

International law and human rights

Book or Report Section

Accepted Version

Honkala, N. (2018) International law and human rights. In: Auchmuty, R. (ed.) Great Debates in Gender and Law. Red Globe Press, pp. 83-94. ISBN 9781137610997 Available at <https://centaur.reading.ac.uk/91828/>

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Publisher: Red Globe Press

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Gender, International Law and Human Rights

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Introduction

The scope of international law has grown significantly and it now covers areas as diverse as the regulation of space, international trade, the environment, laws of war and international human rights, to name a few. The mainstream view is that international law concerns the rules and obligations of states. Broadly, this means that substantive international law applies to states, which have legal personality and thus legal standing. As such, statehood is fundamental to how one understands and uses international law. This is not to say that the concept of the state is without contention. It is merely to suggest the traditional assumption that is presupposed when speaking of the 'context' of international law. This traditional view is stated within the jurisprudence of the International Court of Justice in a seminal case from 1927 commonly known as the '*Lotus*' case:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.¹

Although states are no longer the exclusive subjects of the international system where other entities such as international organisations and, to a more limited extent, individuals are now recognised as having some measure of legal personality, states remain the primary subjects of international law. In light of this mainstream view, what might be the role and significance of gender?

Feminist interventions into international law have been relatively recent, really only starting with the publication of Charlesworth, Chinkin and Wright's ground-breaking '*Feminist Approaches to International Law*' in 1991.² A diverse range of topics has since been debated, and the two debates discussed here are inspired by scholars challenging international law from an appreciation of gender and the international legal order. The first debate concerns the question of whether the traditional structures of international law are themselves gendered. The second focuses on one area of international law, human rights, that has been said to pose challenges to state sovereignty. Human rights is an area of international law in which the role of the individual has been significantly strengthened. A number of international treaties enable the individual to bring a claim against a state for their human rights violations, either through international or regional mechanisms. How a state treats people within their jurisdiction may no longer therefore be said to be solely its own business. Given such central concepts as equality and non-discrimination, many have viewed human rights as a conducive space to challenge gendered inequalities, while others maintain scepticism about the usefulness of this arena.

Debate 1: Is international Society Gendered?

(a) Gender and the Institutional Character of International Society

¹ *S S Lotus* (1927) (Judgement) Series A No.9 Permanent Court of International Justice, p.18, at note 11.

² Hilary Charlesworth, Christine Chinkin and Shelley Wright '*Feminist Approaches to International Law* (1991) 85 *American Journal of International Law* 613.

Women remain unrepresented or underrepresented in national and global decision-making processes. Very few states have female heads of state, equal representation in parliaments or large numbers of female diplomats. According to the UN, there are currently ten women serving as heads of states and only 22.8 percent of all national parliamentarians are women.³ States, feminists claim, are patriarchal structures as they not only exclude women from elite positions and decision-making roles but also because 'they are based on the concentration of power in, and control by, an elite as well as the domestic legitimization of a monopoly over the use of force to maintain that control'.⁴ Radical feminists such as Catharine MacKinnon view the state as male and law as instrumental in institutionalising the power of men over women, as well as institutionalizing power in its male form.⁵

Some legal scholars such as Fernando Tesón have argued that although women may be 'statistically underrepresented', this is not necessarily unjust.⁶ For Tesón, this underrepresentation is only an injustice in situations where the state is preventing women from exercising their right to political participation.⁷ He describes an example of this kind of injustice when a state discriminates against women in its processes for admission to the diplomatic services.⁸ Feminist scholars have pointed out the hollowness of this type of formal equality argument as it fails to engage with the many economic, social and cultural barriers that women continue to face around the world. For example, the nature of foreign service deployment, including long-term posts around the world, may have different implications for men and women. Historically it has been the diplomats' wives who have with their unpaid work contributed to the sustaining of an atmosphere conducive to diplomacy.⁹ Such an integral part were these 'wifely duties' to the service of his government that it was not until 1972 that American diplomats' wives stopped being assessed in their husbands' efficiency reports.¹⁰ Nor was it until 1972 that British and American married women could serve as diplomats. From a feminist perspective, Tesón's limited formal equality argument is not enough, as it can only offer equality when women and men are in the same position.¹¹ It does not address the underlying causes of the inequalities because it assumes a world where people are autonomous individuals making free choices starting a "race" from the same position.¹² As Nicola Lacey points out, the position is inadequate to analyse a world in which the distribution of goods and opportunities are structured along gender lines.¹³

