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MULTICULTURALISM AND INTERNATIONAL LAW

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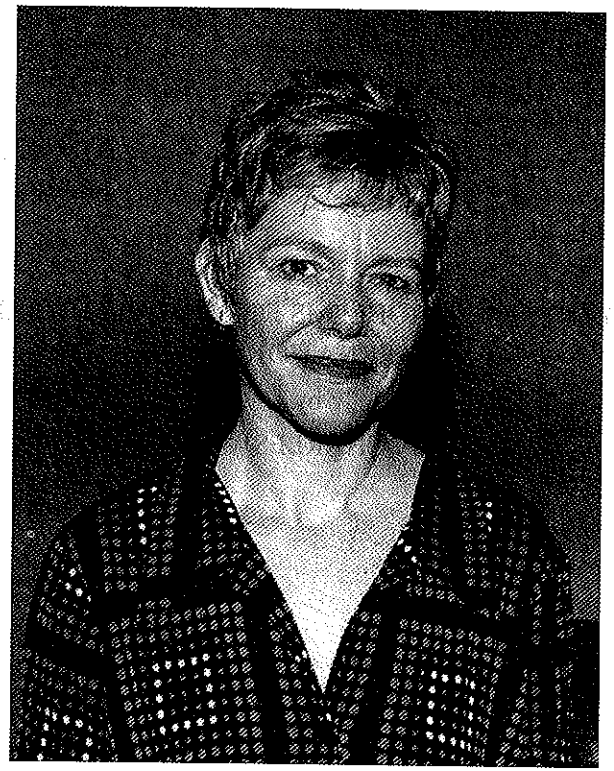
by
Hilary CHARLESWORTH



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1982-1985	*Doctor of Juridical Science, Harvard Law School*
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Professional qualifications

Barrister and Solicitor of the High Court of Australia and the Supreme Court of Victoria, 1981

Employment

1998-	*Professor and Director of the Centre for International and Public Law, Australian National University*
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1990-1992	*Senior Lecturer, Law School, University of Melbourne*
1987-1990	*Lecturer, Law School, University of Melbourne*
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Awards and Scholarships

2001	Certificate of Merit awarded by the American Society of International Law for 'preeminent contribution to creative scholarship' for The Boundaries of International Law (with CM Chinkin)
1998	Zonta (South Australia) Award for Outstanding Achievemet
1992	Francis Déak Prize, American Society of International Law (co-winner) (for best article published by younger authors in the American Journal of International Law in 1991)
1985	Australian Federation of University Women Fellowship
1982-1985	Fulbright Scholarship
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1983	Harvard Human Rights Fellowship
1978	Jessie Leggatt Scholarship in Comparative Law, University of Melbourne
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	Asia Society Award in Indian Studies
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1972	Italian Government Scholarship, Università per Stranieri, Perugia, Italy

Consultancies

Consultant, National Women's Consultative Committee (1987-88)
Consultant, Law Institute of Victoria's Family Law Specialisation Committee (1989-90)
Examiner in Chief, Law Institute of Victoria Family Law Specialisation Exam (October 1989)
Consultant, Law Institute of Victoria's Administrative Law Specialisation Committee (1988-89)
Consultant, Electoral and Administrative Review Council, Queensland (1992-3)
Consultant, NSW Legal Aid Office (1993)
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Consultant, Human Rights Education, Department of Foreign Affairs and Trade/Aus AID (1996-8)
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Member, Advisory Board, New Zealand Journal of Public International Law (2003-)
Co-Editor, Australian Year Book of International Law (1996-)
Member, Board of Editors of the American journal of International Law (1999-)
Member, Advisory Board, Australian Feminist Law Journal (1993-)
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Member, Advisory Board, Leiden Journal of International Law (2000-)
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Member, Advisory Board, Traffic (Postgraduate student journal, University of Melbourne) (2002-)

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PROSPECTS AND PROBLEMS FOR FEMINIST THEORIES IN INTERNATIONAL LAW

1. FEMINIST THEORIES

This lecture will discuss feminist theories and how they have been used in legal thought. It will cover a range of theories such as liberal, cultural, postmodern and third world feminisms and will discuss the strengths and weaknesses of these theories in relation to international law. The lecture will also deal with the distinct concepts of sex and gender.

The traditional story about law that I imbibed as a law student many moons ago was that law offered a system of reasoning about problems that was objective and impartial; it was somehow distinct from the biases of actual decision-makers. This is why law could be said to be different to politics. It was above the fray - purer and more rational than the grubby business of political deals.

Of course, in the area of international law, it's harder to separate law from politics. The resilience of the notion of state sovereignty in the international community has led to an understanding of international law as essentially a voluntary system of regulation. With some exceptions, the idea is that states may choose the principles of international law that they agree to be bound by (whether through treaties or customary international law). So in this sense, international law is a negotiable, rather political form of law.

But the actual principles and rules of international law are able to claim the authority of being quite distinct from politics. Whereas international politics is seen (by realists at least) to be governed by the rule of military or economic might, international law offers a moral discourse about justice and fairness. This is perhaps most obvious in the area of the international law of human rights but the same discourse informs many other areas also – such as the international law of the environment and the international law with respect to the use of force.

International law does not only claim to be impartial and objective, it also asserts universal applicability. In the current climate of foreboding and fear since September 11 and the war on terror, international law seems to have taken a back seat. The language of politics and national interest has pushed talk of legal principles far from the minds of governments everywhere.

While I don't want to undermine international law any further while it's being shuffled off the policy stage, I want to challenge the claim that international law offers a perfectly rational, detached and universal form of justice. I want to argue that international law has a gender, and that that gender is male. This means that its agenda tend to be a skewed and partial one.

I plan to first sketch the elements of this bold claim in general terms, and then I'll move to think about how these ideas might be used to understand the current war situation that preoccupies us all.

1. How does it make sense to say that international law has a gender?

I want to draw on three different types of arguments to sustain my assertion that international law has a hidden gender. These arguments build on different traditions in feminist theory.

The first type of question is simply 'where are the women in international law'? This investigation is one consistent with what is often termed 'liberal feminism'.

Liberal feminists typically accept the language and aims of the existing domestic legal order, couching many of their arguments in terms of individual rights. They insist that the law fulfil its promise of objective regulation upon which principled decision-making is based.

They work for reform of the law, dismantling legal barriers to women being treated like men in the public sphere, and criticise any legal recognition of 'natural' differences between women and men. Their primary goal is to achieve equality of treatment between women and men in public areas such as political participation and representation, and equal access to and equality within paid employment, market services and education.

A liberal feminist surveying the international legal landscape would note the absence of women in the field. All the powerful positions are held by men: eg the ICJ; ILC (first woman, Paula Escamiera of Portugal); UN Secretariat etc, even in HR committees.

Some liberals may argue (eg Teson, D'Amato) that as long as there is no actual formal discrimination against women – i.e. if women are theoretically able to hold these positions, there is no problem of justice at stake. But some liberal feminists would go beyond demands for formal equality and identify their concern primarily with equality of opportunity and of outcome. In the international arena, this may require prohibition of indirect discrimination and use of affirmative action techniques to increase the numbers of women. But these measures are regarded as

temporary methods to counteract inaccurate views that, given the same opportunities, women cannot perform exactly like men. In other words, 'special' treatment is seen as promoting an ultimately neutral outcome.

Apart from this limited acknowledgment of the need for structural change to achieve equality, liberal feminists do not generally regard the legal system itself as contributing to the inferior position of women. They assume that the law is ultimately rational, impartial and capable of achieving justice if it allows proper individual choice. To adapt Sandra Harding's words, on this view, bad or inadequate law is the problem, not law-as-usual.

So, the goal should be to increase women's participation in the making of international law – this 'add women and stir' approach was endorsed strongly in the Beijing Platform for action in 1995. A criticism of this type of approach is that, while important, it does not go far enough. Liberal feminist approaches, as Nicola Lacey has said, are 'inadequate to criticise and transform a world in which the distribution of goods is structured along gender lines.' They assume 'a world of autonomous individuals starting a race or making free choices [that] has no cutting edge against the fact that men and women are simply running different races.' The promise of equality as 'sameness' to men only gives women access to a world already constituted by men and with the parameters determined by them.

A second type of question that might be asked in the project of unpacking the hidden gender of international law is 'what type of values are woven into the fabric of international law'. This question comes out of the tradition of what has been called cultural feminism. Cultural feminism is concerned with the identification and rehabilitation of qualities and perspectives identified as particular to women. The work of the American psychologist, Carol Gilligan, has been very influential in this area. Gilligan's research into modes of moral decision-making and problem-solving by girls and boys found differences between them. She identified a 'different' voice that based decisions on the values of caring and connection in contrast to a style of decision-making based on abstract logic. The former is culturally associated with women and the latter with men. Gilligan pointed out that the psychological literature generally rated the masculine pattern as more mature and developed.

The hypothesis drawn by some feminist lawyers from Gilligan's research is that, just as traditional psychological theories have privileged a male perspective and marginalised women's voices, so too law privileges a male view of the universe and that law is part of the structure of male domination. The hierarchical organisation of law, its adversarial format and its aim of the abstract resolution of

competing rights, make the law an intensely patriarchal institution. Law thus represents a very limited aspect of human experience.

The language and imagery of the law underscore its maleness: it lays claim to rationality, objectivity and abstractness, characteristics traditionally associated with men, and is defined in contrast to emotion, subjectivity and contextualised thinking - the province of women.

A cultural feminist confronted with the international legal system might question the attempt to invest international law with the values of rationality and universality and the adversarial model of justice we see in ICJ cases that assumes that the right resolution of legal disputes emerges from a contest between two parties, judged by a neutral decision-maker.

In national contexts, some cultural feminists have proposed a model of feminist justice in which the decision-maker goes beyond adjudicating on the cases presented by the parties and act creatively to avoid a win/lose situation. Mediation and conciliation have been explored as alternatives to litigation and it has been argued that women judges would bring a 'new humanity' to the decision-making process.

