



International Law

Modern Feminist Approaches

Edited by Doris Buss and Ambreena Manji
With a Foreword by Mary Robinson

International Law: Modern Feminist Approaches

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FOREWORD

Mary Robinson

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and President of Ireland

When international law became the subject of sustained feminist scholarly scrutiny and activism over a decade ago, it opened up new thinking, new language and new priorities. It became clear that international human rights law had suffered from the absence of women's voices. Within a field of international law constituted as objective and neutral, women's rights were often dismissed as either too partial or too domestic to come within the ambit of international law. Without the inclusion of women, and an understanding of their social, economic and political experiences, human rights were hampered in their claims to universal significance. What place could there be for an international protection of the right to life, for example, that did not address the alarming incidences of maternal mortality among the world's women? And, how seriously was state-sponsored violence condemned if widespread and often fatal violence against women, both in the public and private spheres, excited little comment from international human rights institutions and actors?

As a result of the hard work and dedication of many feminist scholars and activists we now have in place a healthier international human rights regime, one that is prepared to rethink its human rights mandate more fully to comprehend and address the human rights of all. This is an important achievement, and one that should not be overlooked.

The essays in this book invite us to consider the question of what comes next for international law, human rights and feminism. Their focus is on what Hilary Charlesworth, Christine Chinkin and Shelley Wright describe in their essay as 'both the increased attention to the language of feminism and the limited progress women have made.' Each of the essays presented here is alert to this tension in both scholarship and activism. By reflecting on the limits of feminist engagement with international law, the authors acknowledge that the task is not simply to offer

feminist analyses of the field but fundamentally to challenge its constitution and boundaries.

This volume of essays comes at a very important time. The challenges facing international law and human rights, as well as the institutional integrity of the United Nations are pressing. The opportunity for reflection on feminist futures offered by this volume should be one that is taken up by everyone. We are at a point where the international community, its institutions, priorities, processes, and self-definition, are being renegotiated. For those committed to human rights and a more inclusive and effective United Nations, a number of developments raise questions.

Formal state and institutional support for the idea and language of human rights is overwhelming. What impact will this professed support for human rights have on international law's ability to make lasting and meaningful change in people's lives? Can we close the gap, even partially, between the professed support for human rights and its open and flagrant violation by many nation-states? And what of the United Nations and proposed reform of bodies such as the Commission on Human Rights? Can they continue to attract international credibility while the gap between commitment and aspiration remains so wide?

The area of women's rights in particular raises a number of questions. How can the current international consensus on the human rights of women be translated into meaningful change? As the essays in this collection highlight, we may very well be entering into a new era of human rights and international law where the formal 'successes' of feminist and other activists pose unexpected challenges to future change.

These complex questions need to be raised and pursued if we are going to ensure that a future international community places at its centre the needs and lived realities of all people.

International lawyers, activists and policy-workers are sometimes accused of doing nothing more than talking while the lived reality of women and men throughout the globe remains a daily struggle against profound inequalities. Talking should never be used to avoid acting. Equally, we need to be wary of the allure of action without thought.

The essays contained here provide timely explorations of the most important questions facing feminist international lawyers today. I warmly welcome this book and hope it will reach a wide audience.

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Introduction

DORIS BUSS AND AMBREENA MANJI

Since the early 1990s and the publication of Hilary Charlesworth, Christine Chinkin and Shelley Wright's 'Feminist Approaches to International Law',¹ feminist scholarship on international law has developed and expanded to the point where it appears to be an 'accepted' part of the legal academy. Room is made for feminists to sit on panels at the main international law conferences, feminist articles appear (infrequently) in mainstream international law journals, and topics of particular concern to feminist legal scholars—violence against women, for example—occasionally make it into international legal textbooks.²

In scholarly terms, the 1990s witnessed an impressive publication of feminist research and writing in the international law field. The American Society of International Law published Dorinda Dallmeyer's edited collection of essays, *Reconceiving Reality: Women and International Law*, in 1993,³ conference panels were dedicated to feminist analyses of international law topics,⁴ and the decade ended with the publication of Charlesworth and Chinkin's landmark text, *The Boundaries of International Law*.⁵ Although primarily focused on public international law,⁶ this scholarly production also explored the breadth of the international legal field: the use of force and collective security,⁷ state sovereignty and non-interference,⁸ self-determination,⁹ humanitarian

¹ H Charlesworth, C Chinkin, and S Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

² HJ Steiner and P Alston, *International Human Rights in Context*, 2nd edn (Oxford, Oxford University Press, 2000).

