

The Women Question in International Law

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Feminist analysis in international law began to emerge two decades ago. It has taken many different forms and is now a lively feature of international legal debate. But has it had any effect? And is it worth pursuing? In this short article, I will argue that feminists have been successful in bringing the language of women's empowerment into international law but less adept at identifying methods to give this language life on the ground.

One major strand in feminist scholarship has been concerned with the involvement of women in the development of international law, documenting the absence and exclusion of women from law-making fora. International institutions have been ready targets for this criticism. Examples of this type of criticism in the area of human rights include the absence of women in the processes of defining human rights standards and in implementing them.¹ The unequal representation of women in most of the institutions of the United Nations (UN) human rights system is a human rights issue in itself, contravening the obligation to ensure that women have the opportunity to participate in the work of international organizations “on equal terms with men and without discrimination”.²

The lack of women is also connected to the lopsided concerns of the traditional human rights canon which sidesteps issues that have a particular significance for women.³ For example, the issues of illiteracy, development, and sexual violence are dealt with in “soft” law instruments but are not addressed by legally binding norms. Moreover, international law focuses on states as primary violators of human rights.

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1. In 2009, out of the eight UN human rights treaty bodies with a total of 125 members, 51 are women (41%). However, 29 of the 51 women members are concentrated in two committees, the Committee on the Elimination of Discrimination Against Women (20 out of 22 members) and the Committee on the Rights of the Child (9 out of 18 members). The Committee on the Rights of the Child is the only committee to have equal numbers of women and men. The Committee for the Elimination of Racial Discrimination, by contrast, has 1 woman member out of 17.
2. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Res. 34/180, UN Doc. A/34/46 (entered into force 3 September 1981) [CEDAW], art. 8.
3. In the context of the 1950 European Convention on Human Rights, see Marie-Bénédicte DEMBOUR, *Who Believes in Human Rights?* (Cambridge: Cambridge University Press, 2006) at 188–231.

Much more significant are the activities of non-state actors, such as international monetary institutions, which can impose social and economic conditions on their loans that adversely affect women's lives.

A second significant strand of feminist scholarship has focused on the role that gender plays in the formation of international law. It has studied the language and imagery of the law and their dependence on gendered categories. International law lays claim to rationality, objectiveness, and abstraction, characteristics traditionally associated with Western masculinity, and it is defined in contrast to emotion, subjectivity, and contextualized thinking. Its claimed universality disguises its gendered character. Examples of this type of critique include the limited nature of the international legal understanding of equality and non-discrimination, which promise equality only on male-defined terms. They require that women be treated in the same way as a similarly situated man, without recognizing the effects of structural discrimination against women. Moreover, women's rights are presented solely as an issue of non-discrimination with respect to men. But the fundamental problem for women is not simply discriminatory treatment compared with men. Women are in an inferior position because they lack real economic, social, or political power in both the public and private worlds.

Despite the limitations of international law identified in feminist analyses, international law has been constantly invoked in feminist struggles as a source of transformation and empowerment. This has created a certain tension within feminist international legal scholarship, and sometimes a deeply fractured politics.⁴

Feminist international legal writings often draw on a range of theoretical positions that can sit uneasily together; for example the idea that women have distinctive attitudes, interests, and experiences may be combined with an argument that a reconstructed international law can deliver a truly impartial form of justice. This has led to charges of theoretical incoherence or impurity. Thus, Nathaniel Berman has pointed out that feminist international lawyers critique the doctrines and structure of international law and yet also rely on the expansionist spirit of *après-guerre* internationalism to campaign for improvements in women's lives.⁵

Such a critique illustrates Elizabeth Grosz's observation that feminist theories rest on a deep tension between their role analysing the thoroughgoing masculinity of disciplinary knowledge and their role as a response to political feminist goals; they often incur the wrath of the traditional academy because of their overtly political ends; and the ire of feminist activists because they can become immersed in the male-dominated world of theory.⁶

4. The differences between Catharine MACKINNON, *Are Women Human? And Other International Dialogues* (Cambridge: Harvard University Press, 2006) and Janet HALLEY, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006) are examples of this. See also Marysia ZALEWSKI, "Do We Understand Each Other Yet? Troubling Feminist Encounters With(in) International Relations" (2007) 9 *British Journal of Politics and International Relations* 302, which describes a parallel debate within feminist international relations.

5. Nathaniel BERMAN, "Power and Irony, or, International Law after the *Après-Guerre*" in Emmanuelle JOUANNET, Hélène RUIZ FABRI, and Jean-Marc SOREL, eds., *Regards d'une génération de juristes sur le Droit International* (Paris: Editions Pedone, 2008) at 79.