Of course, in any event, to some extent the nature of international society makes the model of adversarial national legal systems inappropriate. Compromise solutions are often more realistic and palatable to resolve disputes between states and considerable attention has been given to alternative forms of dispute resolution in international law. For example, Chapter VI of the UN Charter is devoted to an elaboration of peaceful methods of dispute resolution.

Nevertheless, a cultural feminist might note that the use of force (albeit in limited circumstances) is still the ultimate fall back in resolving disputes. She might observe that the values of state autonomy and sovereignty all too often trump the goals and values of the international community. International law might be said to have a gender in the sense that it is constructed upon particular assumptions and experiences of life where men and the male are taken to represent the human experience. A cultural feminist might also observe that the realities of women's lives do not fit easily into the categories and concepts of international law.

A third set of questions about international law are prompted by post-modern feminist writings. This is a broad umbrella term, and I'm using it here to include the writings of scholars from the third world. Post-modern feminism is sceptical of modernist, universal theoretical explanations of the oppression of women and embraces 'the fractured identities ... [of] modern life.' It emphasizes the contextualised and partial nature of our knowledge. Post-modern feminists have paid particular attention to language and the way that it filters our experiences and understanding. They have been concerned with the way the law constitutes identities, such as

'masculinity' and 'femininity'. They have promoted the notion of plurality and multiple viewpoints and emphasised the importance of contextual judgment. Post-modern feminism therefore resists the idea that there is a single analysis of, or solution to, the law's involvement in inequality between women and men.

So, the language of international law might be interrogated from a post-modern feminist perspective. We might ask what type of language is used and we might note the dependence of international legal thinking on a series of binary oppositions: order/chaos, logic/emotion, legal/political, binding/non-binding. Feminist scholars have drawn attention to the gendered coding of some these binary oppositions – the first I the pair is associated with male characteristics and the second female. This is not to say that all, or even most, women or men actually possess these contrasting qualities. It is rather that using the vocabulary of objectivity, logic and order positions a person as being manly, which immediately gives their words a higher value. The use of subjective, emotional or 'disordered' discourse is coded as feminine and thus devalues a statement or argument.

Third world feminists have argued that we must recognise the role of racism and economic exploitation in the position of most of the world's women. They have been concerned with (Mohanty) 'multiple, fluid structures of domination which intersect to locate women differently at particular historical conjunctures' rather than 'a notion of universal patriarchy operating in a transhistorical way to subordinate all women'.

And so, it might be observed that the very choice and categorisation of subject matter deemed appropriate for international regulation reflects western and male priorities. Feminist analysis can indicate the arbitrariness of the traditional categories of analysis that are rarely questioned by international lawyers and highlight the priority given to economic interests and the little interest in women's lives. For example (a feminist international lawyer may ask) why are highly migratory species of sea life regulated by treaty while the use of breast milk substitutes (a major health issue for women in Africa) remains subject to voluntary WHO codes? Why is extra-territorial jurisdiction traditionally invoked against violations of monopoly and competition law but only rarely in cases of trafficking of women and children?

2. THE APPLICATION OF FEMINIST THEORIES TO INTERNATIONAL LAW

This lecture will consider how feminist theories interact with traditional theories about international law, such as positivism, natural law and liberal theories. The argument of the lecture will be that feminist theories uncover some of the silences of international law.

International law scholarship has tended to be descriptive and prescriptive, avoiding scrutiny of the assumptions and commitments of the discipline. The lack of any centralised law-making and enforcing authority has meant that theories of international law concentrate on explaining the basis of obligation in the international community.

Natural law

Early accounts of international law based the possibility of a system regulating behaviour between states on enduring, universal commitments of value that constituted a 'law of nature'. Indeed, it has been argued that the initial development of an interstate system of legal principles depended on the universalist premises of natural lawyers. Thus the nineteenth century British scholar, Sir Henry Maine, described 'the grandest function of the Law of Nature' as 'giving birth to modern International Law'[1]. The attraction of the law of nature as a foundation for an international legal system was increased by the absence of international legislative and judicial institutions. In the absence of central authorities, natural law offered a source of directly applicable law to regulate the co-existence of nation states. The content of the law of nature was defined in various ways. According to some scholars it was synonymous with divine, religious law while for others it constituted rules developed from right reason[2]. Hugo Grotius considered the law of nature as composed of general principles of law that could be synthesised from the major systems of jurisprudence[3].

A significant strand of natural law thinking in modern international law theory has emerged since World War II and has been influential in various practical developments, such as those to define international crimes and to establish jurisdiction over individuals accused of committing them. Fernando Tesón, for example, has argued that the validity of international law rests on 'normative individualism', which makes individuals rather than states the 'primary normative unit' of international law[4]. On this analysis, protection of the rights of individuals is

1. H. MAINE, *Ancient Law*, (London, J. Murray, 1863) at 96, quoted in R. FALK, *'The inadequacy of contemporary theories of international law-gaps in legal thinking'*, 50 VIRGINIA LAW REVIEW (1964) 231 at 244-5, n. 32.

2. For a general account of natural law theory see J. HARRIS, *Legal Philosophies* (London, Butterworths, 2nd ed. 1997) at 6.

3. H. LAUTERPACHT, 'The Grotian tradition in international law', 23 BRITISH YEAR BOOK OF INTERNATIONAL LAW (1946) 1 at 9.

4. Tesón has based this theoretical account on the work of Immanuel Kant (1724-1804): F. TESÓN, *'The Kantian theory of international law'*, 92 COLUMBIA LAW REVIEW (1992) 53. See also F. TESÓN, *A Philosophy of International Law* (Boulder, Westview, 1998).

the overarching value on which international law depends and the rights of states are derivative from the rights of individuals within their borders. Membership of the international community is thus contingent on a nation state's observance of the human rights of its population[5].

How have natural law theories dealt with the domination of women by men? Natural law doctrine, as traditionally formulated in both the national and international contexts, did not question basic inequalities in the social order. Grotius, for example, followed thinkers from Aristotle onwards and justified slavery by reference to the natural law[6]. Modern natural lawyers condemn violations of human rights but rarely comment on the entrenched discrimination against women around the world in these terms. Indeed, Fernando Tesón has described the absence of women in the international legal order as a mere 'statistical underrepresentation' rather than an injustice. Injustice to women, he has argued, would only arise if nation states actively prevented women from participating in international life[7].

Positivism

Positivism, in its international legal manifestations, developed as a response both to the challenge to state sovereignty posed by natural law and to the perceived failure of natural law theories to articulate objective and reliable principles of international conduct. Natural law was seen as open to cynical manipulation by those possessing religious or secular power to support any desired action[8]. Accordingly in the work of theorists such as Richard Zouche (1590-1660) and Cornelius Bynkershoek (1673-1743) international law appeared as a system of restraint based on voluntarism that required states to agree to be bound. In this way consent replaced universal values as the basis of obligation[9].

International legal positivists regard nation states as the ultimate source of international law - the actual practice of states is the normative foundation of international obligation. Some jurists argue that, given the absence of any centralised law-making authority in the international arena, positivism is the only intellectually

5. F. TESÓN, *'The Kantian theory'*, above at 69-72.

6. See H. LAUTERPACHT, above at 43.

7. F. TESÓN, *'Feminism and international law: a reply'*, 33 VIRGINIA JOURNAL OF INTERNATIONAL LAW (1994) 647 at 652. See generally F. TESÓN, *A Philosophy of International Law*, above at chapter six.

8. R. FALK, above at 244-5.

9. *Ibid.* See also J. STONE, *Legal Controls of International Conflict* (Sydney, Maitland Publications, 1954) at 12-13.

coherent approach[10]. The international legal system depends on the generation of totally self-enforcing rules and prescriptive models of international rules are doomed to failure[11]. Indeed, it has been claimed, the prescriptive effect of international law is 'entirely dependent on the accuracy of the codification of state practice'[12]. The Permanent Court of International Justice endorsed a positivist understanding of international law in its famous statement in the Lotus case that 'the rules of law binding upon States ... emanate from their own free will .... [R]estrictions upon the independence of States cannot therefore be presumed'[13]. Not surprisingly, positivism has been the favoured theory of international law for most states, whatever their political commitments. The socialist tradition in international legal theory was, for example, firmly positivist in its concern with voluntary agreement to regulation and its emphasis on the role of treaties in international law making[14].

Positivists come in various shapes and sizes and nationalities. Some insist on a strict and complete adherence to the principle of consent in international law, deploring attempts to develop notions of majority consent through, for example, the articulation of norms of jus cogens that trump the will of individual states[15]. Others have described a gradual movement away from consent to consensus and a 'global will'[16]. Legal positivism has close links to the realist tradition in international relations theory. Realists explain all forms of international behaviour by reference to the national interest of the particular nation states involved. Various schools of realism define the content of 'the national interest' in different ways[17], but all avoid

10. E.G. J. WATSON, *'State consent and the sources of international law'*, PROCEEDINGS OF THE 86TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (Washington DC, American Society of International Law, 1992) 108.

11. E.G. J. WATSON, *'A realistic jurisprudence of international law'*, 1980 THE YEAR BOOK OF WORLD AFFAIRS 265 at 274-5.

12. *Ibid.* at 285.

13. *The Lotus Case* (France v. Turkey) 1927 PCIJ, ser. A, no.10 (Judgment of 7 September) at 18.

14. E.G. V. TUNKIN, *'Co-existence and international law'*, 95 RECUEIL DES COURS (1958) 1; R. MULLERSON, *'Sources of international law: new tendencies in Soviet thinking'*, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW (1989) 498; G. DANILENKO, *Law-Making in the International Community* (United States, Kluwer Academic Publishers, 1993).

15. E.G. P. WEIL, *'Towards relative normativity in international law?'*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW (1983) 413.