³ Washington, DC, American Society of International Law, 1993.

⁴ See, eg, 'Sources of International Law: Entrenching the Gender Bias', *Contemporary International Law Issues: Opportunities at a Time of Momentum Change: Proceedings of the Second Joint Conference Held in The Hague, The Netherlands, July 22–24, 1993* (Dordrecht, Martinus Nijhoff Publishers, 1994).

⁵ (Manchester, Manchester University Press, 2000).

⁶ But see, S Wright, 'Women and the Global Economic Order: A Feminist Perspective' (1995) 10 *American University Journal of International Law and Policy* 861; A Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443; K Engle, 'Views from the Margins: A Response to David Kennedy' (1994) 1 *Utah Law Review* 105.

⁷ A Orford, 'The Politics of Collective Security' (1996) 17(2) *Michigan Journal of International Law* 373; Orford, *ibid*.

⁸ K Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law & Contemporary Problems* 293; K Walker, 'An Exploration of Article 2(7) of the United Nations Charter as an Embodiment in International Law' (1994) 26 *International Law and Politics* 173.

⁹ C Chinkin and S Wright, 'The Hunger Trap: Women, Food and Self-Determination' (1993) 14 *Michigan Journal of International Law* 262; K Knop, *Diversity and Self-Determination in International Law* (Cambridge, Cambridge University Press, 2001).

law,¹⁰ nationality,¹¹ and a sustained analysis of international human rights law.¹² More recent scholarship reveals an extensive feminist engagement with the new institutions of international criminal law¹³ as well as international economic law.¹⁴

The central concern of much of the scholarship in the 1990s was why international law was not doing more to address the inequality and oppression of women. As Karen Engle notes in her chapter for this volume, this scholarship focused on the structural bias of international law, the ways in which the discipline's doctrinal manoeuvres position women's inequality as outside international law's remit. If international law was structurally biased, then the task was not for women to be included within a slightly reformed international law. A more fundamental restructuring process was required, one that would 'lead to the creation of international regimes that focus on structural abuse and the revision of our notions of state responsibility'.¹⁵

The scope and depth of existing feminist literature indicates a sustained effort to engage with, and even rewrite, the disciplinary categories of international law. But while feminist scholars took on the discipline of international law, there is little to suggest that the other practitioners of international law were prepared to

¹⁰ J Gardam, 'The Law of Armed Conflict: a Gendered Perspective' in D Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (Washington DC, American Society of International Law, 1993).

¹¹ K Knop and C Chinkin, 'Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law' (2001) 22 *Michigan Journal of International Law* 523; LC Stratton, 'The Right to Have Rights: Gender Discrimination in Nationality Laws' (1992) 77 *Minnesota Law Review* 195.

¹² See, eg R Copelon, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture,' (1994) 25 *Columbia Human Rights Law Review* 291; C Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87; K Engle, 'International Human Rights and Feminism: When Discourses Meet' (1992) 13 *Michigan Journal of International Law* 317; C MacKinnon, 'On Torture: A Feminist Perspective on Human Rights' in KE Mahoney and P Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff, Dordrecht, 1993); H Charlesworth, 'What are "Women's International Human Rights"?' in R Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania, Philadelphia, 1994); U O'Hare, 'Realizing Human Rights for Women' (1999) 21 *Human Rights Quarterly* 364; D Otto, 'A Post-Beijing Reflection on the Limits and Potential of Human Rights Discourse for Women' in K Askin and D Koenig (eds), *Women and International Human Rights Law* (Ardsley, NY, Transnational Publishers, 1999); D Otto, 'Holding Up Half the Sky, but for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7; S Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (London, Routledge, 2001).

¹³ See, eg, KD Askin, 'Prosecuting wartime rape and other gender related crimes under international law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288; D Buss, 'Women at the Borders: Rape and Nationalism in International Law' (1998) 6(2) *Feminist Legal Studies* 171-203; R Copelon, 'Integrating Crimes Against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217; N LaViolette, 'Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunal for the Former Yugoslavia and Rwanda' (1998) *The Canadian Yearbook of International Law* 1998 93; J Mertus, 'The Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6 *International Feminist Journal of Politics* 110.

¹⁴ See, eg, S Pahuja, 'Trading Spaces: Locating Sites for Challenge within International Trade Law' (2000) 14 *Australian Feminist Law Journal* 38-54.