³ UN Women *Facts and Figures: Leadership and Political Participation*, available at <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures> accessed 15.2.2017.

⁴ Charlesworth, Chinkin and Wright 'Feminist Approaches', 622.

⁵ Catharine A. MacKinnon *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 238.

⁶ Fernando Tesón 'Feminism and International Law: A Reply' (1993) 33 *Virginia Journal of International Law* 647, 651.

⁷ Tesón 'Feminism', 652.

⁸ *Ibid*, 652.

⁹ Martin Griffiths *et al. Fifty Key Thinkers in International Relations* (Abingdon: Routledge, 2009), 404.

¹⁰ Cynthia H. Enloe *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (London: University of California Press, 2000), 107.

¹¹ Hilary Charlesworth 'Feminist Critiques of International Law and Their Critics' (1994) *Third World Legal Studies* 1, 8.

¹² Nicola Lacey 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411, 415.

¹³ Lacey 'Legislation', 415.

The structures of international organisations continue to reflect those of the states,¹⁴ the United Nations being no exception. Negative correlation between level and representation of women persists, or in other words, the higher the position, the less representation of women.¹⁵ Even in the human rights bodies, women remain largely underrepresented.

Two practical examples can be used to explore the gender implications of international institutions and their mechanisms; the International Court of Justice (ICJ) and the Security Council. The example of the ICJ is significant as it has a 'special function in creation and progressive development of international law'.¹⁶ Before the appointments in 2010 of two women judges, there had only been one woman judge in the history of the ICJ.¹⁷ This underrepresentation is relevant for two reasons. First, there is an inherent problem with women being excluded from decision-making processes that have an influence on their daily lives. Second, the long-term domination of institutions or bodies of political power has resulted in the view that issues traditionally of concern to men are viewed as general human concern,¹⁸ while those which are considered 'women's concerns' are relegated to a special and limited category at the margins.¹⁹ Before so-called gender mainstreaming in the UN for instance, 'women's issues' were dealt with in one sector only – namely, the United Nations Development Fund for Women (UNIFEM). Nowadays, the UN pursues a 'dual track' approach that includes women inside mainstream institutions, as well as maintaining women-specific institutions and programmes.²⁰ Whether gender mainstreaming has been successful, however, has been a subject of debate.²¹

What about the institutional character of the international body that is considered to be the most powerful; the Security Council? Because so few women have served throughout the history of the Security Council, feminists have argued that women's voices have been virtually excluded from the major international political and security decisions.²² This is despite the fact that, as Ann Tickner comments, women have a strong history of organising around issues of war and peace.²³ It was not until 2000 that the Security Council formally acknowledged the necessity of women's participation to achieving and sustaining peace. In 2000, the Security Council in its Resolution 1325 'reaffirmed the important role of women in the resolution and prevention of conflicts' and stressed the importance of equal

¹⁴ Charlesworth, Chinkin and Wright 'Feminist Approaches', 622.

¹⁵ Although the P1 and P2 levels exceeded the goal of equal representation, the representation of women continued to correlate negatively with level of seniority; with every increase in grade, the representation of women decreased. UN General Assembly: 'Improvement in the Status of Women in the United Nations System: Report of the Secretary-General', 69th session, A/69/346, para 9.

¹⁶ Charlesworth, Chinkin and Wright 'Feminist Approaches', 623.

¹⁷ There are currently three women judges at the ICJ; Joan Donoghue, Julia Sebutinde and Xue Hanqin, see <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> accessed 8.11.2016.