16. R. FALK, above at 246-7.

17. See Fernando Tesón's account of *'utilitarian realism'* and *'communitarian realism'* in *'Realism and Kantianism in international law'*, PROCEEDINGS OF THE 86TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (Washington DC, American Society of International Law, 1992) 113.

the articulation of global values as the basis for international decision-making. International law, then, is seen as the product of states self-interest. Indeed, the realist scholar Hans Morgenthau regarded international law as simply a smokescreen for political policy by powerful states[18]. Such an account of international law cannot explain however why international law is regularly obeyed even when it seems to go against states' national interest[19].

The positivist view of international law as a voluntary system of restraints on states suggests that questions about structural disadvantages within states will rarely emerge as legal issues. Of course, states may agree to prohibit discrimination, as, for example in the Conventions on the Elimination of All Forms of Racial Discrimination (Race Convention)[20] and All Forms of Discrimination Against Women (Women's Convention)[21], but a positivist analysis does not require any examination of the legitimacy of global or national power structures that effectively subordinate women.

Liberal international legal theory

The dominant modern Western account of international law is a liberal one. The international order is seen as based on subjective, sovereign consent, just as a national order is based on a social contract negotiated by individuals. The state is a member of the international community in a similar way to the individual as a member of a national or local community[22]. The main difference, as Gerry Simpson

18. H. MORGENTHAU, *Politics Among Nations: The Struggle for Power and Peace* (New York, Alfred A. Knopf, 5th ed. 1973) at 93-4.

19. The issue of why states comply with international law attracted renewed interest in the 1990s. See e.g. A. CHAYES & A. CHAYES, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Harvard University Press, 1995); T. FRANCK, *Fairness in International Law and Institutions* (New York, Oxford University Press, 1995); H. KOH, *'Review essay: why do nations obey international law?'*, 106 YALE LAW JOURNAL (1997) 2599.

20. 21 December 1965, 660 UNTS 195, reprinted in 5 INTERNATIONAL LEGAL MATERIALS (1966) 352.

21. 18 December 1979, 1249 UNTS 13, reprinted in 19 INTERNATIONAL LEGAL MATERIALS (1980) 33.

22. SEE J. RAWLS, *'The law of peoples'*, in S. SHUTE & S. HURLEY eds, *On Human Rights: The Oxford Amnesty Lectures* (New York, Basic Books, 1993) 41; A. SLAUGHTER,

has pointed out, is that in international law the requirement of consent is taken literally, while it has been replaced by the notion of representation in liberal democratic theory in national contexts[23]. The 'democratic' liberalism espoused by international lawyers such as Thomas Franck is based on two levels of consent: the consent of states to principles of international law and the consent of a state's citizens as the basis of legitimacy of the state[24].

Liberalism too has its critics. It is claimed to be a procedural, rather than substantive, political theory, with sovereign autonomy as its only commitment of value in the international context[25]. In this vein, Louis Henkin has said that international law 'is designed to further each state's realization of its own notion of the Good'[26]. How does the international community then resolve disputes between two sovereign entities each invoking freedom of action? In theory, the reconciliation is accomplished by the liberal notion of the rule of law. The promise of the rule of law is neutral application of abstract principles, created through the popular will. But the very notion of an 'objective' legal order seems to conflict with the liberal rejection of all but subjective, sovereign, values. A significant tension thus exists between the individualistic, sovereign-based nature of international society and the communitarian justification for a legal system. As a result, in the international arena, the rule of law can only deliver rather indeterminate solutions to disputes between sovereigns. Martti Koskenniemi has pointed out, '[a]rguments from legal principles are countered with arguments from equally legal counter-principles. Rules are countered with exceptions, sovereignty with sovereignty'[27]. International law thus becomes 'singularly useless as a means for justifying or criticizing international behaviour'[28].

'International law in a world of liberal states', 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW (1995) 503.

23. G. SIMPSON, *'Imagined consent: democratic liberalism in international legal theory'*, 15 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW (1994) 103.

24. T. FRANCK, *'The emerging right to democratic governance'*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW (1992) 46. See the useful discussion of Franck's approach in G. SIMPSON, above note 23 at 118-120. See also J. CRAWFORD, *'Democracy and international law'*, 64 BRITISH YEARBOOK OF INTERNATIONAL LAW (1993) 113.

25. M. KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, Finnish Lawyers' Publishing Co., 1989) at 64.

26. L. HENKIN, *'Law and politics in international relations'*, 44 JOURNAL OF INTERNATIONAL AFFAIRS (1990) 186.

27. M. KOSKENNIEMI, above at 485.

28. *Ibid.* at 48.

The liberal account of international law has elements of both the natural law and positivist traditions, co-existing in uneasy tension. Martti Koskenniemi has described these as an 'ascending', individualistic, apologetic (positivist) strand and a 'descending' communitarian, utopian (natural law) strand:

> The ascending strand [in international law] legitimizes political order by reference to individual ends. The existence of natural values is denied. Individuals can be constrained only to prevent 'harm to others'. But any constraint seems a violation of individual freedom as what counts as 'harm' can only be subjectively determined. The descending strand fares no better. It assumes that a set of fundamental rights or a natural distinction between public and private spheres exist to guarantee that liberty is not violated. But this blocks any collective action as the content of those freedoms ... can be justifiably established only by reference to individuals' views thereof[29].

The liberal account of international law rests on a series of distinctions between the 'public' and the 'private' that has long played a central part in Western legal and political philosophy. Divisions between the polis or public realm and the oikos or private sphere of home and family were made in ancient Greek thought[30]. The two spheres were in a symbiotic position: men were able to participate as equals in the public realm only because they were supported by the work of wives and slaves in the private realm[31]. John Locke (1632-1704), one of the most influential architects of liberal thought, drew distinctions between reason and passion, knowledge and desire, mind and body. The first of each of these dualisms was associated with the 'public' sphere of rationality, order and political authority; the latter with a 'private' sphere of subjectivity and desire[32].

Liberal uses of public/private dichotomies are complex. First, there is great debate as to where precisely the boundary between the two spheres lies. Indeed the boundary is constantly shifting in response to economic and social developments such as national 'privatisation' policies and 'globalisation'. Second, notions of public and private are often used in quite different ways from those identified by Locke. Locke distinguished a private, domestic world inhabited by women from

29. *Ibid.* at 66-7.

30. M. THORNTON, *'The cartography of public and private'*, in M. THORNTON ed., *Public and Private: Feminist Legal Debates* (Melbourne, Oxford University Press, 1995) 2.

31. *Ibid.* at 2-3.

32. J. LOCKE, *Two Treatises of Government* (J. Harrison & P. Laslett eds, Oxford, Oxford University Press, 1965).

that of public civil society, the world of politics and men. In modern liberalism the purely domestic sphere is largely ignored as an area of concern and '[t]he separation between private and public is ... re-established as a division within civil society itself, within the world of men'[33]. Thus references to a dichotomy between the public and private can refer to the distinction between politics on the one hand and economic and social life on the other, or between state and civil society. Another important function of the dichotomy in liberal jurisprudence is to demarcate areas appropriate for legal regulation from those that come within the sphere of individual autonomy.

Distinctions between spheres of public and private define the scope of international law. One such distinction is between public international law (the law traditionally governing the relations between nation states) and private international law (the rules applicable to jurisdictional and other conflicts between national legal systems). International law operates in the most public of all public worlds, that of nation states and intergovernmental organisations. Thus the United Nations (UN) Charter makes the (public) province of international law distinct from the (private) sphere of domestic jurisdiction[34]; the acquisition of statehood or international personality confers 'public' status on an entity with consequences for jurisdiction, representation and ownership[35]; the law of state responsibility sorts out (public) actions for which the state is accountable from those 'private' ones for which it does not have to answer internationally. Even international human rights law, which is regarded as radically challenging the traditional distinction between international and domestic concerns, targets 'public', state-sanctioned violations rather than those that have no apparent direct connection to the state. Another manifestation of a public/private distinction in international law is the line drawn between law and other forms of private knowledge, such as social and humanitarian considerations and morality[36]. Public/private distinctions in the international sphere often differ

33. C. PATEMAN, *'Feminist critiques of the public/private dichotomy'*, in S. BENN & G. GAUS eds, *Public and Private in Social Life* (London, Croom Helm, 1983) 281 at 285.

34. Charter of the United Nations, article 2(7) provides: *'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter'.*

35. M. KOSKENNIEMI, above at 126.

36. E.g. *South West Africa Cases* (Ethiopia & Liberia v. South Africa) 1966 ICJ Rep. 6 (Judgment of 18 July); *Western Sahara Case*, 1975 ICJ Rep. 12 (Adv. Op. 16 October) at 69 (sep. op. Judge Gros): economics, sociology and human geography are not law.

from those in national contexts. For example, non-government organisations are often considered part of the 'private' within the international legal arenas and part of the 'public' in domestic fora. However their location at the intersection between the public and private spheres illustrates the changing boundaries of international law. Their penetration of international public arenas and impact upon policy and law-making contrasts with their lack of accountability except under domestic regulation.

What insights has liberal international legal theory provided to understand the situations of women globally? Liberalism asserts that it pays equal concern and respect to all individuals and because of this lays particular claim to the qualities of objectivity, abstractness and neutrality. The liberal idea of equality, however, is limited to procedural rather than to substantive equality. Formally, it requires equal treatment of people or states, but without reference to their actual situation. Consequentially liberal equality is a very blunt tool when dealing with cases of long term, structural disadvantage and inequality both as between states and within them. Moreover, as we shall argue below, the continued separation and opposition of public and private domains in liberal theory and practice has gendered consequences in the international arena.