¹⁵ Charlesworth and Chinkin, above n 5, at 644.

engage with feminists. Hilary Charlesworth, in a 1996 article,¹⁶ describes how the responses to feminist analysis of international law were divided into two camps: those who decried the unfair assault on a discipline that could do good for women; and those from the more critical camp who merely offered whispered words of encouragement. Christine Sylvester identifies similar trends in the international relations field, describing critical scholars as merely tipping their hats in the direction of feminist theory.¹⁷ In their chapter in this volume, Chinkin, Wright and Charlesworth describe responses to feminist international legal scholarship as ranging from 'support' to 'a mass of passively resistant inertia'.¹⁸ We might conclude that the international legal academy and its political brethren seem prepared to include feminist scholars within the discipline, provided the discipline's foundational assumptions and modes of operation are left unaltered. That is, international lawyers may not change *what* they do or *how* they do it, but they now seem willing to tolerate feminists at their side *as* they do it.

Feminist engagement with international law, however, has never been confined solely to the academy. Indeed, some of feminism's more high-profile 'successes' have occurred at the conferences, meetings, institutions and courts that develop and implement international law and policy. From the vantage point of 2004, a number of feminist campaigns to secure greater international attention to women's oppression—and the conditions that sustain that oppression—are particularly worthy of note. A list of such celebrated successes might include the 1994 Cairo Conference on Population and Development,¹⁹ with its prioritisation of women's autonomy and health; the 1995 Beijing Conference on Women,²⁰ with its recognition of women's sexual and reproductive rights; the strengthening of the Committee that oversees the 'Women's Convention',²¹ that for many years shivered in the cold of its exclusion from the mainstream of human rights; the negotiation of the protocol to the Women's Convention to allow individual complaints;²² the recognition of the need for gender analyses and 'gender mainstreaming' throughout the UN;²³ the drafting of the Declaration on the Elimination of Violence Against Women²⁴ and the inter-

¹⁶ 'Cries and Whispers: Responses to Feminist Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 561.

¹⁷ C Sylvester, *Feminist International Relations: An Unfinished Journey* (Cambridge, Cambridge University Press, 2002), at 264.

¹⁸ 'Feminist Approaches to International Law: Reflections from Another Century', this volume.

¹⁹ *Report of the International Conference on Population and Development, Cairo 5–13 September 1994, Annex, Programme of Action of the International Conference on Population and Development, A/CONF.171/13*, 18 October 1994.

²⁰ *Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, China, 4–15 September 1995. UN Doc DPI/1766/Wom* (1996).

²¹ *The Convention on the Elimination of all Forms of Discrimination Against Women, 1979, UN Doc A/34/46* (1979).

²² *Optional Protocol to the Convention on the Elimination of Discrimination Against Women, 1999, UN Doc A/54/49 (Vol I)* (2000).

²³ See Kouvo, this volume. For a discussion of gender mainstreaming in international economic law, see Beveridge, this volume. There is a growing body of literature analysing gender mainstreaming in different areas of the UN apparatus. On peacekeeping and related activities, see S Whitworth, *Men, Militarism and UN Peacekeeping: A Gendered Analysis* (Boulder, CO, Lynne Rienner, 2004);

²⁴ *Declaration on the Elimination of Violence Against Women, 1993 A/RES 48/104* (1994).

national recognition of violence against women as a serious human rights issue; the prosecution of rape as a war crime at the ad hoc tribunals in Rwanda and Yugoslavia;²⁵ the inclusion of gender analyses and women's human rights frameworks within multiple international agreements;²⁶ the increased participation of feminist and women's NGOs at all levels of UN activity; and the increased representation of women in senior positions at the UN.²⁷

Although it is possible—and necessary—to question the impact of these changes on women's lives, collectively they signal a sustained feminist presence in the international realm, and one that has challenged the depiction of international law as concerned exclusively with a narrow range of matters related to affairs between states. They also suggest a shift in the scholarly project of 'asking the woman question'. Karen Knop, in her introduction to a recent collection of essays on women's human rights,²⁸ traces a number of shifts in the literature that suggest women's human rights may be emerging as a distinct disciplinary field, with all the problems and prospects that constituting a discrete area of study brings.

