

Charlesworth's call to reconnect feminist messages with feminist methods, through techniques such as 'world travelling', underlines a transgressive and reformist potential that can be muted or mimicked by international institutions, but never entirely repressed. Meanwhile, the flow invoked by this notion of 'world travelling' is reflected in Pearson's descriptive insistence on the fluidity of socio-political and legal spaces, which in turn finds a prescriptive articulation in Otomo's notion of 'hosting' as a model that acknowledges both the instability of borders and the inevitability of transitional trespass.

The focus on space(s)—for inclusion, for resistance, for reflection—that animate these chapters is mirrored, moreover, in the self-consciously situated nature of each author's contribution. Pearson's opening and closing observations regarding the local and normative spaces of Ankara, Otomo's deliberate reflections from the vantage point of a Japanese-Australian girl in a glass office in central Melbourne, and Charlesworth's experience of a split and splintered identity as academic and activist inform the experiential locations from which their respective engagements are made.

The chapters in this Part, in subtle but compelling ways, traverse and transcend the present dichotomy in much feminist commentary between sustained allegations of a systemic and entrenched patriarchal privilege that is impervious (in law and beyond) to challenge and celebratory endorsements of international law's adoption (or co-option?) of feminist language and core concepts in setting its institutional agendas. Highlighting the paradoxical, fluid, complex, and multi-faceted nature of the spaces of international law, the authors make a collective call for caution in the face of suggestions that it is time to 'take a break from feminism'. At the same time, they reject monochrome visions of gender, or legal, power relations, and insist upon the reconstructive potential—for feminism—of international institutions and doctrines. Though not purporting to chart a detailed map, the authors offer hope for an elsewhere between resistance and compliance. Their chapters provoke a critical re-appraisal of feminist theory in general, and in relation to international law in particular; and promise to re-invigorate reformist politics therein.

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Talking to Ourselves? Feminist Scholarship in International Law

HILARY CHARLESWORTH*

INTRODUCTION

FEMINIST SCHOLARSHIP IN international law has generated debate between feminists, but little engagement from the disciplinary mainstream. This chapter addresses one strand of the internal debate, Janet Halley's argument that feminism has come to exercise considerable power in international law and its institutions; and that it does so with little self-reflection, indeed denying its own influence by asserting an inauthentic underdog status. After describing the place of feminist theorising in international law, and then Halley's critique, the chapter considers feminist scholarship and its oscillation between resistance to and compliance with international law in the context of state-building and democratisation. It argues that feminists have been successful in bringing the language of women's empowerment into international law but less adept at identifying methods to give this language life on the ground.

FEMINIST CONVERSATIONS IN INTERNATIONAL LAW

Much feminist international legal scholarship presents itself as being in conversation with the mainstream of international law. We ask the mainstream to consider women's lives when applying or developing the law; we critique the assumptions of international legal principles; and we argue for an expanded referential universe. This conversation is, however, almost completely one-sided; a monologue rather than a dialogue. It is very hard

* Many thanks to the editors of this book for their comments on earlier drafts of this chapter. I also thank Karen Engle and Ann Genovese for their valuable comments on the chapter and Susan Harris Rimmer for her research assistance.

to find any response from international legal scholars to feminist questions and critiques; feminist scholarship is an optional extra, a decorative frill on the edge of the discipline. This lack of engagement by the academy contrasts with the approach taken in international institutions, as I describe below.

Some critical and progressive scholars use the occasional footnote to feminist scholarship to signal that they have kept up with their reading, and mainstream international law texts sometimes feature women's lives, especially in discussions of universalism and relativism. Feminist ideas are however almost never treated seriously; they are not acknowledged, debated or refuted. Similarly, international law casebooks often include a paragraph or two from a feminist article in the 'overview' or 'theory' section to show that they have broadminded authors, but feminist critiques usually appear as token offerings as they are not carried through to all areas of inquiry. In short, feminist theories are in a scholarly ghetto in international legal scholarship.

Although feminist international lawyers are often grouped under the umbrella of 'New Approaches to International Law', feminist ideas are in some tension with those of critical theorists. For example, David Kennedy's work has excavated the dark sides of international law. He understands the law largely as a method of ducking responsibility for ethical and political choices.¹ On this account, international law is worth studying for its contradictions and obfuscations but it can deliver only fleeting or illusory benefits. Martti Koskenniemi recognises a realm for international law that is distinct from politics—the regulative idea of universal community which directs us beyond the interests of particular groups.² However Koskenniemi indicates his political commitments only in the most general terms—rejection of imperialism and totalitarianism—and is wary of a broader suite of causes.³ Feminists, by contrast, embrace normative projects—in particular achieving equality for women—with alacrity. Feminist lawyers tend generally to assume that the right sort of international law will achieve women's equality, or at least get them part of the way.