¹⁸ Charlesworth, Chinkin and Wright 'Feminist Approaches', 625.

¹⁹ Ibid.

²⁰ Alice Edwards *Violence Against Women Under International Human Rights Law* (Cambridge: Cambridge University Press, 2011), 49.

²¹ See eg. Dianne Otto 'Holding Up Half the Sky, But For Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7, Laura Reanda 'Engendering the United Nations: The Changing International Agenda' (1999) 6 *European Journal of Women's Studies* 49.

²² J. Ann Tickner *Gendering World Politics: Issues and Approaches in the Post-Cold War Era* (New York, Columbia University Press, 2001), 111.

²³ Ibid.

participation and 'full involvement in all efforts for the maintenance and promotion of peace and security'.²⁴ It was the first Security Council Resolution that addressed the disproportionate effect of armed conflict on women. Together with a number of other resolutions, it forms part of the Security Council's women, peace and security agenda. Although currently six of the 15 Security Council members are women, according to the UN, out of the 504 agreements signed since the resolution, only 27 % included references to women.²⁵ Of course, merely including references to women in agreements does not equal empowerment of women in the processes. Indeed, between 1992 and 2011, 4 % of the signatories of peace agreements and less than 10% of negotiators of peace agreements were women.²⁶ Beyond merely calling for equal representation in decision-making processes, activists and scholars have called for a more substantial engagement with feminist critiques. For instance, Gina Heathcote argues that a feminist reappraisal of women's participation needs to integrate recognition and understanding of the intersection between race and gender.²⁷ She has also stressed the importance of critiquing the ways in which military force has remained embedded in the women, peace and security agenda and has come to be framed as a solution to systematic sexual violence.²⁸ Feminist scholarship, instead, has highlighted the need to examine social and cultural causes of violence against women and to focus on preventative strategies, together with re-imagining the basic norms and values that shape international law.²⁹ These types of strategies challenge the normative character of international law.

(b) Feminist Engagements with the Normative Character of international law

The institutional image discussed above is a practical one. In contrast, the idea that the international society possesses a normative character is by and large a matter for theory. While it is not possible to do justice to the diversity of feminist engagements with the normative structure of international law in such a short space, a few preliminary points can be made with a view to encourage further engagement with the scholarship in this regard. It is worthwhile to remember that the integration of practice and theory is an important feature of feminist enquiry and that the feminist project in international law is both normative and political.

Feminists critique the assumption that international norms directed at individuals within states are universally applicable and neutral, and argue that such principles affect women and men (and other groups) differently. As a consequence, uncritical acceptance of those principles can silence or discount women's experiences of them. Uncovering the silences within a discipline is a familiar feminist method that questions the objectivity of a discipline, as well as the ways in which law distinguishes certain issues as irrelevant or of little significance.³⁰ In a Symposium on 'Method in International Law', where several approaches to international law were represented by eminent jurists, Charlesworth noted

²⁴ United Nations Security Council Resolution 1325, UN Doc. S/RES/1325 (2000), preamble.

²⁵ UN Women *Facts and Figures: Peace and Security- At the Peace Table*, available at <http://www.unwomen.org/en/what-we-do/peace-and-security/facts-and-figures> accessed 3.2.2017.

²⁶ UN Women *Facts and Figures*.

²⁷ Gina Heathcote 'Feminist Perspectives on the Law on the Use of Force' in Mark Weller (ed.) *Oxford Handbook of the Use of Force in International Law (Oxford Public International Law (Oxford: Oxford University Press, 2015)*, 114- 128, 121.

²⁸ Heathcote 'Feminist Perspectives', 128.

²⁹ *Ibid*, 127-128.