'Newstream' theories

The post-modern trend in late twentieth century scholarship is reflected in the work of the 'newstream'[37] of international law theorists who have translated the techniques of the United States-based critical legal studies movement (CLS) onto the international plane[38]. Since the late 1970s, critical legal scholars have challenged a view of the law as rational, objective and principled by exposing the indeterminacy of and contradictions inherent in legal rules. The function of legal systems in legitimating the political, social and economic status quo have been examined and the notion of the 'false necessity' or essential contingency of legal systems and legal truths developed in a wide variety of contexts[39]. A unifying

37. This term was first used in D. KENNEDY *'A new stream of international law scholarship'*, 7 WISCONSIN INTERNATIONAL LAW JOURNAL (1988) 1. For a useful overview of the 'newstream' approach see D. CASS, *'Navigating the Newstream: recent critical scholarship in international law'*, 65 NORDIC JOURNAL OF INTERNATIONAL LAW (1996) 341.

38. See N. PURVIS, *'Critical legal studies in public international law'*, 32 HARVARD INTERNATIONAL LAW JOURNAL (1991) 81.

39. See G. SIMPSON & H. CHARLESWORTH, *'Objecting to objectivity: the radical challenge to legal liberalism'*, in R. HUNTER, R. INGLEBY & R. JOHNSTONE eds, *Thinking About Law* (Sydney, Allen & Unwin, 1995) 86 at 100-104.

theme in much CLS scholarship is the coincidence of law and politics and the futility of liberal attempts to carve out a separate and distinct sphere for legal truth.

Many of the newstream techniques and insights are important in understanding the relationship of international law to women. As we shall see, some feminist approaches to international law share the newstream concern with the political and contingent nature of liberal legal argument and the law's role in reifying and justifying social, political and economic inequalities. Once we can uncover the unstated political commitments of the present international legal order, we are able to re-imagine it. However the newstream, just as the mainstream, has displayed little interest in the situation of women. To some extent this is because the newstream is itself rather vague in its normative visions of the international community. Martti Koskenniemi, for example, has referred to an essentially contextual, experiential justice that requires assessing the legal and political issues in a dispute or conflict and proposing tentative, ad hoc solutions. This form of justice is based on only two global principles: the exclusion of imperialism and of totalitarianism[40]. This type of critical approach, built on limited explicit substantive commitments, cannot deal adequately with the complex forms of structural disadvantage encountered by women all over the world. Post-colonial theory and critical race theory, however, offer many useful insights and techniques to deal with the multiplicity of global difference[41].

'Southern' theories of international law

Jurists from the South have made a sustained critique of the international legal order in which their states have emerged as full members on achieving independent status. They have contested the inevitability or universality of particular international law principles by pointing to the Western origins, orientation and cultural bias of such rules[42]. They have argued that many international legal principles, such as the laws relating to the acquisition of territory, diplomatic protection for aliens

40. *Ibid.* at 496-7.

41. See D. OTTO, *'Subalternity and international law: the problems of global community and the incommensurability of difference'*, 5 SOCIAL & LEGAL STUDIES (1996) 337; T. MORRISON ed., *Race-ing Justice, En-gendering Power* (New York, Pantheon Books, 1992); L. GANDHI, *Postcolonial Theory* (Sydney, Allen & Unwin, 1998).

42. E.g., F. SNYDER and S. SATHIRATHAI, *Third World Attitudes Towards International Law: An Introduction* (Dordrecht, Martinus Nijhoff, 1987); T. ELIAS, *New Horizons in International Law* (Dordrecht, Martinus Nijhoff, 2nd rev. ed 1992); M. SHAHABUDDEEN, *'Developing countries and the idea of international law'*, in R. MACDONALD, above note at 721.

abroad and to compensation for expropriation of property interests, were devised to justify colonial confiscation and appropriation and they have suggested that the participation by states of the South in the further development of international law will lead to a new international legal order[43]. For example, the Tunisian jurist, and former President of the International Court of Justice, Mohammed Bedjaoui, has written: '[l]ike a mastodon crushing the interests of the Third World countries, while the latter attempt with great difficulty to shift it, traditional international law «is, as a whole, the embodiment of situations of predominance of the strong over the weak»'[44].

Another challenge by jurists from the South has been to the international law-making process, especially with respect to customary international law. Some have argued that, as Southern states did not participate in the development of international law, they should not necessarily be bound by it[45]. This is also sometimes said to be the reason why the South for many years resisted compulsory systems of international adjudication[46], although in the 1990s Southern states participated actively in such regimes. In general, however, jurists from the South have not questioned key elements of the traditional legal order, particularly its commitment to state sovereignty[47]. Indeed, state sovereignty has been emphasised as a bulwark against perceived Western neo-colonialism and the broadening scope of international regulation, for example in human rights law and international environmental law.

It has been argued that there are conceptual links between the critiques of the South and feminist analyses of international law[48]. In practice, however, Southern critiques are as blind to issues of sex and gender as are other approaches to

43. M. BEDJAOUI, *Towards a New International Economic Order* (New York, Holmes & Meier, 1979) at 11-12.

44. *Ibid.* at 63.

45. See discussion in L. HENKIN, *How Nations Behave: Law and Foreign Policy* (New York, Columbia University Press, 2nd ed. 1979) at 121-3, 360 n. 6.

46. M. BEDJAOUI, above at 102. Compare M. Shahabuddeen, above at 728-30.

47. Compare A. ANGHIE, *'Finding the peripheries: sovereignty and colonialism in nineteenth-century international law'*, 40 HARVARD INTERNATIONAL LAW JOURNAL (1999) 1.

48. E.g I. GUNNING, *'Modernizing customary international law: the challenge of human rights'*, 31 VIRGINIA JOURNAL OF INTERNATIONAL LAW (1991) 211 at 217-8. See H. CHARLESWORTH, C. CHINKIN & S. WRIGHT, *'Feminist approaches to international law'*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW (1991) 613 at 616-8;

international law. Southern and feminist critiques may share a questioning of Northern 'scientific' objectivity as reflected in international law, but the former generally preserve the basic concepts of the international legal order and seek recognition of economic disparity between states and preferential treatment in overcoming it. Southern theories about international law tend to focus on power imbalances between states and have little concern with power differentials within states. The oppression of women, if considered at all, is generally linked with colonialism and the achievement of self-determination is seen as the appropriate remedy.

In light of these theories about international law, how can we understand the impact of feminist critique? Feminist excursions into international law have been reproved for criticising the male-centredness of international law while at the same time invoking the international legal order to improve the situation of women[49]. Are these contradictory moves? The implication of the charge is that feminists forfeit the right to invoke international law if they point out its bias. As we noted above, feminist interventions in international law have to be conducted on a number of levels, inside the discipline, strengthening it to respond to the oppression of women, and outside looking in, drawing attention to the structural faults in the system. We do not want to assert that international legal doctrine is a monolithic force for the oppression of women and the advantage of men, but rather that it offers only a partial, and often contradictory and inconsistent, response to women's oppression. One of the major strategic advantages of international law is its universal vocabulary. Feminists may want to make use of this feature of international law, while at the same time arguing that its 'universality' must extend beyond a limited male view.

Feminist analysis of international law has two major roles. One is deconstruction of the explicit and implicit values of the international legal system, challenging their claim to objectivity and rationality because of the limited base on which they are built. All tools and categories of international legal analysis become problematic when the exclusion of women from their construction is understood. The 'international' the canon purports to represent is, in Elizabeth Grosz' words, in fact a 'veiled representation and projection of a masculine which takes itself as the unquestioned norm, the ideal representative without any idea of the violence that this representational positioning does to its others'[50].

49. E.g. A. D'AMATO, book review of R. COOK ed., *Human Rights of Women: National and International Perspectives* (Philadephia, Pennsylvania University Press, 1994), 89 AMERICAN JOURNAL OF INTERNATIONAL LAW (1995) 840.

50. E. GROSZ, *Volatile Bodies: Towards a Corporeal Feminism* (Sydney, Allen & Unwin, 1994) at 103.

Investigating the silences of international law is another way of discovering its gendered nature: why are some activities considered capable of international legal regulation while others are not? Deconstruction has transformative potential because it reduces the imaginative grip of the traditional theories. In this sense, all feminist theories are subversive strategies. They are 'forms of guerrilla warfare, striking out at points of patriarchy's greatest weakness, its blindspots.' They reveal the 'partial and partisan instead of the universal or representative position' of patriarchal discourse[51].

The second role of feminist analysis of international law is that of reconstruction. This does not mean a strategy of simply increasing international legal regulation, making 'public' all that the legal system deems 'private'. It requires rebuilding the basic concepts of international law in a way that they do not support or reinforce the domination of women by men. The benefits of such a reconstruction would not be limited to women. Non-domination of women would allow the major aims of the UN Charter – the maintenance of international peace and security, the self-determination of peoples and the protection of fundamental human rights – to be defined in new, inclusive, ways.

3. FEMINIST APPROACHES TO HUMAN RIGHTS

This lecture will use feminist theories to analyse international human rights law. It will discuss the various 'generations' of rights (civil and political, economic, social and cultural etc) and how these might be interpreted in a way that responds to issues confronting women. It will also examine the Convention on the Elimination of All Forms of Discrimination against Women.

An initial issue in any discussion of women and international human rights law is whether international formulations of rights are useful for women. Some feminist scholars have suggested, in the context of national laws, that campaigns for women's legal rights are at best a waste of energy and at worst positively detrimental to women. They have argued that, while the formulation of equality rights may be useful as a first step towards the improvement of the position of women, a continuing focus on the acquisition of rights may not be beneficial: women's experiences and concerns are not easily translated into the narrow, individualistic, language of rights; rights discourse overly simplifies complex power relations and their promise is constantly thwarted by structural inequalities of power; the balancing of 'competing' rights by decision-making bodies often

51. E. GROSS, *'What is feminist theory?'* in C. PATEMAN & E. GROSS eds, *Feminist Challenges: Social and Political Theory* (Sydney, Allen & Unwin, 1986) 197.

reduces women's power; and particular rights, such as the right to freedom of religion or to the protection of the family, can in fact justify the oppression of women. Feminists have examined the interpretation by national tribunals of rights apparently designed to benefit women and pointed to their often androcentric construction[52]. Other critiques of rights include the claim that statements of rights are indeterminate and thus highly manipulable both in a technical and a more basic sense. Recourse to the language of rights may give a rhetorical flourish to an argument, but provides only an ephemeral polemical advantage, often obscuring the need for political and social change. To assert a legal right, it is sometimes argued, is to mischaracterise our social experience and to assume the inevitability of social antagonism by affirming that social power rests in the state and not in the people who compose it[53]. The individualism promoted by traditional understandings of rights limits their possibilities by ignoring 'the relational nature of social life'[54].

