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**Panel 4: International Law and Gender  
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**Retrieving Gender-Legitimacy in International Law:  
Trends and Prospects of Gender Perspective**

**SHIN Hae Bong  
Associate Professor  
Aoyama Gakuin University, Tokyo, Japan**

A feminist approach to law or gender perspective in law is not a new phenomenon, at least in domestic law. Even in Japan, where feminist thinking has not prevailed compared with other western societies and where the word "feminism" or "feminist" itself is not necessarily popular, critical legal studies called feminist legal studies have been developed by female scholars and lawyers in such areas as civil law and labor law from the first half of the 1980's. The trends of feminist approach to law have brought visible effects in Japanese law in recent years. A good example is the Act for the Prevention of Violence by a Spouse of 2001, which recognized the role of the police in restraining violence and provided the power of the court to issue a protection order in serious cases. Violence by a spouse, that is violence by a husband to a wife almost by definition, had traditionally been regarded as "private matter" free from public interference in Japan. The enactment of this law is remarkable in that the law recognized domestic violence as violation of women's human dignity and renewed the boundary of the "public" and the "private" in view of human rights of women.

The arrival of feminist wave to the arena of international law was somewhat late; it was in the 1990's that feminist analysis began to make gradual inroads into the discipline of international law by the works of some leading female scholars, notably Professor Charlesworth as we all know. On the other hand, the 1990's was also the time when positive international law could not be immune to feminist thinking amid the

democratization and deconstruction in the post-Cold War international community. In my view, the most important motivation was the focus on the two egregious sexual violence to women, the one being the massive rapes and forced pregnancy perpetrated in the former Yugoslavia and the other being the so-called "comfort women" by the Japanese soldiers during the Second World War. The issue of comfort women had been known to limited number of people both in Japan and abroad, but the situation started to change when one of the Korean survivors, the late Kim Hak-Sung, disclosed her name for the first time as a victim and filed a suit in Japan demanding compensation from the Japanese government in 1991. It is important here to note that the issue of comfort women attracted worldwide attention not only as a tragic event which occurred in the distant past but rather as a typical human rights violation to women in armed conflict that is common to the present, ongoing atrocities witnessed in the former Yugoslavia. The "comfort women" reemerged in the 1990's as a grave human rights violation of women which had remained unpunished, and prompted the international community to deal with the question of impunity in the face of the undeterred violence unfolded in the ex-Yugoslavia.

In fact, the prevention and punishment of sexual violence to women, coupled with the remedies to victims of grave human rights violations, were at the center of the discussion in the UN Commission on Human Rights and the Sub-Commission through the 1990's and the issue of comfort women occupied enormous pages of the reports of special rapporteurs. In terms of a gender perspective, the "comfort women" was a symbolic subject which underwent a dramatic development in its status in international law in this process. The fact which had been a secret story for Japanese soldiers and a shameful past for victims was characterized as "military sexual slavery", instead of perverse "comfort women", and visualized as a matter of grave violation of human rights.

It would be needless to say that the establishment of the International Criminal Tribunals for ex-Yugoslavia and Rwanda and the epoch-making adoption of the Rome Statute establishing the International Criminal Court were closely intertwined with such a process. The statutes of the Tribunals for ex-Yugoslavia and Rwanda both include rape in crimes against humanity, and these tribunals have handed down judgments recognizing

rape as a crime against humanity, torture, or even genocide. The ICC statute provided various forms of sexual violence such as rape, sexual slavery, and forced pregnancy as crimes against humanity and also as war crimes constituting grave breaches of the Geneva Convention. The provision on crimes against humanity in the ICC statute also referred to the persecution against group or collectivity on grounds including gender. The ICC statute is indeed the first international treaty which explicitly introduced the notion of gender, and it is well known that the statute has numerous provisions referring to gender with regard to the constitution and proceedings of the court.

Apart from international criminal law, the area in which the reexamination from a gender perspective has been called for is human rights law. International law of human rights has as its fundamental principles the universality of human rights and the equality of all human beings, and has been committed to bringing equality between men and women by means of standard-setting and implementation. However, the enjoyment of human rights often meets a range of deep-rooted economic, social, cultural, political, religious or other obstacles especially for women, and human rights law needs a gender perspective to deal with particular situations of women and to achieve effective universality. The 1993 Vienna Declaration of Human Rights recognized this and included several paragraphs referring to gender, such as para.38 concerning the elimination of gender bias in the administration of justice and para.42 on the role of treaty bodies in paying attention to human rights of women.

Among the treaty bodies, the Committee on the Elimination of Discrimination against Women has shown consciousness for gender from the early 1990's. In its General Recommendation 19 adopted in 1992, the Committee defined gender-based violence, that is, violence directed against a woman because she is a woman, as discrimination against women within the meaning of article 1 of the convention. Other than this Committee, the body which has been most sensitive to the situation of women would be the Committee on Economic, Social and Cultural Rights created in the mid-1980's. This new committee, which proved to be quite active with the leadership of some eminent scholars, foremost of which being Professor Philip Alston, has made consistent efforts to inquire of States the extent to which the rights are practically enjoyed by the most vulnerable members of

society such as women, children and the handicapped. In recent general comments, the Committee has referred to gender more explicitly, such as the General Comment 14 on the right to health which encouraged States to integrate a gender-based approach in their health policies and programmes. On the other hand, the Committee on the Elimination of Racial Discrimination has been late in adopting a gender perspective, but in 2000, the Committee showed its awareness on the matter in the General Recommendation 25 concerning gender-related aspects of racial discrimination. In this recommendation, the Committee recognized that certain forms of racial discrimination, such as sexual violence to women belonging to different ethnic groups during detention or armed conflict, are directed especially to women because of gender. The Committee requested States to include information on the enjoyment of rights by women and, in turn, declared that it would commit itself to integrate a gender-based analysis in examining racial discrimination.

