcing existing power structures? It is important to recognise that cosmopolitanism is situated in its own context and it can be debated whether it is truly based on 'common' values and interests. Considerations like these are being discussed in critical legal theory.

Critical Legal Theories

Critical legal theories argue that appeals to universal, shared values and a 'common morality' in international legal discourse are in fact just disguised self-interested actions, used by the most powerful to maintain their own position in the global order. As Carty, for instance, argues: "The crucial question is simply whether a positive system of universal international

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[19]The ICC can take action if the crime occurred on a state parties' territory or if it was committed by a state parties' national. It can also exercise jurisdiction if the UN Security Council refers a situation to it under Chapter VII of the UN Charter. 'True' universal jurisdiction would not require any nationality tie to the crime or the individuals involved.

law actually exists, or whether particular states and their representative legal scholars merely appeal to such positivist discourse so as to impose a particularist language upon others *as of if it were a universally accepted legal discourse*."[20]

Critical legal theory sees Law not as a distinctive and concrete discipline but as being interlinked with other issue areas such as Politics and Sociology and as being dependent on morality. Critical legal theorists, such as David Kennedy and Martti Koskenniemi, are sceptical about notions of 'universal' values of justice and human rights in the international community, however. They argue that international law is embedded in a specific context that reflects and reinforces existing power relations between states developed in international politics over the past decades. These relations, they argue, contain elements of imperialism and suppression of weaker states.

Koskenniemi, for instance, asserts that there is a danger that, by claiming to act in the name of universal values and the international community as a whole, international law can be distorted to reflect only the interests of the most powerful but, at the same time, claim to be based on universality. He argues that "law is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and institutions on their side, making sure they would not support the adversary."[21] He asserts that 'universal values' and 'international community' can only be expressed through a state or international organisation and therefore only embody *one* certain view of international law, because 'the whole' cannot be represented without at the same time representing a particular.

One example that illustrates difficulties attached to actions based on 'universal' values is that of humanitarian intervention; i.e. intervention by one of more states in another state's internal affairs to protect the human rights of individuals that are not of the interveners' nationality. Such an intervention is then said to be based on ideas of common morality and doing 'the right thing' in the face of serious human rights abuses. Critical legal theorists argue that applying international law to justify such intervention is problematic because motivations for actions are ultimately dominated by *political* considerations of the most powerful states rather than by universal ethics norms. Koskenniemi argues that this 'turn to ethics' has "often involved a shallow and dangerous moralisation which, if generalized, transforms international law into an uncritical instrument for the foreign policy choices of those whom power and privilege has put into decision-making positions."[22]

Kennedy similarly criticizes the hidden power politics in such human rights language and argues against using human rights norms as justifications for interventions. He argues that "humanitarians are conflicted – seeking to engage the world, but renouncing the tools of power politics and embracing a cosmopolitan tolerance of foreign cultures and political systems. These conflicts have gotten built into the tools – the United Nations, the human rights movement, the law of force – that humanitarians have devised for influencing foreign

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[20]Anthony Carty, "Critical International Law: Recent Trends in the Theory of International Law," *European Journal of International Law* 2, no. 1 (1991): 1. (emphasis in original)
[21]Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," http://www.valt.helsinki.fi/blogs/eci/Hegemony.pdf.
[22]"'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," *The Modern Law Review* 65, no. 2 (2002): 159.

affairs."[23] Similar to Koskenniemi, he asserts that the states of the centre employ the language of human rights to justify their decisions against states of the periphery. This language then constitutes a vehicle for imperialism and reinforces existing power imbalances by referring to universal values that are in fact only based on the values of the most powerful. Kennedy sees humanitarians as misguided in their belief that humanitarian ideas and institutions are absolute virtues that can excuse any state action whereas, in reality, they are likely to be used to disguise other intentions. He argues that by relying primarily on humanitarian justifications, the issues that motivated humanitarian intervention are fudged: too much attention is placed on justifying actions in human rights terms even when the main motivating factors were entirely different.