³⁰ Hilary Charlesworth 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 380, 381.

that none of them had displayed any concern with gender, or with the position of women, as an international issue.³¹ Feminists have also claimed that not only does the silence of women exist throughout international law, it is an integral part of the structure of the international legal order and a critical element in maintaining its stability.³² This matter has been recognised by critical legal scholarship more generally. Martti Koskenniemi has argued that the international legal concept of statehood has existed to privilege some voices at the expense of others.³³ In this light, there is much to agree with Charlesworth's suggestion that women form the largest group whose interests remain stifled by the structure of the state and its sovereignty.³⁴

Using feminist legal theory to inform the challenging of structures that favour the priorities of small number of elite men (and women) in positions of power at the expense of addressing pervasive economic, social and political inequalities offers potential for the progressive development of international law. Feminists engaging with international law have sought to deconstruct international law norms to expose their structural biases and to question the value systems that underlie the privileging and prioritizing of certain issues over others. Questioning how power operates through the structures and values of the international legal order has therefore been central to feminist enquiry. In line with the political project, feminists have also sought ways in which to reconstruct international law and to transform its practice as well as its normative structures for progressive ends.

Some scholars, such as Karen Knop, see opportunities for women in rejecting the centrality of the state, for instance through non-state groups and networks that make up international civil society in order to influence the development, interpretation and implementation of international law by states.³⁵ Women's interests and concerns are not defined by state borders, but are rather shaped by gender, sexual orientation, culture and other factors.³⁶ For many, the most successful strategies remain attuned to and grounded in local grassroots feminist activism that reflect the specificity and diversity of women's lived experiences and concerns. Others stress the need to focus on the gendered impact of globalisation and to develop global feminist alliances, or in the words of Chandra Mohanty to build 'transnational feminist solidarity'.³⁷ Readers interested to explore how this might look in practice may wish to refer to a collection on 'New Directions in Feminism and Human Rights'.³⁸

For those seeking to challenge the patriarchal structures of international law, the dilemma of how to best engage with international law remains a significant one. Feminists have both been wary of the consequences of working within the mainstream structures and thereby reproducing unequal power relations as well as the potential risk of remaining in the

³¹ Charlesworth 'Feminist Methods', 392.

³² Ibid, 381.

³³ Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 558.

³⁴ Hilary Charlesworth 'Alienating Oscar? Feminist Analysis of International Law' in Dorinda G. Dallmeyer (ed.) *Reconceiving Reality: Women and International Law* (Washington: The American Society of International Law, 1993), 1-18, 8.

³⁵ Karen Knop 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law & Contemporary Problems* 293, 308.

³⁶ Knop 'Re/Statements', 309.

³⁷ Chandra Mohanty *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Durham and London: Duke University Press, 2004).

³⁸ Dana Collins, Sylvanna Falcon, Sharmila Lodhia and Molly Talcott 'New Directions in Feminist and Human Rights' (2010) 12 (3-4) *International Feminist Journal of Politics* 298.

margins associated with rejecting those structures and working outside their boundaries. Some of these contestations can be viewed through the lens of feminist engagement with human rights law, discussed in the following section.

Debate 2: Can International Human Rights Tackle Gender Inequality?

(a) Challenges to Rights

Some feminists do not view rights as the appropriate strategy to challenge gendered inequalities. A frequent criticism of rights discourse within national contexts has been that formal guarantees of equality through rights do not necessarily bring with them substantive equality.³⁹ Carol Smart has illustrated this through the example of the right to abortion: 'the law may concede a right but if the State refuses to fund abortions...it is an empty right'.⁴⁰ In the international human rights arena, formally all human rights are declared "universal, indivisible, interdependent and interrelated".⁴¹ That being said, this point of view about human rights masks a "deep and enduring disagreement" over the status of economic, social and cultural rights.⁴² In general, traditional civil and political rights have received far greater attention with disproportionate consequences for women, as many of the violations of human rights suffered by women are bound up with inequalities in the economic and social spheres. Normative hierarchies and political decisions inherent in reservations to international treaties are evident when comparing the reservations between CEDAW and CERD.⁴³ This is also clear from practice and international jurisprudence. For instance, in 1970 in the *Namibia Advisory Opinion*⁴⁴, the ICJ stated explicitly that South African government's practice of apartheid amounted to a flagrant violation of the purposes and principles of the Charter of the United Nations. No such cases exist with regards to discrimination based on sex/gender.