This aspect of the critique of rights echoes reservations about rights held in the South: the notion of adversarial rights held against the state can be interpreted, not as a symbol of civilization and progress, but as a sign of a malfunctioning community[55]. Talk of rights is said to make contingent social structures seem permanent and to undermine the possibility of their radical transformation. Indeed it has been claimed that the only consistent function of rights has been to protect the most privileged groups in society[56].

52. Canadian feminists have made a distinctive contribution to this critique in their analysis of judicial interpretation of the Canadian Charter of Rights and Freedoms of 1982. E.g. E. SHEEHY, *'Feminist argumentation before the Supreme Court of Canada in R. v. Seaboyer; R. v. Gayme: the sound of one hand clapping'*, 18 MELBOURNE UNIVERSITY LAW REVIEW (1991) 450; J. FUDGE, *'The effect of entrenching a Bill of Rights upon political discourse: feminist demands and sexual violence in Canada'*, 17 INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW (1989) 445. See also, in the United States context, F. OLSEN, *'Statutory rape: a feminist critique of rights analysis'*, 63 TEXAS LAW REVIEW (1984) 387.

53. See P. GABEL & P. HARRIS, *'Building power and breaking images: critical legal theory and the practice of law'*, 11 NEW YORK REVIEW OF LAW AND SOCIAL CHANGE (1982-83) 369 at 375-76.

54. M. TUSHNET, *'Rights: an essay in informal political theory'*, 17 POLITICS AND SOCIETY (1989) 403 at 410.

55. R. COOMARASWAMY, *'To bellow like a cow: women, ethnicity and the discourse of rights'*, in R. COOK ed., *Human Rights of Women: National and International Perspectives* (Philadelphia, University of Philadelphia Press, 1994) 43.

56. D. KAIRYS, *'Freedom of speech'*, in D. KAIRYS ed., *The Politics of Law* (New York, Pantheon Books, 1982) 140 at 141.

While the acquisition and assertion of rights is by no means the only solution for the domination of women by men, it is an important tactic in the international arena. Human rights offer a framework for debate over basic values and conceptions of a good society. Because women in most societies operate from such a disadvantaged position, rights discourse offers a recognised vocabulary to frame political and social wrongs. Martha Minow has described the problems in denying rights discourse to traditionally dominated groups: 'I worry about criticizing rights and legal language just when they have become available to people who had previously lacked access to them. I worry about those who have, telling those who do not, "you do not need it, you should not want it"'[57]. In a similar vein, Patricia Williams has pointed out that for African-Americans, talk of rights has been a constant source of hope:

> 'Rights' feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate restructuring ... at this point in history. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power[58]...

The empowering function of rights discourse for women, particularly in the international sphere where women are still almost completely invisible, is a crucial aspect of its value. As has been observed in the context of South Africa, rights talk can often seem naive and unpragmatic, but its power relies on a deep faith in justice and rightness[59].

Rights discourse also offers a focus for international feminism that can translate into action if responses to women's claims are inadequate. It affirms 'a community dedicated to invigorating words with a power to restrain, so that even the powerless can appeal to those words'[60]. At the same time, the language of rights offers the traditional power holders some comfort. This point has been made about black South Africans' claims of rights:

57. M. MINOW, *'Interpreting rights: an essay for Robert Cover'*, 96 YALE LAW JOURNAL (1987) 1860 at 1910.

58. P. WILLIAMS, *'Alchemical notes: reconstructing ideals from deconstructed rights'*, 22 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW (1987) 401 at 431.

59. Albie Sachs, quoted in *Economic and Social Rights and the Right to Health* (Cambridge, Harvard Law School Human Rights Program, 1995) at 42.

60. M. MINOW, above at 1881.

> At this stage of nation-building, when we are sitting down with our oppressors, the rights rhetoric is very helpful. It helps to allay their fears: we will not lock them up or kick them out or boot them into the country; we want to escape this cycle of domination, subordination, resistance and revolution, which never ends. As an internationally accepted aspiration, it appeals to the best in all of us. They have their right to their freedoms, we have the right to forgive[61].

In discussing the experience of African-Americans with the United States constitutional guarantees of rights, Patricia Williams has noted that 'the problem with rights discourse is not that the discourse is itself constricting but that it exists in a constricted referential universe'[62]. This observation is particularly apt with respect to women's international human rights law which operates within the narrow referential universe of the international legal order. The need to develop a feminist rights discourse so that it acknowledges gendered disparities of power, rather than assuming all people are equal in relation to all rights, is crucial.

The challenge is then to invest a rights vocabulary with meanings that undermine the current skewed distribution of economic, social and political power. In societies of the South, this task may be particularly complex. In South Asia, for example, Radhika Coomaraswamy has pointed out that 'rights discourse is a weak discourse', especially in the context of women and family relations[63]. She has argued that the very notion of rights has little resonance in many cultures, for example the countries of South Asia[64], and that the discourse of women's rights assumes a free, independent, individual woman, an image that may be less powerful in protecting women's rights than other ideologies, such as 'women as mothers'[65].

Adetoun Ilumoka has made a similar observation with respect to Africa, pointing out that the enforcement of rights is rarely an arena of struggle, and that the language of freedom, justice and fair play is considerably more powerful[66]. In the

61. A. SACHS, above at 13.

62. P. WILLIAMS, *The Alchemy of Race and Rights* (Cambridge, Harvard University Press, 1991) at 159.

63. R. COOMARASWAMY, above at 55.

64. *Ibid.*

65. Compare S. HOSSAIN, *'Equality in the home: women's rights and personal laws in South Asia'*, in R. COOK, above note 55 at 456 (arguing for the relevance of international human rights in Bangladesh).

66. A. ILUMOKA, *'African women's economic, social, and cultural rights - towards a relevant theory and practice'* in R. COOK, above note 55 at 307, 319.

African context, Ilumoka has argued, 'addressing the problem of poverty is a priority human rights issue ... [and] international economic policies ... are a main source of violation of [women's] human rights'[67]. She has suggested that the language of rights may have a particular force in this context, because the generators of the international economic policies, UN agencies and the developed North, also see themselves as guardians of human rights. The language of rights is thus a complex instrument at an international level and ways of adapting it to respond to local and regional circumstances need to be devised.

In my view, the significance of rights discourse outweighs its disadvantages. Human rights provide an alternative and additional language and framework to the welfare and protection approach to the global situation of women, which presents women as victims or dependents[68]. It allows women to claim specific entitlements from a specified obligation-holder. Because human rights discourse is the dominant progressive moral philosophy and a potent social movement operating at the global level[69], it is important for women to engage with, and contest, its parameters.

At first sight, the international law of human rights offers considerable protection to women. The concerted activity of women's groups at the international level from early this century is reflected in the range of instruments dealing with women. The major focus of the protection of women's rights has been the right to equal treatment and non-discrimination on the basis of sex. The UN Charter was the first international agreement to establish non-discrimination on the basis of sex as a basic right. It refers in its Preamble to 'the equal rights of men and women' and includes as a purpose of the UN the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction based on sex[70]. The references to discrimination on the basis of sex were inserted in the Charter as

67. *Ibid.* at 321.

68. C. BRAUTIGAM, *'Mainstreaming a gender perspective in the work of the United Nations human rights treaty bodies'*, PROCEEDINGS OF THE 91ST ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (Washington DC, American Society of International Law, 1997) 389 at 390.

69. V. PETERSON, *'Whose rights? A critique of the "givens" in human rights discourse'*, 15 ALTERNATIVES 303 at 303-4. For an investigation of the way moral philosophies have been generated in the international sphere see A. ORFORD, *'Locating the international: military and monetary interventions after the Cold War'*, 38 HARVARD INTERNATIONAL LAW JOURNAL (1997) 443.

70. Charter of the United Nations, 26 June 1945, article 1(3). Other references in the Charter to non-discrimination on the basis of sex are in articles 13, 55 (c) & 76 (c).

the result of concerted lobbying by women delegates and non-government organisations (NGOs) accredited to the San Francisco conference[71]. The UN and some of its agencies, as well as regional organisations, have since adopted a range of treaties and declarations that elaborate the principle of non-discrimination in certain contexts. The international legal system has dealt with non-discrimination on the basis of sex in both generally applicable and women-specific instruments.

General instruments

The right of women to equal treatment and non-discrimination on the basis of sex is part of the traditional canon of human rights. General human rights treaties at both the global and regional levels contain rights of non-discrimination on a number of bases that include sex and prohibit distinctions based on sex with respect to the enjoyment of rights[72]. For example, article 3 of the ICCPR provides that 'States Parties ... undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant'. More generally, article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Human Rights Committee has adopted a General Comment on article 26[73], which gives it a broad meaning. It has made clear that article 26 is an autonomous right to equality and is not limited to those rights already provided for in the ICCPR. In other words, the right to equality applies across the spectrum of civil, political, economic, social and cultural rights. A second important aspect of the General Comment is its definition of the term 'discrimination', unelaborated in the text of article 26 itself. The comment refers to the definition of discrimination in

71. *The United Nations and the Advancement of Women 1945-1996* (New York, United Nations, 1996) at 10.

72. E.g. International Covenant on Civil and Political Rights, articles 2, 25 & 26; International Covenant on Economic and Social Rights, articles 3 & 7; American Convention on Human Rights, article 1; African Charter of Human and Peoples' Rights, articles 2 & 18 (3); European Convention on Human Rights, article 14.