6. Elizabeth GROSZ, "A Note on Essentialism and Difference" in Sneja GUNEW, ed., *Feminist Knowledge: Critique and Construct* (London and New York: Routledge, 1990) at 332.

Because of the significant scholarly literature in this area over the last two decades, some feminist ideas have now been absorbed into the rhetoric of international law and its institutions. International women's groups have taken up feminist critiques of the international legal order. In many areas, however, progress has been limited. Feminist issues have been either corralled in the margins or rendered so bland that they have no transformative bite.

Feminist ideas have fared little better within the academy. Feminist international legal scholarship typically presents itself as in conversation with the mainstream of international law. We ask the mainstream to consider women's lives when applying or developing the law; we critique the assumptions of international legal principles; and we argue for an expanded referential universe. This conversation is, however, almost completely one-sided; a monologue rather than a dialogue. It is very hard to find any response from the mainstream to feminist questions and critiques; feminist scholarship is an optional extra, a decorative frill on the edge of the discipline.

Some critical and progressive scholars use the occasional footnote to feminist scholarship to signal that they have kept up with their reading, but feminist ideas are almost never treated seriously; they are not acknowledged, debated, or refuted. Similarly, international law casebooks often include a paragraph or two from a feminist article in the "overview" or "theory" section to show that they have broad-minded authors, but feminist critiques usually appear as token offerings as they are not carried through to all areas of inquiry. In short, feminist theories form a scholarly ghetto in international legal scholarship.

Although feminist international lawyers are often grouped under the umbrella of "New Approaches to International Law", feminist ideas are in some tension with those of critical theorists. For example, David Kennedy's work has excavated the dark sides of international law. He understands the law as a method of ducking responsibility for ethical and political choices.⁷ On this account, international law is worth studying for its contradictions and obfuscations but it can deliver only illusory benefits. Feminists, by contrast, embrace normative projects—in particular achieving equality for women—with alacrity. Feminist lawyers tend generally to assume that the right sort of international law will achieve women's equality, or at least get them part of the way.

It is striking that most of the debate and engagement with feminist ideas in international law comes from other feminists. So, while the rest of the discipline ignores us, feminists have created a veritable industry of internal critique, pointing to the problematic assumptions and approaches of other feminists.

Examples of such critiques include those of Third World and post-modern feminists. Take Ratna Kapur's scrutiny of what she terms the "victimization" rhetoric used by the international human rights movement when discussing the situation of Third World women, particularly in relation to violence and trafficking. Kapur argues that the assumption of a common international women's victimhood operates to keep women in their place by presenting them as both vulnerable and ignorant.⁸ She criticizes a focus on

7. See, e.g., David KENNEDY, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004); and David KENNEDY, *Of War and Law* (Princeton: Princeton University Press, 2006).

sex as the locus of women's oppression and urges a more complex understanding of women's lives through considering factors such as race, wealth, class, and religion.

Karen Engle has examined one of the apparent success stories of international feminist activism, the criminalization of rape in the International Criminal Tribunal for the Former Yugoslavia.⁹ She suggests that this strategy is built on a view of women as passive victims of sexual violence, and that it presents a one-dimensional view of the suffering of women in the conflict in Bosnia–Herzegovina. Engle contends that the strategy of prosecution has had the practical effect of reifying ethnic differences and the legal and moral effect of denying the possibility of sexual agency in times of conflict. She is sceptical of the utility of any claims made in the name of feminism and implies that change will depend on economic reforms such as redistribution of wealth.¹⁰

Another “internal” critique of feminist work in international law is presented by Janet Halley who claims that feminism “is running things” in “the European Union, the human rights establishment, even the World Bank”.¹¹ “Sex harassment, child sexual abuse, pornography, sexual violence, antiprostitution and antitrafficking regimes ... have moved off the street and into the state.”¹² Feminist activism directed at the ad hoc international criminal tribunals, she writes, has had a major effect on the development of international criminal law and, she concludes “[b]y positing themselves as *experts* on women, sexuality, motherhood, and so on, feminists walk the halls of power”.¹³ Halley accuses feminism of failing to recognize its own power and creating “male roadkill”. These are strong charges.

To some extent, the internal debates among feminists map onto a divide between scholars and activists. Academics seem much more willing to scrutinize the premises of feminist theory and to attack impurity and inconsistency; people working in NGOs or international institutions with feminist agendas, by contrast, are generally keen to work with a big picture, and associate feminism with getting more women involved in decisions, or using international law to help women.¹⁴ Using this rather crude distinction, we can see that, generally, academics are more concerned to identify the flaws and fault lines of feminist analyses of international law, while feminists in NGOs or international institutions tend to accept feminist agendas as self-evidently worthwhile.¹⁵

8. Ratna KAPUR, “The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/ Post-Colonial Feminist Legal Politics” (2002) 15 *Harvard Human Rights Law Journal* 1.