Another criticism of the usefulness of rights entails concerns over the proliferation of competing rights, such as children's rights and men's rights, which may produce counterclaims to women's rights.⁴⁵ There is nothing inherent in the rights analysis to provide guidance on how tensions between different persons' invocation of their competing rights claims can be resolved without resort to a utilitarian calculus.⁴⁶ Similarly, rights claims can also be bound up with competing interests. While the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is one of the most ratified human

³⁹ Susan Millns 'Bringing Rights Home: Feminism and the Human Rights Act' in Susan Millns and Noel Whitty (eds.) *Feminist Perspectives on Public Law* (London: Cavendish Publishing Limited, 1999), 181-209, 187.

⁴⁰ Carol Smart *Feminism and the Power of Law* (London: Routledge, 1989), 143-144.

⁴¹ Vienna Declaration and Programme of Action (1993), UN Doc. A/CONF/157/23.

⁴² Philip Alston and Ryan Goodman *International Human Rights* (Oxford: Oxford University Press, 2012), 277.

⁴³ You can explore the current numbers and nature of reservations to treaties by using the United Nations Treaty Collection database, available at <https://treaties.un.org/>.

⁴⁴ *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, at 45.

⁴⁵ Elizabeth Kingdom 'Legal Recognition of a Woman's Right to Choose' in Julia Brophy and Carol Smart (eds.) *Women in Law: Explorations in Law, Family and Sexuality* (London: Routledge, 1985), 143- 161.

⁴⁶ Munro *Law and Politics*, 77.

rights conventions,⁴⁷ there remain extensive reservations to this treaty. Extensive criticism has been voiced with regard to these reservations being contrary to the aim of the treaty; to eradicate discrimination against women in all its forms.⁴⁸

Some states have based their objections to CEDAW provisions on conflicting principles or rules in a religion or a culture.⁴⁹ Even though the CEDAW Committee has since its inception consistently stressed that using national, traditional, cultural or religious reasons as excuses for violations of women's rights is not acceptable.⁵⁰ The Committee has insisted that some of these reservations are 'incompatible' with the object and purpose of the Convention and should be reviewed, modified or withdrawn.⁵¹ The Committee, however, has no power to do more than to condemn the reservations and encourage their removal. Yet reservations are said to exemplify some of the major obstacles for effective application of CEDAW as a whole.⁵²

While noting that some of the uses of culture can be "profoundly conservatizing", Dianne Otto has critiqued some of the references to culture as the source of stereotyped gender attitudes and 'custom' as the basis for discrimination.⁵³ She notes that these are sometimes read by Western feminists to justify efforts to abolish non-Western cultural practices, rather than questioning the specific politics of culture⁵⁴. Otto warns that this contributes to neocolonial narratives of women as powerless victims of their tradition, a central concern raised by postcolonial feminist scholars such as Chandra Mohanty, Ratna Kapur and Sherene Razack.⁵⁵ Arati Rao has stressed the importance of asking whose culture is being invoked and who are its primary beneficiaries when evaluating claims based on culture. In this way, she suggests that by placing the very nature of culture in its historical context and investigating the status of the interpreter, we can better understand 'the ease with which women become instrumentalised in larger battles for political, economic,

⁴⁷ CEDAW, currently 189 State parties, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=en accessed 8.11.2016.

⁴⁸ Article 28 (2) provides that "a reservation incompatible with the object and purpose of the present convention shall not be permitted", CEDAW (1979). For a critique on the number of reservations as well as their derogative nature see for eg. See for Marsha Freeman, Christine Chinkin and Beate Rudolf *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OPU, 2012), Belinda Clark 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 (2) *The American Journal of International Law* 181.

⁴⁹ See for eg. reservations to Article 16- equality in marriage.

⁵⁰ UN 'Reservations to CEDAW'.

⁵¹ UN 'Reservations to CEDAW'.