73. UN Doc. CCPR/C/21/Rev.1/Add.1, 21 November 1989.

both the Convention on the Elimination of All Forms of Racial Discrimination (Race Convention)[74] and the Women's Convention[75] and adapts this to the context of the ICCPR:

> the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

This definition makes clear that a discriminatory intention is not necessary to establish discrimination and that article 26 extends to both direct and indirect discrimination.

Third, the Committee was explicit that equality does not always mean identical treatment. It acknowledged the possibility of different treatment in particular circumstances (for example the prohibition in the ICCPR on the imposition of the death sentence on those under 18 or on pregnant women). It also pointed out that 'the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant'[76]. A fourth significant aspect of the General Comment is its observation that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

This passage is a tacit adoption of criteria developed by the European Court of Human Rights to measure ostensibly discriminatory national laws[77]. Such a justification for differential treatment has been interpreted to involve showing that it has been adopted in pursuit of a legitimate aim (such as the efficient teaching of children in schools in cases of language discrimination)[78] and that there is a

74. Convention on the Elimination of All Forms of Racial Discrimination, article 1.

75. Convention on the Elimination of All Forms of Discrimination against Women, article 1.

76. Compare Convention on the Elimination of All Forms of Discrimination against Women, article 4.

77. *Belgian Linguistics Case,* 1 EHRR 252 (1968).

78. Compare *Minority Schools in Albania* PCIJ ser. A/B, no. 64 (1935).

reasonable relationship of proportionality between the means employed and the aims sought to be realised -- the so-called 'margin of appreciation' doctrine.

Sex discrimination has been the most invoked ground in article 26. The interpretation of article 26 in the context of individual cases brought before the Human Rights Committee under the first Optional Protocol to the ICCPR has been relatively narrow, however. The Committee has been more concerned to respond to cases of direct ('disparate treatment') than indirect ('disparate impact') discrimination. The Human Rights Committee has declared national laws that discriminate on their face between men and women to be in violation of article 26. For example Mauritian immigration legislation that required foreign husbands to apply for residence permits, but did not make the same requirement of foreign wives, was found to violate several provisions of the ICCPR, including article 26[79]. So too a Peruvian law that prevented a married woman from taking legal action with respect to matrimonial property was held to discriminate against women[80]. Two Dutch women's challenge to national social security laws, which required married women, but not men, to prove that they were breadwinners before obtaining unemployment benefits, was also upheld by the Committee[81].

Other cases of alleged discrimination have not, however, been closely scrutinised by the Human Rights Committee, which has allowed a considerable margin of appreciation to states. For example Vos v. The Netherlands[82] involved discrimination with respect to access to a disability allowance on the death of a spouse. Dutch law allowed disabled men to retain the right to a disability allowance when their wives died, but on the death of their husbands, disabled women were only eligible for a widow's pension which in Ms Vos' case was less than the disability pension. Ms Vos had been divorced for 22 years at the time of her former husband's death and had been supporting herself when she became disabled. The Human Rights Committee found no violation of article 26 in this case. It accepted the Dutch government's justification of the distinction as reasonable and objective on a number of grounds: first that at the time of the legislation's enactment 'it was customary for husbands to act as bread-winners for their families'; second, that the

79. *Aumeeruddy-Cziffra v. Mauritius* Communication no. 9/35. See International Law Association Committee on Feminism and International Law, *Women's Equality and Nationality in International Law* (London, International Law Association, 1998).

80. *Avellanal v. Peru* Communication no. 22/1986.

81. *Zwaan de Vries v. The Netherlands* Communication no. 182/1984; *Broeks v. The Netherlands* Communication no. 172/1984.

82. Communication no. 218/1986.

law was 'necessary ... to avoid the necessity of entering the person concerned in the records of two different bodies'; and third that generally the widow's pension was more than the disability allowance because most married women worked part-time and therefore qualified for only partial disability benefits.

Women-specific instruments

A number of international instruments focus entirely or in part on discrimination against women. These include the Convention on the Political Rights of Women[83], the Convention on the Nationality of Married Women, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[84]. The most wide-ranging of the international human rights treaties devoted to women is the Women's Convention, adopted by the UN General Assembly in 1979[85]. The Convention contains a broader definition of discrimination than that contained in the earlier treaties, covering both equality of opportunity (formal equality) and equality of outcome (de facto equality). It states that discrimination against women means:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field[86].

The Women's Convention also covers discrimination in the civil, political, social, economic and cultural fields[87]. Article 2 requires states to take legal and other measures to ensure the practical realisation of the principle of sex equality and refers to a range of arenas where states parties must work to eliminate discrimination: political and public life[88], international organisations[89], education[90],

83. UN Doc. A/RES/640 (VII), 20 December 1952.

84. UN Doc. A/RES/1763 A (XVII), 7 November 1962.

85. See generally L. REHOF, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Dordrecht, Martinus Nijhoff, 1993).

86. Convention on the Elimination of All Forms of Discrimination against Women, article 1.

87. *Ibid.* article 3.

88. *Ibid.* article 7.

89. *Ibid.* article 8.

90. *Ibid.* article 10.

employment[91], healthcare[92], financial credit[93], cultural life[94], the rural sector[95] and the law[96]. It contemplates the use of 'temporary special measures' to accelerate de facto equality between women and men[97].

The Women's Convention has been ratified widely by states from all regions of the world and makes advances for women's rights in a number of ways. Its transcendence of the divide between first and second generation rights acknowledges that, for women, protection of civil and political rights is meaningless without attention to the economic, social and cultural context in which they operate. It identifies areas where discrimination against women is most marked and where women most need guarantees of rights. The Women's Convention also attempts to overcome the public/private dichotomy observed in international law. For example, it asserts women's equal rights to participate in public decision-making bodies at all levels and also explicitly affirms women's right to equality in a limited way within the 'private' arena of the family[98], unlike other human rights instruments which designate the family as a unit to be protected[99].

What then are the problems for women in human rights law?

My argument is that, in this important symbolic function, human rights law privileges one category of persons, men, over another, women. Although women have achieved some recognition in the international system for the protection of human rights, it has not been an adequate response to the situation of women.

Marginalisation of women's rights

In many ways, the creation of a specialised 'women's' branch of human rights law, of which the Women's Convention is the flagship, has allowed its

91. *Ibid.* article 11.

92. *Ibid.* article 12.

93. *Ibid.* article 13 (b).

94. *Ibid.* article 13 (c).

95. *Ibid.* article 14.

96. *Ibid.* article 15.

97. *Ibid.* article 4.

98. Convention on the Elimination of All Forms of Discrimination Against Women, article 16.

99. E.g. Universal Declaration of Human Rights, article 16; International Covenant on Civil and Political Rights, article 23.

marginalisation. 'Mainstream' human rights institutions have tended to ignore the application of human rights norms to women. The Human Rights Committee, for example, has outlined the scope of the right to life without reference to the issue of female infanticide[100].

In 1994, the UN Commission on Human Rights appointed the Sri Lankan jurist, Radhika Coomaraswamy, as Special Rapporteur on the Elimination of Violence against Women[101]. This was the first gender-specific mandate of a Special Rapporteur. In her reports, Ms Coomaraswamy has drawn attention to the phenomenon of violence against women in a systematic manner and made valuable proposals for change. But the very nature of the mandate may be viewed as an ambivalent advance for women in the international legal order because it can be read as implying that violence against women does not constitute torture, nor is it within the mandates of 'general' Special Rapporteurs, such as those on the right to life, disappearances and religious intolerance[102].

The influence of cultural relativism

One strong response to the creation of a universal system of human rights protection has been assertions of the philosophy of cultural relativism. Indeed it has been argued that 'cultural relativism dominates social, political and academic thought today'[103]. The claim is that if international human rights norms conflict with particular cultural standards, the particularity of culture must take precedence over universalising trends[104]. Critics of universal human rights standards point to

100. A. BYRNES, *'Women, feminism and international human rights law: methodological myopia, fundamental flaws or meaningful marginalisation?'* 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW (1992) 205 at 216-23.

101. CHR Res. 1994/45, UN Doc E/CN.4/1994/132 at 140 (1994). The mandate was renewed in 1997, CHR Res. 1997/44.

102. The Special Rapporteur on religious intolerance has noted that the Commission on Human Rights has emphasised the need for a gender perspective and has stated that he intends to pay particular attention in future to the status of women. UN Doc. A/52/477, 16 October 1997.

103. K. BARRY, *Female Sexual Slavery* (New York, New York University Press, 1984) at 163.

104. See generally A. RENTELN, *'The unanswered challenge of relativism and the consequences for human rights'*, 7 HUMAN RIGHTS QUARTERLY (1985) 514; A. AN-NAIM, *'Religious minorities under Islamic law and the limits of cultural relativism'*, 9 HUMAN RIGHTS QUARTERLY (1987) 1.

the Western ethical basis of human rights law and reject this as a basis for commitments in other traditions. At the same time, Western states have developed their own form of cultural relativism in the human rights area in arguing for very broad 'margins of appreciation' in implementing their human rights obligations, based on the particularity of their national circumstances[105]. While concerns of cultural relativism arise with respect to human rights generally, it is striking that 'culture' is much more frequently invoked in the context of women's rights than in any other area. Indeed, Radhika Coomaraswamy has argued that in Asia especially the next decade will be marked by the collision of national cultural movements and women's rights[106].

National and international bodies have had to grapple with claims that set individual rights and cultural practices or standards against each other, particularly in the context of women's rights. One example of this is Lovelace v Canada[107]. Sandra Lovelace was born and registered as a female member of the Maliseet Indian tribe. Under Canadian law, she had lost her rights and privileges as a member of the tribe, including the right to live on the Tobique Indian reservation, after her marriage to a non-Indian[108]. Lovelace made a communication under the first Optional Protocol asserting that this law violated articles 26 and 27[109] of the ICCPR. In determining that the legislation breached article 27, the Human Rights Committee held that 'persons who are brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority.'