Feminist international legal writings often draw on a range of theoretical positions that can sit uneasily together; for example the idea that women have distinctive attitudes, interests and experiences may be combined with an argument that a reconstructed international law can deliver a truly impartial form of justice. This has led to charges of theoretical incoherence or impurity. Thus Nathaniel Berman has pointed out that feminist international

¹ See, eg, D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, Princeton University Press, 2004); and D Kennedy, *Of War and Law* (Princeton, Princeton University Press, 2006).

² M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 30.

³ M Koskenniemi, *From Apology to Utopia* (Helsinki, Finnish Lawyers Publishing Company, 1989) 497.

lawyers critique the doctrines and structure of international law and yet also rely on the expansionist spirit of *après-guerre* internationalism to campaign for improvements in women's lives.⁴ Such a critique illustrates Elizabeth Grosz's observation that feminist theories generally rest on a deep tension between their role in analysing the thoroughgoing masculinity of disciplinary knowledges and their role as a response to political feminist goals; they often incur the wrath of the traditional academy because of their overtly political ends; and the ire of feminist activists because they can become immersed in the male-dominated world of theory.⁵

As in other areas of knowledge, most of the debate and engagement with feminist ideas in international law comes from other feminists. It seems that one needs to be a card-carrying feminist to use or discuss feminist ideas.⁶ So, while the rest of the discipline ignores us, feminists have created a veritable industry of internal critique, pointing to the problematic assumptions and approaches of other feminists. Examples of such critiques include those of Third World and postmodern feminists. Take Ratna Kapur's scrutiny of what she terms the 'victimisation' rhetoric used by the international human rights movement when discussing the situation of Third World women, particularly in relation to violence and trafficking. Kapur argues that the assumption of a common international women's victimhood operates to keep women in their place by presenting them as both vulnerable and ignorant.⁷ She criticises a focus on sex as the locus of women's oppression and urges a more complex understanding of women's lives through considering factors such as race, wealth, class and religion. Karen Engle has taken on one of the apparent success stories of international feminist activism, the criminalisation of rape in the International Criminal Tribunal for the Former Yugoslavia.⁸ She suggests that this strategy is built on a view of women as passive victims of sexual violence and political and military agency, and that it presents a one-dimensional view of the suffering of women in the conflict in Bosnia-Herzegovina. Engle argues that the strategy of prosecution has had the practical impact of reifying ethnic differences and the legal and moral effect of denying the possibility of sexual agency in times of conflict. She seems suspicious of the utility of any claims made

⁴ N Berman, 'Power and Irony, or, International Law after the *Après-Guerre*' in E Jouannet, H Ruiz Fabri, and JM Sorel (eds), *Regards D'Une Génération de Juristes Sur Le Droit International* (Paris, Editions A Pedone, 2008) 79.

⁵ E Grosz, 'A note on essentialism and difference' in S Gunew (ed), *Feminist Knowledge: Critique and Construct* (London and New York, Routledge, 1990) 332.

⁶ A critical international law scholar once told me that he did not consider feminist ideas in his work because there were no books on feminist theory in his university's library.

⁷ R Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Law Journal* 1.

⁸ K Engle, 'Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *American Journal of International Law* 778.

in the name of feminism and implies that change will depend on economic reforms such as redistribution of wealth.⁹

To some extent, the internal debates about feminist scholarship map onto a divide between scholars and activists. Academics seem much more willing to scrutinise the premises of feminist theory and to attack impurity and inconsistency; people working in non-governmental organisations (NGOs) or international institutions with feminist agendas, by contrast, are generally keen to work with a big picture, and associate feminism with getting more women involved in decisions, or using international law to help women.¹⁰ Generally, academics are more concerned to identify the flaws and faultlines of feminist analyses of international law, while feminists in NGOs or international institutions are less critical.¹¹

The tension between critical approaches to international law, which are concerned with identifying the politics of international law, and feminist approaches, which analyse the law to improve the position of women, is often acute. I find myself one day discussing with colleagues and students the dark sides of international law and the way that the discipline puffs up its own importance. On such days, I counsel modesty and restraint. On other days I find myself talking to community groups about the value of international law in framing arguments about injustices. On such days, I counsel enthusiasm and hope. My inconsistencies trouble me but are unresolved. So, in this uneasy situation, Janet Halley's book, *Split Decisions: How and Why to Take a Break from Feminism*, with its snappy title and clear prescriptions, seems to offer a way ahead. Is taking a break from feminism a useful strategy in international law?