⁵² Janusz Symonides *Human Rights: Concepts and Standards* (Aldershot: Dartmouth and Ashgate Publishing, 2000), 238.

⁵³ Dianne Otto 'Lost in Translation- Re-scripting The Sexed Subjects of International Human Rights Law' in Anne Orford (ed.) *International Law and Its Others* (Cambridge: Cambridge University Press, 2006), 318-356, 343.

⁵⁴ *Ibid*, 343.

⁵⁵ *Ibid*, 343, See also Chandra Mohanty 'Under Western Eyes: Feminist Scholarship and Colonial Discourse' (1988) 30 *Feminist Review* 64, Ratna Kapur 'The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1-37, Sherene Razack *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: Toronto University Press, 2008).

military and discursive battles in the international arena'.⁵⁶ All in all, as Deborah Rhode has argued, rights discourse presents a challenge for women because a rights analysis of itself is incapable of resolving complex social issues, which require structural changes in society.⁵⁷

Feminists have also argued that universal human attributes posited in liberal political theory which has shaped human rights discourse are examples of false universalisation from a particular, dominant male standpoint.⁵⁸ While many activists, scholars and policy-makers have contested the masculinist underpinnings of human rights law in order to seek the emancipatory potential of human rights, others have argued that some feminist interventions have played into reproducing other hierarchies.⁵⁹ In response to this, Otto suggests building feminist and queer coalitions that would challenge the dichotomy between male and female and its associated asymmetry and adopt an understanding of gender as performative.⁶⁰

There is, of course, an important political dimension added to the question of who is using rights discourse and within which paradigm. Women's rights can be at risk of being co-opted by agendas that do not advance women's rights.⁶¹ For instance, the rhetoric of advancement of women's rights in Afghanistan during the 2001 intervention illustrates this risk. Gender was used in this context to invoke images of "saving the uneducated, corporally punished, burqa-clad women"⁶² in connection with and as a justification for the deployment of military force. This echoes Orford's warnings of the difficulties with feminist engagements with international law's "civilising mission", in which feminists could only contribute by seeking to protect the weak through the rule of law.⁶³ She cautions against international law's understandings of women principally as victims of conflict, rather than as contributors or active participants.⁶⁴

(b) Possibilities of Rights

Although feminist critiques of liberal rights have pointed to the various problems and challenges of rights discourse, many scholars have argued for the potential of human rights discourse for challenging gendered inequalities. Two interconnected arguments can be outlined here.

⁵⁶ Arati Rao 'The Politics of Gender and Culture in International Human Rights Discourse' in Julie Peters and Andrea Wolper (ed.) *Women's Rights Human Rights* (London: Routledge, 1995), 167- 175, 174.

⁵⁷ Deborah Rhode 'Feminist Perspectives on Legal Ideology' in Mitchell, J. and Oakley, A.(eds.): *What is feminism?* (Oxford: Blackwell, 1986).

⁵⁸ Niamh Reilly 'Cosmopolitan Feminism and Human Rights' (2007) 22 (4) *Hypatia* 180, 183.

⁵⁹ Otto 'Lost in Translation'.

⁶⁰ Dianne Otto 'Queering Gender [Identity] in International Law' (2015) 33 (4) *Nordic Journal of Human Rights* 299.

⁶¹ For a critique of the co-option of LGBTQ rights for Western imperialist and racist projects, see Jasbir Puar: *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007).

⁶² Karen Engle 'Liberal Internationalisms, Feminism and the Suppression of Critique: Contemporary Approaches to Global Order in the United States' (2005) 46 (2) *Harvard International Law Journal* 427, 439.

⁶³ Anne Orford 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275, 278.

⁶⁴ *Ibid*, 282.