Thus a gender perspective has become a common agenda for treaty bodies as well as States, and the implementation of human rights norms actually has much room for reconsideration from a gender perspective. For example, Professors Charlesworth and Chinkin, in their book of 2000, raised a question on article 7 of the Economic, Social and Cultural Rights Covenant, asking how the principle of "equal remuneration for work of equal value" could be effectively applied when certain work is assumed only by women and there is no comparable work in a gender-divided working environment. This is exactly the point disputed in court cases in Japan concerning discrimination of wages or promotion. Most Japanese companies maintain the two-track system of employment comprising the management-candidate course and the general, clerical course, and fill the latter mostly with women. And when those women complain the gap of wages and conditions for promotion as discriminatory, it is often justified in the court for the reason that they were employed in that course and that the difference of treatment between the courses is permitted. But given the data that over 90 percent companies employ only women for the clerical course, it is obvious that the two-track system functions nothing else but gender-based segregation of labor. The equal remuneration for work of equal value is also a principle in the ILO Convention No.100 to which Japan is a party, and Japanese government has received repeated

recommendations from the Committee of Experts of the ILO that it should submit information on the objective value of different works assumed by men and women. It is true that the objective evaluation of different works is difficult, but a gender perspective could play a key role in the effective realization of these labor-related rights.

The degree to which a gender approach can be useful may vary in different fields of international law, but in any event, the introduction of a gender perspective itself seems to be an irreversible current. For one thing, the current of a feminist approach in international law is overlapping with the democratization of international community in which civil societies have come to intervene in order not to make international legal process a monopoly of a handful of male elites of States. The making of the ICC Statute was a process involving active participation of a coalition of women's rights groups, and the resulting Statute was given strong legitimacy in terms of democracy and a gender perspective.

Under such circumstances, it is likely that a gender perspective will increasingly require deconstruction and reconstruction of various aspects of international law. I will cite only one example in which a gender perspective and the intervention of civil society had played a remarkable role in such an effort. It is the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, a citizens' tribunal held in Japan in 2000 upon the initiative of a Japanese NGO, Violence Against Women In War-Network Japan (VAWW-NET Japan). This enterprise won sympathy of lawyers on international plane, and this War Crimes Tribunal opened in Tokyo with Ms.Gabrielle McDonald, former president of the International Criminal Tribunal for ex-Yugoslavia and Professor Christine Chinkin among the bench and Ms.Patricia Sellars, a legal council for the Tribunal for ex-Yugoslavia, and Professor Ustinia Dolgopol, as chief prosecutors. The Tribunal found the emperor Hirohito and other commanders guilty for either ordering and operating the comfort women system or failing to take steps to abolish it, and its thick "judgment" is a treasury of a critical analysis of international law from a gender perspective. The judgment states the significance of the tribunal as follows:

"[The Tribunal] was established to redress the historic tendency to trivialize, excuse, marginalize, and obfuscate crimes against women of subordinated ethnicities."

On State responsibility for the prosecution and punishment of crimes of rape and sexual slavery, the judgment notes a "gender blindness" in peace treaties in the following terms:

"We...find persuasive the arguments of the co-Chief Prosecutors regarding the inherent gender bias underlying the Peace Treaties. We note that women...did not have an equal voice or equal status to men at the time of the conclusion of the Peace Treaties, with the direct consequence that the issues of military sexual slavery and rape were left unaddressed at that time and formed no part of the background to the negotiations and ultimate resolution of the Peace Treaties. The Tribunal considers that such gender blindness in international peace process contributes to the continuing culture of impunity for crimes perpetrated against women in armed conflict."

As a Japanese scholar, Abe kohki commented, the victims of sexual violence in Asia were "the ultimate stranger" in international law, who were most marginalized in this law as a system serving for political values such as western-centrism, male-domination and ruling-elitism. The unprecedented, radical findings of the Women's War Crimes Tribunal are powerful statements of feminist criticism directed to the extreme of gender bias in international law. Although it is a tribunal devoid of any enforcement, this judgment is to be evaluated as a historic step of the international community in the light of a gender perspective.

Finally, a feminist approach in international law is not to question or deny the basic character or *raison-d'être* of the legal framework of international law, and it would be wrong and self-contradictory if it is to be taken that way. A feminist approach might give an impression that international law is totally contaminated with gender discrimination, but in truth, norms such as human rights law for the elimination of gender discrimination often include contents much more advanced than domestic law of many States. International law can work for the better protection of women's rights and interests by requiring States to amend domestic law and practice. A feminist approach does not overlook such important function of international law but rather attempts to develop it in a constructive manner by rectifying its male-centered construction, thereby aiming at materializing the basis of real universality and legitimacy of international law. In that sense, a feminist approach could make precious contribution for

years to come, as a critical perspective which fortify the universality and legitimacy of international law in terms of gender.