TAKING A BREAK FROM FEMINISM

Halley's arguments about feminism derive in large part from her experience of left of centre American sexual politics.¹² She describes feminism as essentially 'a subordination theory set by default to seek the social welfare of women, femininity, and/or female or feminine gender by undoing some part or all of their subordination to men, masculinity, and/or male or

⁹ K Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Oxford and Portland, Hart Publishing, 2005) 47.

¹⁰ See H Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' (2008) 16 *Feminist Legal Studies* 347.

¹¹ See further Mertus' chapter, below, this collection. There are of course disputes about transnational feminist agendas: see, eg, B Ackerly, "'How Does Change Happen?' Deliberation and Difficulty' (2007) 22 (4) *Hypatia* 46.

¹² JE Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, Princeton University Press, 2005) 4.

masculine gender'.¹³ Halley summarises the three basic conditions for feminist argument pithily: drawing a distinction between male/masculinity/men and female/femininity/women (m/f); positing a relationship of subordination between m and f (m>f); and opposing the subordination of f to m—in Halley's words 'carrying a brief for f'.¹⁴ Many feminists, she argues, are also committed to the 'Injury Triad'—female injury + female innocence + male immunity. Halley describes 'governance feminism' as the institutionalisation of feminist ideas in law and other sites of formal power. For Halley, feminism has now achieved considerable clout in many areas—governance, society and culture—and refusal to acknowledge and manage this is a form of bad faith.¹⁵ She presents a draft of the terms of such an acknowledgment:

Yes, feminism wields power; ratifies as well as critiques the experience of feminine injury; cares not whether its famous plaintiffs are telling the truth; seeks to impose itself with vigour and sometimes with violence on the social world; rules across the board, not case by case; and so, overall will necessarily generate male road kill, male scapegoats, and male objects of retributive vigour. So be it.¹⁶

Other feminist commitments identified and criticised by Halley are the belief that feminism is integral to any theory of sexuality and the idea that one theory is better than many.

Halley has the 'late' work of Catharine MacKinnon in her sights in particular, describing MacKinnon's work in the 1990s and 2000 as dogmatic, totalising and so focused on male power that it is unable to recognise the power of women and feminism.¹⁷ Robin West's work on cultural feminism¹⁸ is also attacked by Halley for failing to explain 'women's erotic yearning for men'.¹⁹ Halley associates feminism with an almost punitive, or joyless, approach to sex. MacKinnon and West are 'anti-sex' while Halley describes herself as 'sex-positive'.

Although the title of her book may imply a rupture with or discarding of feminist theory, Halley emphasises that she respects the traditions and contributions of feminism and is seeking simply to draw attention to its blind spots and limitations. She explains her mission as getting feminism 'to see around the corners of its own construction',²⁰ while resisting any substantive feminist program, such as sex equality. In this sense Halley's interest in sexuality rather than social justice is deeply influenced by queer theories. Halley advocates Taking a Break from Feminism (her capitalisation) so that

¹³ *Idem*.

¹⁴ *Ibid* 17–18.

¹⁵ *Ibid* 341–44.

¹⁶ *Ibid* 342.

¹⁷ She is enthusiastic about the 'early' MacKinnon, which she sees as radical and uncertain.

¹⁸ See, eg, R West, *Caring for Justice* (New York, New York University Press, 1997).

¹⁹ Halley, above n 12, 65.

²⁰ *Ibid* 321.

we can let go of being committed to an overarching explanation for the places in which women find themselves and the problems they encounter. In this way, Halley presents herself as breathing new life into feminism. She argues that 'the very vitality and usefulness of feminism as a social theory seems to have waxed when the commitment to its omnipresence wanes, and vice versa'.²¹

Halley's work has prompted a range of responses. It has been criticised for presenting a narrow account of feminism, glossing over different feminist forms, with their diverse and often contradictory goals and methods.²² Critics have also attacked Halley's generalities and broad brush.²³ But the clarity and energy of Halley's critique make it hard to dismiss quickly. It usefully draws attention to some of the assumptions that feminists rely on in the international arena.