Critical law theorists argue that law is inherently political and that the application of objective and general international legal provisions only takes place selectively. They doubt that international legal provisions can resolve conflicts and ambiguities, because their vagueness opens up the possibility of self-serving interpretations. Values such as 'morality' or 'justice' are always interpretative rather than objectively 'given'. International law for instance provides some threshold criteria when it comes to the protection of human rights, , but borderline cases persist which then leads to the selective enforcement of international legal provisions.

Arguably, due to the lack of independent enforcement mechanisms, international law is always dependent on some form of agency – one or more states need to be willing to act in the face of serious human rights abuses. If they do so, it is because they focused on one particular situation, they called it a 'crisis' that warrants intervention, but this can then hardly be called an action in the name of the international community as a whole. It is much rather action by one or more states that chose to act independently in particular circumstances, but still claim to act in line with the appropriate enforcement of universal principles of international law. This difficulty is evident, for instance, in recent cases of humanitarian intervention in Libya that included references to a common responsibility to protect human beings from the most serious human rights abuses. Whilst the international community decides to take action in this particular situation, a very similar human rights catastrophe in Syria does not lead to similar interventions to protect civilians.

Critical legal theorists are concerned that "the more international lawyers are obsessed by the effectiveness of the law to be applied [in situations defined as] 'crises', the less we are aware of the subtle politics whereby some aspects of the world become defined as 'crisis' whereas others are not."[24] Such a decision is ultimately a political act, however much it is justified in terms of ethics. Establishing 'universal' standards of human rights that legitimize intervention poses problems, because "human rights often excuses government behavior by setting standards below which mischief seems legitimate. It can be easy to sign a treaty and then do what you want."[25]

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[23]David Kennedy, "International Humanitarianism: The Dark Sides," *International Journal of Not-for-Profit Law* 6, no. 3 (2004).

[24]Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 173.

[25]Kennedy.

The selectivity that arises from such 'crisis' language is problematic because it normalizes and justifies all other conduct that falls short of being called an 'atrocity'. The difficulty lies in devising criteria that are flexible enough but also encompass all situations on an international level. In the domestic context, formal rules work well; occasional injustices can be tolerated because of the 'bigger picture' resulting from the need to honour the formal validity of the law. In the international context, however, "an injustice caused by the law immediately challenges the validity of a legal system that calls for compliance even against self-interest."[26] Establishing criteria in international law that can encompass *all* cases is near impossible because such criteria are likely to be either over- or under-inclusive. Establishing criteria also provides a permission, it provides a threshold until no action needs to be taken. For instance, a criterion for humanitarian intervention could be set as 'at least 500 civilians being killed'. This would mean that 499 killed civilians would (justifiably) trigger no response from the international community or individual states and would signal to the human rights abuser that his or her actions are legitimate.

Critical law theory is concerned about the danger that exists when actions that are based on *individual* states' morality and ethics are used as precedents for the 'rightful' application of international law that are then incorporated into that law as 'objective' principles said to reflect international society as a whole. Such selectivity and situational interpretation of a 'crisis' does not lead to a consistent and universal application of international law and also reinforces existing power relations between states. Similar to critical legal theory but moving from the state level to individual actors, feminist approaches are also concerned about inherent power relations in international law that exclude and disadvantage women.

Feminist approaches to international law and ethics

Feminist legal theory is linked to critical legal theory but it is "much more focused and concrete … and derives it theoretical force from immediate experience of the role of the legal system in creating and perpetuating the unequal position of women."[27] It is not a single school (there are various strands of feminism such as liberal, radical and other forms) but it aims to give voice to diverse experiences women have in different parts of the world. Feminist legal theory can be seen to be more a set of questions rather than a set of answers; it is a particular perspective, a mode of analysis and an approach to life.