Lovelace illustrates the identity conflict between Sandra Lovelace, who identified herself as an Indian, and wished to return home after the breakdown of her marriage, and the group who considered that women (but not men) who

105. C. FLINTERMAN, *'The universality of human rights and cultural diversity'*, in *Contemporary International Law Issues: Conflicts and Convergence* (The Hague, Nederlandse Verenigning voor Internationaal Recht, 1995) 330.

106. R. COOMARASWAMY, *'Reinventing international law: women's rights as human rights in the international community'*, in P. VAN NESS ed., *Debating Human Rights* (London/New York, Routledge, 1999) 167 at 180-1.

107. Communication no. 24/197 (1986), UN Doc. CCPR/C/OP/1 at 83.

108. Indian Act, section 12 (1) (b).

109. Article 27 provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

married outside the group ceased to have group identity. The group was supported in this view by the Canadian legal system, reflecting a shared cultural acceptance that the identity of married women is determined by reference to their husbands. Native Indian women had differing responses to the decision. The primary goal for some was to redress the discriminatory provisions of the Indian Act; for others the goal was the replacement of the Act by a form of indigenous self-government. Still others saw the case as imposing Western assumptions of sex equality, although the Human Rights Committee did not in fact address the claim under article 26. Mary Ellen Turpel (Aki-Kwe) asked:

> Before imposing upon us the logic of gender equality (with White men), what about ensuring for our cultures and political systems equal legitimacy with the Anglo-Canadian cultural perspective which dominates the Canadian State?[110]

Another example of the conflict between women's rights and customary norms is the case of Md Ahmed Khan v. Shah Bano Begum[111]. An Indian Muslim woman who was being divorced after forty years of marriage claimed the maintenance payments under the Indian Code of Criminal Procedure rather than those lower payments available under Muslim personal status law. After the Supreme Court of India upheld her claim, opposition and protests from within the conservative Muslim community ultimately persuaded the government to reverse the decision through the inaccurately named Muslim Women (Protection of Rights on Divorce) Act 1986. Shah Bano Begum was thus disadvantaged by three layers of adverse identity: as a woman; as a Muslim woman within the predominantly Hindu society; and as a Muslim woman who wished to assert rights not supported by her community.

A major conceptual difficulty with cultural relativism is that the notion of culture is itself endlessly mutable. All social values and hierarchies in their own time frames can be described as forms of culture. In this sense, 'to argue from culture is to prove too much'[112]. If all cultures are seen as special, resting on values that cannot be investigated in a general way, it is difficult to make any assessment from an international perspective of the significance of particular concepts and practices for women. Feminists have pointed out that we need to

110. M.E. TURPEL (Aki-Kwe), *'Patriarchy and paternalism: the legacy of the Canadian State for First Nations Women'*, 6 CANADIAN JOURNAL OF WOMEN AND LAW (1993) 174 at 183.

111. [1985] 3 S.C.R. 844.

112. G. BINION, *'Human rights: a feminist perspective'*, 17 HUMAN RIGHTS QUARTERLY (1995) 509 at 522.

investigate the gender of the 'cultures' that relativism privileges. Relativism is typically concerned with dominant cultures in particular regions and these are, among other things, usually constructed from male histories, traditions and experiences. Arati Rao has argued that:

> the notion of culture favoured by international actors must be unmasked for what it is: a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top[113].

Rao has proposed a series of questions to assess claims of culture, particularly those used to counter women's claims of rights: whose culture is being invoked? what is the status of the interpreter? in whose name is the argument being advanced? and who are the primary beneficiaries of the claim?[114]

The limited understanding of 'equality' in international law

A major reason for the circumscribed protection of women in international human rights law is that the existing law identifies sexual equality with equal treatment. This 'liberal' feminist approach explains the centrality of the norm of non-discrimination, rather than a fuller set of rights, in the international law on women's rights[115]. For example, the rationale of the Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, and the norm of non-discrimination contained in both the ICCPR[116] and ICESCR[117] is to place women in the same position as men in the public sphere. This is also the strategy of the Women's Convention, although it extends to a limited extent into the private sphere. The shortcomings of understanding the global situation of women as a product of unequal treatment compared to men have been canvassed in chapter two. The fundamental problem for women is not simply discriminatory treatment compared with men, although this is a manifestation of the larger problem. Women

113. A. RAO, *'The politics of gender and culture in international human rights discourse'*, in J. PETERS & A. WOLPER eds, *Women's Rights, Human Rights: International Feminist Perspectives* (New York, Routledge, 1995) 167 at 174.

114. *Ibid.*

115. Compare the Convention on the Rights of the Child which contains a catalogue of children's rights.

116. Articles 2 & 28.

117. Articles 2 & 3.

are in an inferior position because they lack real economic, social or political power in both the public and private worlds. As Noreen Burrows has written:

> For most women, what it is to be human is to work long hours in agriculture or the home, to receive little or no remuneration, and to be faced with political and legal processes which ignore their contribution to society and accord no recognition of their particular needs[118].

For these reasons, even the comparatively broad definition of discrimination contained in the Women's Convention may not have much cutting edge against the problems women face worldwide. The non-discrimination approach of the Women's Convention was translated directly from the 1966 Race Convention. Although this can be understood as a strategy to ensure the international acceptability of the Women's Convention, the appropriateness of the model can be questioned. Indeed, one of the obstacles faced by women in the area of international law is the general consensus at the state level that oppression on the basis of race is considerably more serious than oppression on the basis of gender[119]. The discrimination prohibited by the Women's Convention is, with the exception of the obligation in article 6 to suppress all forms of traffic in women and exploitation of prostitution of women, confined to accepted human rights and fundamental freedoms. If these rights and freedoms are defined in a gendered way, access to them will be unlikely to promote any real form of equality. The Convention's endorsement of affirmative action programmes in article 4 similarly assumes that these measures will be temporary techniques to allow women eventually to perform exactly like men.

The Human Rights Committee's consideration of individual communications under article 26 of the ICCPR in cases such as Vos, discussed above, illustrates the problems of an 'equality as sameness' approach. It privileges outmoded historical assumptions about working habits of women and administrative convenience over the right to equality[120]. As Anne Bayefsky has written of Vos: 'the decision fails

118. N. BURROWS, at 82.

119. This approach is well illustrated by the comment of an Indian delegate at the 1985 Copenhagen UN Mid-Decade for Women Conference that, since he had experienced colonialism, he knew that it could not be equated with sexism. Quoted in C. BUNCH, *Passionate Politics: Essays 1968-1986: Feminist Theory in Action* (New York, St. Martin's Press, 1987) at 297.

120. A dissenting opinion signed by two of the Human Rights Committee's members argued that the differential treatment was unjustifiable.

entirely to recognize that th[e Dutch] legislative distinction [between disabled widows and disabled widowers] bore the hallmarks of classic stereotyping of women with its accompanying consequences of degradation and second class'[121]. Moreover the views adopted by the Human Rights Committee seem to assume that there must be some sort of discriminatory intent for the legislation to violate article 26 rather examining than the actual effect of the legislation.

The male-centred view of equality offered in international law is tacitly reinforced by the focus in the Women's Convention on public life, the economy, the legal system, education, and its only limited recognition that oppression within the private sphere, that of the domestic and family worlds, contributes to women's inequality[122]. It does not, for example, explicitly prohibit violence against women perhaps because of the conceptual difficulty of compressing a harm characterised as private into the public foci of the Convention, or perhaps because it does not fit directly into the equality frame. In its General Recommendation No.19, CEDAW described gender-based violence as a form of discrimination against women[123], thereby underlining the significance of the private sphere as a site for the oppression of women.

In 1995, the Beijing Declaration and Platform for Action elaborated in detail the international understanding of women's equality. Equality is generally presented as women being treated in the same way as men, or at least having the same opportunity to be so treated, with little consideration of whether the existing male standards are appropriate. The Platform calls for women's equal participation in a wide range of areas - from the economy[124] and politics[125] to environmental management[126]. The assumption appears to be that women's inequality is removed once women participate equally in decision-making fora. This account of equality ignores the underlying structures and power relations that contribute to the oppression of women. While increasing the presence of women is certainly important, it does not of itself transform these structures. We also need to

121. A. BAYEFSKY, *'The principle of equality or non-discrimination in international law'*, 11 HUMAN RIGHTS LAW JOURNAL (1990) 1 at 15.

122. Convention on the Elimination of All Forms of Discrimination against Women, Preamble, article 5.

123. UN Doc. A/47/38, CEDAW/C/1992/L.1/Add.15. See chapter three.

124. E.g. Beijing Platform for Action, paras 58-66.

125. *Ibid.* paras 190-195.

126. *Ibid.* paras 253-255.

understand and address the gendered aspects of fundamental concepts such as 'the economy', 'work', 'democracy', 'politics' and 'sustainable development'.

On the surface at least, the international community appears to have made considerable progress with respect to women and human rights. For example, at the Vienna World Conference on Human Rights in 1993, the international community formally recognised that the human rights system did not adequately respond to women's lives and committed itself to the view that the human rights of women were 'an inalienable integral and indivisible part of human rights'. It also accepted that gender-specific violations of human rights were part of the human rights agenda[127]. The Beijing Declaration and Platform for Action acknowledged that women's rights were human rights and described the human rights of women and the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms[128]. It should be noted, however, that the assertion that 'women's rights are human rights' is not contained in the Platform apparently because of an anxiety of states about recognising 'new' human rights[129]. Thus the Platform distinguishes between human rights of women (which are universal) and women's rights (which are not).

Although the Beijing Platform for Action gives a nod in the direction of the diversity of women's experiences[130], it nevertheless presents women in a very limited, encumbered, way. The major role for women remains that of the UDHR

127. Vienna Declaration and Programme of Action, I, para 18.

128. Beijing Platform for Action, para. 213.

129. D. OTTO, *'A post-Beijing reflection on the limitations and potential of human rights discourse for women'*, in K. ASKIN & D. KOENIG eds, *Women's Human Rights: A Reference Guide.*

130. Beijing Platform for Action, para. 46, recognises that:

> women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other status. Many women encounter specific obstacles related to their family status, particularly as single parents; and to their socio-economic status, including their living conditions in rural, isolated or impoverished areas. Additional barriers also exist for refugee women, other displaced women, including internally displaced women as well for immigrant women and migrant women, including migrant women workers. Many women are also particularly affected by environmental disasters, serious and infectious diseases and various forms of violence against women.