TAKING A BREAK FROM FEMINISM IN INTERNATIONAL LAW

What implications do Halley's arguments have for feminists working in international law? Although Halley does not identify as part of the 'invisible college' of international lawyers,²⁴ and is concerned mainly with the United States (US) feminist academy, her work has increasingly engaged with international legal issues.²⁵ In demonstrating the bad faith of feminist argument, she inverts its second condition: rather than $m > f$, we regularly find that in fact $f > m$. Thus, Halley claims that feminism 'is running things' in 'the European Union, the human rights establishment, even the World Bank'.²⁶ 'Sex harassment, child sexual abuse, pornography, sexual violence, antiprostitution and antitrafficking regimes ... have moved off the street and into the state'.²⁷ Feminist activism directed at the ad hoc international criminal tribunals, she writes, has had a major effect on the development of international criminal law and, she concludes '[b]y positing themselves as *experts* on women, sexuality, motherhood, and so on, feminists walk the halls of power'.²⁸

²¹ Ibid 6.

²² AP Romero, 'Methodological Descriptions: "Feminist" and "Queer" Legal Theories' (2007) 19 *Yale Journal of Law and Feminism* 227.

²³ See, eg, M Hawkesworth, 'Book Review' (2007) 5 *Perspectives on Politics* 608.

²⁴ O Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217.

²⁵ See J Halley, P Kotiswaran, H Shamir and C Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Gender and Law* 335.

²⁶ Halley, above n 12, 20.

²⁷ Idem.

²⁸ Ibid 21. See also J Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78.

Halley's diagnosis of feminism's great power and its inevitable 'male road kill' has little resonance in international law. Halley's examples of the feminist takeover of 'the human rights establishment' or the international criminal tribunals, for example, seem exaggerated in light of the evidence. Some international institutions have to some extent absorbed the vocabulary of women and gender, but they have reduced feminist ideas to ritualised incantations. Despite all the talk of women, gender and gender mainstreaming, women's lives remain on the periphery of international institutions.²⁹ Halley seems to have been dazzled by the inclusive language, but she has not looked beneath the surface. As I discuss below, at the international level, feminist concerns have been translated in a very limited way as simply a head count of women; even so, numerical equality always seems out of women's reach. And some central institutions, such as the World Trade Organisation, have never taken on even the vocabulary of women or gender. In the academy, as I have noted above, the fact we are usually over in a corner talking to ourselves makes most feminists feel powerless. The fact that feminists wear a label allows the masculinism of the mainstream to become an unremarked backdrop in our work and lives. Halley's claim of the triumph of feminism and feminists on the international stage also overlooks the way that hierarchies based on gender continue to influence the development of international law.³⁰

But Halley's overstatement of the power of feminism in international institutions should not obscure the value of her other insights. One important aspect of Halley's critique is its attention to the crusading and emotional dangers inherent in feminist international legal discourse. The seductive possibilities for international lawyers of using other people's disasters for their own consolation are ever present. Halley's challenge to peer around the corners of the construction of feminist projects in international law is also useful, although it is very hard to do. Almost all feminist writing in international law neatly replicates Halley's tripartite feminist pattern, and the Injury Triad is omnipresent in the literature. We have assumed that women and men are always in different situations in the international order; that women always do worse than men; and that our task is to insist on women being taken seriously. The first two steps in this argument are often simply asserted—for example, the differential, and worse, impact

²⁹ See the discussion of gender mainstreaming below; and in Kouvo, below, this collection. Also S Kouvo, 'The United Nations and Gender Mainstreaming: Limits and Possibilities' in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Oxford and Portland, Hart Publishing, 2005) 237.

³⁰ See D Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Oxford and Portland, Hart Publishing, 2005) 105, 125.

of conflict on women.³¹ We should be wary of these blanket statements and present more contextualised and nuanced accounts of women's lives. However the third condition of feminist argument identified by Halley, 'carrying a brief for women', is hard to avoid precisely because it is the political edge of feminist projects.