9. Karen ENGLE, “Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina” (2005) 99 *American Journal of International Law* 778.

10. Karen ENGLE, “International Human Rights and Feminisms: When Discourses Keep Meeting” in Doris BUSS and Ambreena MANJI, eds., *International Law: Modern Feminist Approaches* (Oxford and Portland: Hart Publishing, 2005) at 47.

11. Halley, *supra* note 4 at 20.

12. *Ibid.*

13. *Ibid.*, at 21. See also Janet HALLEY, “Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict” (2008) 9 *Melbourne Journal of International Law* 78.

14. See Hilary CHARLESWORTH, “Are Women Peaceful? Reflections on the Role of Women in Peace-Building” (2008) 16 *Feminist Legal Studies* 347.

15. *Ibid.*

I think that the situation is more complex than either the enthusiasts or critics of feminist analysis claim. It is clear that feminist concepts now have some respectability in the international arena. One example is the use of the language of women's rights and empowerment in the context of peacebuilding, most famously in Security Council Resolution 1325 in 2000. That resolution spoke of supporting women's capacity "to take their rightful and equal place at the decision-making table in questions of peace and security".¹⁶ Another, more problematic, example is the invocation of women's rights in the invasion of Afghanistan in 2001. Using military force to implement women's rights undermines feminist commitments to peace;¹⁷ moreover, the fate of women's rights in Afghanistan since the invasion suggests that the attention paid to them was superficial.¹⁸

On the other hand, the critiques overstate the power of feminist analysis: international feminist projects have had limited success in empowering women. Feminist commitments, such as the equality of women, have influenced the development of international law, but they have been incorporated only in a partial manner and implemented without regard to context or with empathy for their intended beneficiaries. Dianne Otto has pointed out that increased institutional acceptance of feminist vocabularies has been undermined by "selective engagement" with feminist ideas, the lack of systems of accountability, and the re-emergence of stereotypes of women.¹⁹ She argues that Resolution 1325 was adopted to shore up the "flagging legitimacy" of the Security Council and that it fails to deal with structural discrimination against women.²⁰

This underlines a distinction between feminist messages and feminist methods in international law. The former have been influential in rhetorical terms, while the latter have been ignored. Feminist messages, however, are likely to be productive only if they are deployed through feminist techniques such as "world travelling".²¹ This involves being explicit about our own historical and cultural background, trying

16. *Press Release from the Secretariat on the Secretary-General's Address to the Special Meeting of the Security Council Meeting on Women and Peace and Security*, UN Doc. SG/SM/7598 (2000).

17. See Karen ENGLE, "'Calling in the Troops': The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention" (2007) 20 *Harvard Human Rights Journal* 189. Compare the argument of Catharine MacKinnon in MacKinnon, *supra* n.4 at 271–2, that there is a direct parallel between the violence against the United States that took place on 11 September 2001 and global violence against women and that both forms of violence merit international intervention. She has asked:

What will it take for violence against women, this daily war, this terrorism against women as women that goes on every day worldwide, this everyday, group-based, systematic threat to and crime against the peace, to receive a response in the structure and practice of international law anything approximate to the level of focus and determination inspired by the September 11th attacks?

... Why, with all the violations of international law and repeated Security Council resolutions, was [Afghan women's] treatment alone not an act of war or a reason to intervene (including, yes, militarily) on any day up to September 10, 2001?

18. See, e.g., Statement by Afghan Women's Network, *Reaction from Afghan Women Civil Society Leaders to the Communique of the London Conference on Afghanistan* (29 January 2010), online: UNIFEM <http://www.unifem.org/news_events/story_detail.php?StoryID=1019>.

19. Dianne OTTO, "The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade" (2009) 10 *Melbourne Journal of International Law* 11 at 12.

20. *Ibid.*, at 21.

21. The term was introduced by Maria LUGONES in "Playfulness, 'World'-Traveling, and Loving Perception" (1987) 2 *Hypatia* 3.

to understand how other women might see us, and recognizing the complexities of the lives of other women.²²

Feminist methodologies suggest that prescriptions of women's equality must respond to the needs and desires of the women we think we are helping. Understanding these needs is not always easy and requires patience and empathy. So the challenge is not to take a break from feminism (in Halley's terms) but to devise practical and responsive feminist methods to support feminist political projects. The *Asian Journal of International Law* will be a valuable vehicle for these discussions.

22. Isabelle GUNNING, "Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries" (1991-92) 23 *Columbia Human Rights Law Review* 189 at 191.