Is there a similar shift in the literature on feminist approaches to international law? The chapters in this volume by Karen Engle, and by Christine Chinkin, Shelley Wright and Hilary Charlesworth, provide a map of feminist engagement with international law. Karen Engle develops a periodisation of feminist scholarship on international human rights, exploring the questions that motivated feminist research and the problems that animated feminist analyses throughout the 1990s. These changed over time from demands for inclusion to more fundamental problematising of the very structures of human rights law. Chinkin, Wright and Charlesworth similarly reflect on feminist engagement with international law, locating their analysis in the context of 'seismic shifts' in scholarship and on the geo-political, institutional and educational planes of international law.

Both these chapters highlight different problems, conflicts and challenges that face feminist engagement with 'the international' and with law. For Engle, the most pressing question is how feminism confronts the two 'elephants in the room'. First, the 'feminist' question: what constitutes 'feminist' international law and are we doing it now? And, second, the issue of diversity and imperialism: whether and how Western feminists can avoid speaking of and for the ubiquitous Third World Woman. One of the key questions underpinning Chinkin, Wright and Charlesworth's analysis is what comes after the apparent feminist successes in including gender, however partially and problematically, in the practice and study of international law?

²⁵ See, eg, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment, IT-96-23-T & IT-96-23/1-T (22 February 2001; last accessed 5 October 2004), and Copelon, above n 13.

²⁶ See, for eg, *Declaration of Commitments on HIV/AIDS*, UN General Assembly Special Session on HIV/AIDS, 25–27 June 2001, http://www.unaids.org/EN/events/un+special+session+on+hiv_aids/declaration+of+commitment+on+hiv_aids.asp (last accessed 10 October 2004).

²⁷ For a discussion of the recent statistics on the UN and the representation of women, see Chinkin, Wright and Charlesworth, this volume.

²⁸ *Gender and Human Rights* (Oxford, Oxford University Press, 2004).

This brings us to the motivation behind the present volume of essays. The idea of this project arose out of a sense that feminist legal scholarship in the international law field had unfolded in a piecemeal, ad hoc and dispersed manner. It is clear that feminist international scholars are as productive today as they were in the 1990s, but is there a field or area of study that we could call 'feminist international legal scholarship'? With Charlesworth, Chinkin and Wright's landmark paper 'Feminist Approaches to International Law' over a decade old, what were feminists doing, thinking, writing about now? And, to take up the question asked recently by an international law colleague, do feminists have anything more to say about international law? Could it be, as this colleague suggested, that everything that feminists have to say has been said, and that the various doctrines of international law have been comprehensively canvassed for their gendered character?

This volume is oriented around these questions. The chapters included here reflect feminist work on different aspects of international law. Our self-imposed task has not been to offer a definitive account of feminism and international law, even if this were possible. Rather, the objectives of this volume are more limited: to offer a snap-shot of current feminist thinking on some of the doctrinal, applied and theoretical aspects of both international law and feminist engagement with 'the international'. And, more importantly, through this snap-shot, to complicate understandings of both feminist analyses and international law.

The chapters in this volume have in common a concern with reading, negotiating and troubling boundaries. One of the principal boundaries under scrutiny here is the disciplinary one: what do we define as international law? How might a feminist analysis of law and 'the international' offer a more transgressive account of international law and its impact? How might we tell a different story of international law, one that recognises its constitutive relationship with the theory and practice of other fields and systems not traditionally seen as part of international law: development, economic and environment law, criminology and victimology, pedagogy, imperialism and colonialism? How might we ourselves cross disciplinary boundaries to read and view international law through literature and film?

The chapters in this volume are unabashedly interdisciplinary. But we urge caution in seeing this as purely an exercise in interdisciplinarity for its own sake. To do so risks overlooking the more essential critique offered by these chapters of the very idea of boundary. Many of the authors in this volume question, subvert and challenge the orthodoxy of disciplinary boundaries that mark inside and outside. In doing so, they disrupt the received wisdom of what is and is not international law, and what counts, or does not count, as feminist theory.²⁹

The chapters in this volume are organised around the twin objectives of mapping what it means to bring feminist perspectives to international law, and reflecting on what it means for feminists to include 'the international' in their

²⁹ The idea of what 'counts' as feminist theory is taken from T Murphy, Book Review: 'KD Askin and DM Koenig, eds. *Women and International Human Rights*, Vols I, II, III' (2002) 2 *Human Rights Law Review* 167.

theory and practice. We view the chapters contained here as part of an ongoing conversation about the possible impact of feminist engagement with 'the international'. What constitutes a feminist theory of international law? What are the implications for feminists of the ostensible successes of feminist scholarship and practice in international law? What concepts, strategies and questions might need to be reassessed by feminists in coming years?