Halley's work resists identifying a central feminist project. Earlier scholarship about diversity in feminism typically searched for a unifying thread; for example Denise Réaume proposed an account of feminist jurisprudence as 'an analysis of the exclusion of (some) women's needs, interests, aspirations, or attributes from the design or application of the law'.³² This account does not require a thick substantive conception of the aims of feminism. In other words, it assumes a broad commitment to the equality of women, without defining what equality actually is. Réaume's notion of feminist jurisprudence also builds on the sense that the injustice women face is structural and systemic; it is sceptical about the justice of traditional power structures. Halley's work, by contrast, suggests that any attempt to locate an overarching theory of feminism is on the wrong track; we are too concerned with finding a theory and sticking to it, integrating alternative theories as best we can.³³ We should acknowledge instead the partial and imperfect insights of feminism.

Halley's focus on MacKinnon as the embodiment of legal feminism overlooks feminist work in law that focuses on specific situations and acknowledges the limits of legal mechanisms.³⁴ Like many academic feminists, Halley is suspicious of the category 'women' and political claims based on it.³⁵ She does address the complex interaction of feminism's political aims and its theories; can they be separated out, or would feminism lose its point if it had no political agenda? The politics and power of feminist messages, such as the equality of women, comes precisely from their generality, although they require careful translation in specific contexts. In the next section, I suggest that feminism remains useful in the international context in bringing women's lives onto the agenda, but that feminist messages without feminist methods are unlikely to bring change.

³¹ See, eg, RC Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians* (London, Ashgate, 2006); Charlesworth, above n 10.

³² D Réaume, 'What's Distinctive About Feminist Analysis of Law?' (1996) 2 *Legal Theory* 265, 271.

³³ Halley, above n 12, 5.

³⁴ See, eg, V Nikolic-Ristanovic, 'Sexual Violence, International Law and Restorative Justice' in D Buss and A Manji (eds), *International Law: Modern Feminist Approaches* (Oxford and Portland, Hart Publishing, 2005) 273; J Krishnadas, 'Global De-Valuing of Local Capacities to Care: From Rights of Redistribution to Revaluation in the Post-Earthquake Reconstruction Process, Maharashtra' (2007) 58 *Northern Ireland Legal Quarterly* 376.

³⁵ Margaret Thornton connects this type of postmodern feminism with neoliberalism in the academy. See M Thornton, 'Neoliberal Melancholia: The Case of Feminist Legal Scholarship' (2004) 20 *Australian Feminist Law Journal* 7.

STATE-BUILDING: WHAT DOES FEMINIST ANALYSIS ADD?

State-building is often presented as an opportunity to improve women's lives and thus provides a fruitful context to assess the role of feminism at the international level. International institutions have become deeply implicated in state-building since the end of the Cold War, particularly in the wake of 11 September 2001, and the advancement of women has been accorded considerable prominence in these projects. For example, the United Nations Development Fund for Women (UNIFEM) defines its role in the project of reconstruction after the conflicts in Afghanistan and Iraq as 'advanc[ing] gender equality by supporting new legislation, backing women's leadership and equal representation, and widening the space for women's participation at peace tables'.³⁶ The international state-building industry also has embraced the language of women's human rights, supporting women's capacity 'to take their rightful and equal place at the decision-making table in questions of peace and security'.³⁷ A different type of feminist engagement with international intervention can be found in Catharine MacKinnon's arguments that there is a direct parallel between the violence against the US of 11 September 2001 and global violence against women and that both forms of violence merit international intervention. She has asked:

What will it take for violence against women, this daily war, this terrorism against women as women that goes on every day worldwide, this everyday, group-based, systematic threat to and crime against the peace, to receive a response in the structure and practice of international law anything approximate to the level of focus and determination inspired by the September 11th attacks? ... Why, with all the violations of international law and repeated Security Council resolutions, was [Afghan women's] treatment alone not an act of war or a reason to intervene (including, yes, militarily) on any day up to September 10, 2001?³⁸

How can we 'peer around the corners' of these different feminist prescriptions? Both seem unsatisfactory: the first is a focus on women's presence at decision-making tables alone, while the second advocates military intervention in pursuit of women's human rights. While both strategies rest on a feminist commitment to women's equality, their methods do not taken into account the specificity of the situations they are addressing and are unlikely to achieve their goal.

³⁶ Available at www.unifem.org/gender_issues/governance_peace_security/at_a_glance.php.

³⁷ United Nations. Press Release from the Secretariat on the Secretary-General's address to the special meeting of the Security Council meeting on women and peace and security. UN Doc SG/SM/7598 (24 October 2000).

³⁸ C MacKinnon, *Are Women Human?* (Cambridge, Harvard University Press, 2007) 271-72.