- wife and mother. Attempts to raise the diversity of women's identities, most particularly with respect to sexual orientation, were unsuccessful[131].

The new discourse of 'women's rights as human rights' is limited also in the way it understands the notion of equality. Although there have been significant moves in the recognition of some women-specific harms, particularly violence against women, the major remedy for the global subordination of women is an increased role in decision-making. This allows women only access to a world already constituted by men, not to a world transformed by the interests of women. Dianne Otto has argued:

> [i]n the absence of a recognition that the decision-making structures must themselves change, it is not clear what difference women's equal participation would make. Ultimately, it may merely equally implicate women in the perpetuation of the masculinist liberal forms of minimalist representative democracy and capitalist economics.

The new discourse also gives prominence to civil and political rights of women at the expense of economic and social rights. In particular, health and reproductive rights were controversial at Beijing. The feminisation of poverty, although clearly acknowledged in the Beijing Platform, was not placed in a rights context. It has been noted that the Platform 'assumes ... that capitalism has the ability to deliver economic equality to the poor women of the world and ... that the obligation of states to guarantee certain economic and social rights is made redundant by the more "efficient" processes of free market forces'[132]. Focussing on economic and social rights would draw attention to 'the operation of systems of privilege among women' and the inequitable structures of global capital[133].

Women's international human rights must be developed on a number of fronts. First, it is important to document the relevance of the traditional canon of human rights to women. Second, the instruments and institutions of international law with respect to women must be supported and strengthened. Third, the boundaries of the traditional human rights canon must redefined to accommodate women's lives. At the same time, rights that focus on harms sustained by women in particular need to be identified and developed, challenging the public/private distinction by bringing rights discourse into the private sphere. This has been described by Radhika

131. D. OTTO, at 25-7.

132. *Ibid.*

133. *Ibid.*

Coomaraswamy as a fourth generation of women's rights[134]. The definition of specifically women's rights is one way of moving beyond the limitations of the non-discrimination focus of women's international human rights law. These rights may include those associated with reproductive choice and childbirth. Other potential women's rights include the right to a minimum wage for work within the home or in subsistence farming, and the right to literacy.

Human rights are, in essence, what we want to take out of the agenda of short-term politics[135]. They create 'a protective sphere for vital interests, which people need to persuade them that they may accept vulnerability, run risks, undertake adventures in the world, and operate as citizens and as people'[136]. The two major challenges to all human rights, and especially to those of women, in the twenty-first century will be the forces of religious extremism and those of economic globalisation.

4. FEMINIST APPROACHES TO ARMED CONFLICT

This lecture will examine in particular 'the war against terror' from a feminist perspective. It will also consider the limits of feminist approaches to international law.

The claim that international law as we know and love it has a gender, and that that gender is male, holds any water, how can these ideas help us understand better the international reaction to the events of 11 September? I want to suggest that using the lens of gender allows us a broader perspective on the issues at stake here.

I want to start with the observation that the debate over what to do in the wake of 11 September has been highly gendered although this feature of the debate has not been acknowledged at all. There are two general types of questions that can help us see this and these are an amalgam of the types of questions I have just sketched.

- (from Zalewski) first - question about sex: 'what about women'?; second, 'what work is gender doing'?

134. R. COOMARASWAMY, *'Reinventing international law'*, above note 106 at 181-2.

135. R. UNGER, quoted in *Economic and Social Rights and the Right to Health*, above note 59 at 13.

136. *Ibid.*

What about women?

An initial observation that can be made about the events of 11 September and their aftermath is that women have not featured in any way as involved in any of the crucial decisions. The hijackers were all men, indeed some of them at least seemed to really hate women deeply (eg Md Atta's will). The only place for women in their scheme of things was as virgins to welcome them into paradise. The major White House players have all been men. President Bush, Colin Powell, Donald Rumsfeld have been the crucial decision-makers. Condoleeza Rice has played at best a very limited public role – she appears as a background figure. The coalition-building has been a men's only event: its major focus were leaders such as Blair, Putin, and Musharaff.

And if you study all the commentators and opinion-makers on the events, women's voices were almost entirely absent. Indeed only coverage of women in a consistent way has been as either victims of the disaster; the women left behind, or killed by hijackers or by American bombs gone astray in Afghanistan; or women as victims of the Taliban – particular focus on women being forced to wear the burqa.

Imagine for a moment if the picture was entirely the opposite: if all the hijackers and terrorist leaders were women, and if all the intelligence gatherers and analysts and White House decision-makers and world leaders were women. It seems almost absurd and unthinkable to us here, but it would also lead I suspect to an entirely different analysis of events. Pundits would assume that the hijackings and the response to them were connected to femaleness in some way; that they indicated that women were essentially unstable and unreliable and that they should be kept out of public life, that women are unfit for leadership

The current debate has not reflected at all on the significance of the almost completely male actors. This is seen as standard and unexceptional. So, the gender of the conflict is hidden. Indeed, some international lawyers (eg Teson) would say that the absence of women in the debate in the US is entirely different to the absence of women in the happenings in Afghanistan or Iraq. Teson would say that, because there are no formal barriers to women's participation in public life in the US, their absence is not a matter for comment or concern by international lawyers. The situation of women in Afghanistan under Taliban IS, by contrast, a matter for international law.

But, I think the almost complete absence of women in decision-making about this conflict suggests that there are some deep linkages and connections between the public position of women in all parties to the war against terror. If

the abstract freedom of women in the West to participate in public life is being undermined by structural barriers of culture and tradition, this is not much different in practice to the formal exclusion of women in Afghanistan. We can also ask about the discourse about women are in the discussions of a post-Taliban Afghanistan. Although in his speech to Congress President Bush referred to the fact that women in Afghanistan may not attend school, the situation of women was not initially seen as a central objection against the Taliban.

The US may not have liked the treatment of women there, but at the end of the day, it's seen as something essentially within the domestic jurisdiction of Afghanistan. Indeed, in October 2001, a Bush adviser was quoted as saying about women's rights in a future government: 'Right now we have other priorities. ... we have to be careful not to look like we are imposing our values on them.' This was striking in view of the bombing campaign which was designed precisely to challenge the Taliban's fundamental values.

Indeed, the RAWA has pointed out that the Taliban's destruction of the ancient standing Buddha figures earlier this year attracted vehement international protests, more than all the official international statements of disapproval of the treatment of women put together. The US move to embrace the Northern Alliance as its partner against the Taliban was a very problematic one when seen from the perspective of women. The Northern Alliance was regarded as only fractionally better than the Taliban with respect to women's position. Ironically perhaps, women's lives seemed best under the Soviet-backed government in Afghanistan, which was vilified by the United States and the west.

It was striking also that the issue of women was rather suddenly showcased in November 2001, when the US State Dept posted a report on its web site called 'The Taliban's war against women'. It's very brief and rather journalistic. The only publicity for report was given by Mrs Bush, in her husband's weekly radio address: the message seemed to be that concern for women was women's business.

The United Nations also played a problematic part here. In 2000, amid great fanfare, the UN Security Council adopted a resolution on the importance of involving women in peace negotiations and peace settlements (1325). And yet, Lakdhar Brahimi, the UN Secretary-General's special representative to Afghanistan, was initially silent about women's involvement in any new government. Indeed, Brahimi repeatedly referred to the possibility of a government based on tribal structures, which gave women little status. His list of relevant players in the new government even includes 'moderate' members of the Taliban, but not any representative of 54% of Afghanistan's population.

all nations and peoples? Is a focus on double standards of powerful countries with respect to international law useful? Of what value is a challenge to the neo-liberal basis of international law? How do we conceptualise the critical project in international law by exposing its gendered (and other) biases and hierarchies, while nevertheless seeking its widest possible application and enforcement?

The acceptance of international law by centres of power at the beginning of the 21st century is ambivalent. Challenging this law with feminist questions may contribute to this fragility. Martti Koskenniemi has criticised the feminist project of reconceiving international law for this reason. "We can reconceive international law every now and then, but not all the time" he has argued[137].

> Our immediate fears and hopes do not necessarily match to produce the good society. ... At some point, we need distance from those fears and hopes – if not objective distance, then at least a partial, consensual, formal distance. That the law makes this distance possible (if always only for a moment) is not a defect of law, but its most immediate benefit.

My argument in these lectures is however that international law does not provide even a momentary distance from subjectivity. It is intertwined with a sexed and gendered subjectivity and reinforces a system of male power. Until international law focuses on *all* people and peoples, not just the powerful few, it will always be subject to geopolitical agendas inimical to genuine security – such as security in food, fresh water, a clean and stable environment, economic development that sustainable, trade that is fair, and adequate safeguards protecting the rights of migrants, prisoners-of-war, children, as well as vulnerable women and men.

137. KOSKENNIEMI, MARTTI, Book review of Dallmeyer, Dorinda ed. Reconceiving International Law (1995) AMERICAN JOURNAL OF INTERNATIONAL LAW 89: 227 at 230

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Another gateway to all sorts of international law resources is that at the University of Chicago: http://www.lib.uchicago.edu/~llou. Check under 'Women and international law'

UN High Commissioner for Human Rights: http://www.unhchr.ch

[an invaluable web site with full text copies of relevant UN Publications, text and status of ratifications of international human rights instruments, links to the human rights treaty monitoring bodies decisions and general comments]

University of Minnesota Human Rights Library

http://www1.umn.edu/humanrts/

[a well-linked guide to human rights resources, including literature, mirror sites, documents etc]

CHILDREN'S RIGHTS AND CULTURAL DIVERSITY

by

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