The chapters in this collection are all reflective, scholarly accounts of three aspects of feminist international legal scholarship suggested in the volume's title: the range, direction and implications of *feminist approaches* to international law; the constitution, definition and possibilities of *international law*; and the place of the *modern* in changing global circumstances.

Feminist Approaches

So far, we have referred to feminist analyses of international law as though there is agreement as to what constitutes such a project. As Denise Réaume has noted, 'efforts to systematize [feminist scholarship] sit uneasily with the simultaneous trumpeting of the diversity within feminist thought'.³⁰ Referring to 'feminist approaches to international law' might imply a shared intellectual project, and one that takes place within the international legal academy. Neither of these assumptions holds true. Indeed, we thought it important to bring the essays presented here together precisely because of the diversity of feminist engagement with international law which is, furthermore, increasingly conducted by scholars who may not explicitly locate themselves within the international law field.

And yet there is an emerging terrain of feminist international legal scholarship, the broad contours of which are evident in the following essays. Certainly, feminist scholars of international law may be still only stretching their theoretical legs, and conversations about the questions we need to ask and the tools we need to employ are only just beginning.³¹ Further, there are differences in the theoretical perspectives that feminist international scholars bring to their work, from post-structural and post-modern preferences,³² to more materialist analyses.³³ But

³⁰ 'What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law,' (1996) 2 *Legal Theory* 265, at 269.

³¹ See, eg, A Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law* 275; H Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379; K Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights' in DG Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (Washington, DC, American Society of International Law, 1993); D Buss, 'Going Global: Feminist Theory, International Law and the Public/Private Divide' in SB Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto, University of Toronto Press, 1997).

³² D Otto, 'Rethinking the "Universality" of Human Rights' (1997) 29 *Columbia Human Rights Law Review* 1; and A Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, Cambridge University Press, 2003).

³³ See Rochette, this volume; S Wright, above n 6.

these differences and emerging conversations foretell analytical richness rather than ideological divisions.

Chapters 2 and 3 in this volume, by Chinkin, Wright and Charlesworth, and by Engle, provide the important historical context for the remaining chapters. Substantively, Chinkin, Wright and Charlesworth place the ostensible gains of feminist activism, together with the seismic shifts of the end of the cold war and the events of September 11, 2001 at the centre of their analysis. Presaging some of the themes developed in subsequent chapters in this volume, these three authors note the advances in the substance and procedures of international human rights, the mainstreaming of gender in international institutions, the 'troubling triumphalism' of human rights, and the complexity of doing and teaching feminism and law as something *other* than a subject of curiosity. Engle's chapter orders the feminist literature on women's rights according to the methods and objectives employed primarily in the 1990s in feminist approaches to international law.

These two chapters raise, in different ways, a key theme pursued throughout this volume: the emergence of an identifiable field of feminist international law and politics in which feminists have achieved ostensible successes of varying significance. For Engle, the emergence of a field of scholarship on international law can be detected in the debates that unfolded in the 1990s, in which feminist scholars began to consider *what* they were trying to achieve and the means by which they would do so. While this chapter is exclusively focused on American scholarship, its analysis could also pertain to the literature by Australian, Canadian and British feminists. In painting a picture of two elephants at the heart of this emerging field—the meaning of *feminist* theory and the difficulties and inevitabilities of the Exotic Other Female—Engle's analysis suggests that at the very moment of its birth, feminist international law was bedeviled by the complexity and uncertainty of its politics.

Chinkin, Wright and Charlesworth also outline the many apparent successes of feminist activism in international law and human rights. While each of these successes is important, the authors highlight a more troubling development: the instrumental connection between human rights discourse and neo-liberalism.³⁴ What implications does this connection have for feminist activism in international human rights? Do we, the authors ask, 'bring human rights and democracy, for example, to Iraq, even while we recognise that this will provide the desired environment for economic reconstruction of the country in line with neo-liberal policies with all their inherent disregard for human security, especially gendered security?'³⁵ Having achieved inclusion within mainstream human rights, the authors note, feminists are now faced with the difficulties of a human rights discourse itself side-lined by the war on terror and the over-arching concern of 'security'. 'Just as women have sought to become "insiders" in human rights discourse, human rights

³⁴ 'Feminist Approaches to International Law: Reflections from Another Century', this volume.

³⁵ *Ibid.*