Feminist scholars argue that "international law is a thoroughly gendered system."[28] They claim that women's voices are silenced because of International Law's organisational as well as its normative structure. Firstly, in terms of organisational structure, states are the principal subjects of international law with international organisations also becoming increasingly more important. Feminists criticise the fact that women only play marginal roles in both – they are underrepresented in decision making processes and hold very few positions of power (within states or organisations). For instance, for many years, women have not had prominent roles in important international legal institutions such as the International Law Commission, or featured highly among the judges' benches of the International Court of Justice. Feminists therefore argue that issues that are most relevant to women (rather than to men) are often

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[26]Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 169.
[27]Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," *American Journal of International Law* 85, no. 4 (1991): 613.
[28]Ibid., 615.

ignored. Secondly, in terms of its normative dimension, a presumption exists that international legal norms that are directed at individuals are neutral and universally applicable even though in reality they may affect men and women differently.

A feminist critique of international law argues that normative and institutional structures of international law are committed to masculinist and imperial power. "The absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has among other things, legitimated the unequal position of women around the world rather than challenged it."[29] Feminists argue that women are disadvantaged and subordinated in a number of areas in the international sphere: socially, politically, culturally etc. Existing international institutions are seen as disadvantageous to women and even if (formal) equality exists, discrimination occurs.

Feminist legal theorists argue that international law and particularly human rights thinking is based on a political conception of the division of life into private and public spheres and that international law is seen as reflective of a gendered international order.[30] International law prioritises public institutions over the private sphere. This means that rights are particularly associated with the public sphere (right to freedom of speech; right to vote; rights that protect individuals from arbitrary state interference of citizens). Rights have been more associated with activities engaged in by men and generally offer little protection from dangers characteristically faced by women. Historically, women have been systematically excluded and been confined to the private sphere which is where women need protection (and rights). Feminists argue that protection is needed from other individuals rather than the state; women experience violations of their rights from husbands and other family members which are not covered by the international human rights regime. "The law has always operated primarily within the public domain; it is considered appropriate to regulate the workplace, the economy and the distribution of political power, while direct state intervention in the family and the home has long been regarded as inappropriate."[31]

Some parts of international human rights law are being revised to respond to this critique. For instance, it is acknowledged that rape can be a war crime and that it can be used as a weapon of war; or in refugee law, it is acknowledged that women can constitute a social group subject to persecution. Even though these are positive developments to advance rights for women, they do not go far enough in addressing more structural problems that would require a more radical rethinking of international institutions that are linked to international law.[32] Feminist international legal theorists call for *structural* changes to the international legal system as a whole. As Charlesworth argues: "Feminist analysis of international law has two major roles, one deconstructive, the other reconstructive. Deconstruction of the explicit and implicit values of the international legal system means challenging their claims to objectivity and rationality because of the limited base on which they are built."[33] This approach

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[29]Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester, UK: Manchester University Press, 2000), 1.
[30]See for instance Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," *American Journal of International Law* 85 (1991).
[31]Ibid., 627.
[32]Christine Chinkin, "Feminist Interventions into International Law," *Adelaide Law Review* 19 (1997): 61.
[33]Hilary Charlesworth, "Feminist Critiques of International Law and Their Critics," *Third World Legal Studies* 13 (1994): 3.

challenges ideas of 'universal' morality and values that are based on gendered assumptions. Deconstructing such notions of universality have transformative potential. The second role of feminist analysis in international law, the idea of reconstruction "requires rebuilding the basic concepts of international law in a way that they do not support or reinforce the domination of women by men."[34] This would then lead to an overall more inclusive and ultimately fairer system.

Conclusion

Debates in International Law have moved in recent years from discussions about sources of law towards questions of ethics and the role of individuals as the ultimate subjects of the law. As this chapter has shown, a number of theoretical approaches address issues that cross disciplines of law, ethics, morality and politics. The theoretical approaches explored here were chosen as illustrations of different aspects of debates in current international legal thinking. Global constitutionalism looks to different constitutional structures and how they interact beyond the state level whereas cosmopolitanism focusses on the role of the individual and ideas of a common morality. Challenging some of these normative assumptions of international law, critical legal theory and feminism question some of the more structural and underlying ideas of International Law as a whole and call for radical transformations of the system.

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[34]Charlesworth and Chinkin.

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