State-building is often regarded more generally as a process that has the capacity to deliver a new dispensation for women. Simona Sharoni has observed that 'while in some instances, political conflict may complicate women's lives and set back their struggles for gender equality, in a different context and under different circumstances, a heightened political conflict may become a springboard for gender equality'.³⁹ She notes, for example, that in Northern Ireland 'far from being mutually exclusive or irreconcilable, feminism and nationalism are presented as two complementary movements wh[ich] seek to radically transform existing social and political relationships and structures as a stepping stone for the future envisioned nation'.⁴⁰ However, other cases of international state-building and democratisation suggest that these projects are more usually conceived in a limited way and produce asymmetrical power relations between women and men. The language of 'women's rights' may have rhetorical power, but women's claims are usually not met. For example, to take two recent cases of state-building, women's groups in East Timor and Iraq express great frustration with their inability to affect the post-conflict settlement.

In East Timor, gender roles assigning men to a public world of politics and employment and women to a private world of home and family pervade social and economic relations. They are supported by religious doctrine, low levels of education and traditional practices.⁴¹ The situation in Iraq is more complex. Despite the oppressive nature of Saddam Hussein's regime, Iraqi women generally benefitted from its secular approach to personal status laws.⁴² The United Nations Arab Development Report noted in 2002 that Iraqi women rated highest among Arab women on United Nations (UN) measures of 'gender empowerment' because of their significant political participation.⁴³ The 2003 invasion of Iraq, among other things, has allowed an assertive masculine traditionalism to re-claim authenticity and authority and this has not been challenged by international state-builders.

One significant issue in both countries has been the association of talk of women's rights with imposed, international standards, inevitably in tension with some local cultures. Thus the East Timorese resistance (and now political) leader, Xanana Gusmão, complained in 2001 of the 'obsessive

³⁹ S Sharoni, 'The Empowering and Disempowering Effects of Conflict and Violence' (paper presented to the Gender, Armed Conflict and Political Violence conference, The World Bank, Washington DC, 10–11 June 1999) 1.

⁴⁰ *Ibid.* 7.

⁴¹ See S Harris Rimmer, *Gender and Transitional Justice: The Women of East Timor* (New York, Routledge, 2010).

⁴² G Taber, 'Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria' SHS Papers in Women's Studies/ Gender Research, 4 (Paris: UNESCO, July 2005) 11–12.

⁴³ United Nations Development Program, *Arab Human Development Report: Creating Opportunities for Future Generations* (New York, United Nations Publications, 2002). In 2002, women held almost 20% of parliamentary seats in Iraq compared to the 3.5% average for Arab states.

acculturation to standards that hundreds of international experts try to convey to the East Timorese, who are hungry for values'.⁴⁴ He implied that the right of women to determine their own lives had no natural affinity with East Timorese culture. This type of argument has been strongly resisted by women's groups in East Timor, but has continued to undermine women's rights campaigns.⁴⁵ In Iraq also there has been considerable local hostility, particularly from religious groups, to international pressure for the involvement of women in public life.⁴⁶ The international community has often tolerated these culturally-based rejections of women's rights to prevent alienating local leaders. In this way very specific, male, cultures have been made generally applicable in both East Timor and Iraq through the state-building process.

The cultures of the international communities involved in state-building do little to promote women's equality. Very few women hold senior positions in agencies concerned with state-building, an absence that sends a strong message in post-conflict societies. Including more women in the state-building process will not automatically lead to changed practices, but it signals a greater willingness to pay attention to identity and diversity. Evidence from the last decade of state-building also shows an institutional insouciance or forgetfulness about the position of women, with mistakes being repeated in subsequent missions. One recurring issue in this respect is the lack of funding for initiatives that focus on women's lives.⁴⁷

A second concern for women in state-building is the way that relevant international human rights standards are defined. Representation of women has been the major concern addressed, albeit superficially and inadequately, by the international community, with intense debate about the legitimacy and impact of quotas for women. Other problems women face in particular contexts tend to be obscured. For example, Sumie Nakaya points to the lack of attention paid to the effect of the ethnic partitions model used in state-building in Bosnia-Herzegovina and Kosovo where women who had married across ethnic lines faced both sex and race discrimination.⁴⁸ Moreover the right to equality in international law invoked in state-building has essentially remained tethered to a limited, procedural, account of non-discrimination

⁴⁴ Available at www.pcug.org.au/~wildwood/JanNewYear.htm.