First, some view rights interpretations as open to feminist theorizing due to their potential flexibility. Jennifer Nedelsky points out that, as rights define and structure the relationship of power, the task is to foster interpretations that promote relations of equality.⁶⁵ Stephanie Palmer sees the potential in international human rights law as an opportunity to introduce perspectives and experiences into the courts that have been consistently excluded or marginalised in national contexts.⁶⁶ In this view, feminist insights can be brought into law through rights.⁶⁷ Similarly, MacKinnon has argued that international law can provide new grounds for theory and action, where national struggles might have failed.⁶⁸

Second, some feminists see the potential in rights to be effective in connecting together the political demands for progressive change.⁶⁹ Because women are in a disadvantaged position in societies in a range of ways, rights discourse offers a recognised vocabulary in which to frame political and social wrongs.⁷⁰ A traditional approach to human rights views them as a framework of basic values and conceptions of a 'good society'.⁷¹ This is exemplified by Richard Bilder's comment that 'to assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy'.⁷² Some feminist international law scholars recognise this symbolic power inherent in claims based on international law and argue that it can carry considerable political force.⁷³ Charlesworth and Chinkin argue that the discourse of rights is especially powerful as it is the 'dominant progressive moral philosophy', which presents itself as a persuasive social movement that operates at a global level.⁷⁴ They contend that political power of a rights-oriented framework cannot be ignored or discarded as irrelevant.⁷⁵ However, they also note the importance of engaging with and contesting its parameters in order to employ it usefully for women.⁷⁶ Speaking in the US context, Patricia Williams has described the talk of rights as 'the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power'.⁷⁷ For Williams, 'the problem of rights is not that the discourse is itself constricting but that it exists in a constricted referential universe'.⁷⁸

Conclusion

⁶⁵ Jennifer Nedelsky 'The Practical Possibilities of Feminist Theory' (1993) 87 *Northwestern University Law Review* 1286, 1290.

⁶⁶ Stephanie Palmer: "Feminism and the Promise of Human Rights: Possibilities and Paradoxes" in Susan James and Stephanie Palmer (eds.) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford: Hart Publishing, 2002), 91- 115, 97

⁶⁷ *Ibid*, 97.

⁶⁸ Catharine MacKinnon 'Disputing Male Sovereignty: On United States v Morrison' (2002) 114 *Harvard Law Review* 135, 177.

⁶⁹ Palmer 'Feminism', 97.

⁷⁰ Hilary Charlesworth 'What Are 'Women's International Human Rights'?' in Rebecca Cook (ed.): *Human Rights of Women* (Philadelphia, University of Pennsylvania Press, 1994), 58- 84, 61.

⁷¹ *Ibid*, 61.

⁷² Richard Bilder: "Rethinking International Human Rights Law: Some Basic Questions" (1969) *Wisconsin Law Review* 171, 174.

⁷³ Charlesworth 'Feminist Methods', 393.

⁷⁴ Charlesworth and Chinkin *The Boundaries of International Law*, 212.

⁷⁵ Palmer 'Feminism', 97.

⁷⁶ Charlesworth and Chinkin: *The Boundaries of International Law*, 212.

⁷⁷ Patricia Williams 'Alchemical Notes: Reconstructing Ideals From Deconstructed Rights' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401, 431.

⁷⁸ Patricia Williams *The Alchemy of Race and Rights* (Cambridge: Cambridge University Press, 1991), 159.

While it can be said that gender issues are now firmly on the international agenda, debate remains about the success of this perceived visibility. For instance, gender mainstreaming, while increasing women's participation in the institutional arena, has been criticised for not fundamentally challenging the structural biases of international institutions or international law. Similarly, international human rights law poses both challenges and possibilities for feminist activists and scholars and contestations between how best to advance feminist goals remain a subject of intense debate. While some feminists do not see rights as the appropriate strategy for tackling gender inequality, others argue for the transformative potential in engaging with rights discourse, alongside other social, economic and political strategies. It is clear that scholarship that engages with gender and international law today is rich and diverse. In a world where women continue to be more deeply affected by such complex issues as poverty and intersectional inequalities, globalisation and climate change, for those committed to gender justice finding ways in which to engage with international law for progressive ends remains a necessary struggle.

Further Reading

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