⁴⁵ See N Hall and J True, 'Gender Mainstreaming in a Post-conflict State: Towards Democratic Peace in Timor-Leste?' in B D'Costa and K Lee-Koo, *Gender and Global Politics in the Asia-Pacific* (New York, Palgrave Macmillan, 2009) 159.

⁴⁶ S Hunt and C Posa, 'Iraq's Excluded Women' (July/August 2004) *Foreign Policy*, 40.

⁴⁷ H Charlesworth and C Chinkin, 'Regulatory Frameworks in International Law' in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law* (Melbourne, Oxford University Press, 2004) 246; T Smith 'Post-War Bosnia and Herzegovina: The Erosion of Women's Rights under International Governance' (2005) 38 *Critical Half* 2, 3.

⁴⁸ S Nakaya, 'Women and Gender Equality in Peacebuilding: Somalia and Mozambique' in T Keating and WA Knight (eds), *Building Sustainable Peace* (Tokyo, UN University Press, 2004) 143, 146.

which has had minimal effect on improving women's lives. It may be more useful to investigate alternatives to discrimination paradigms, such as those identified by Rosemary Hunter in national legal systems. She proposes the language of 'undervaluation' in the context of pay disparities for women rather than that of 'equal pay', which immediately implicates a male comparator. Another alternative to the language of discrimination is that of 'policy neglect' in the area of resource allocation, which draws attention to groups that end up disadvantaged by apparently neutral policies.⁴⁹ These ideas have resonance in the context of state-building; for example the concept of policy neglect could be used to capture the effect of international monetary institutions' policies on women's lives.

A related problem is the tendency in state-building to emphasise civil and political rights over economic, social and cultural rights.⁵⁰ This is of course an issue for men as well as women, but existing discrimination against women in areas such as access to land or inheritance of housing and property makes it particularly acute for women.⁵¹ If the empowerment of women is understood to depend simply on the inclusion of women in various spheres of public life, there will be inadequate attention to the gendered nature of the rules of the game that women are required to play. We need to rethink traditional structures of public and private life, such as ideas of economic activity and value, to accommodate women's lives. We also must consider the effects of the unequal balance of domestic labour which limits the capacity of women to operate in the public, political sphere.

State-building relies on the human rights concept of self-determination. In international law, self-determination accords a people the right to autonomy, freedom from alien oppression and the right to choose an economic, political and social system 'free from outside intervention, subversion, coercion or constraint of any kind whatsoever'.⁵² Once external self-determination has been achieved and internal self-determination is guaranteed, it is assumed that all members of the group will equally benefit, in other words that the terms 'self' and 'peoples' are homogenous. Individual and group aspirations and goals, both before and after the achievement of self-determination, are subsumed within those of the self-determining unit. This assumption of

⁴⁹ R Hunter, 'Alternatives to Equality' in R Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Oxford and Portland, Hart Publishing, 2008) 82–83.

⁵⁰ I Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *International Journal of Transitional Justice* 163; H Charlesworth, 'Human Rights and the Rule of Law After Conflict' in P Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford, Hart Publishing, 2010) 43.

⁵¹ See N Niland, 'Rights, Rhetoric and Reality: A Snapshot from Afghanistan' in ND White and D Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester, Manchester University Press, 2005) 322; C Chinkin and H Charlesworth, 'Building Women into Peace: The International Legal Framework' (2006) 27 *Third World Quarterly* 937.

⁵² The wording is taken from a General Assembly Resolution on Afghanistan after the Soviet invasion in 1979. GA Res ES-6 2 (14 January 1980).

group identity and commonality is open to challenge. The notion of a self-determining unit collapses many forms of diversity, but most particularly that of sex. The consequences of this limited definition are evident in the fact that apparently successful claims to self-determination typically fail to deliver the same level of personal freedom and autonomy for women as for men. Indeed, in many cases achievement of national self-determination has led to deterioration in the position of women.⁵³

A third problem for the protection of women's human rights in state-building is its relationship to the flawed 'gender mainstreaming' enterprise promoted by some women's organisations and endorsed by international institutions. Gender mainstreaming projects in state-building typically achieve little change in women's lives.⁵⁴ But more significant is the inadequacy of the concept itself.⁵⁵ The notion of gender mainstreaming is both too broad and too narrow in the international arena. In one sense, it has become an almost meaningless term. Most commitments to gender mainstreaming draw on the definition adopted by United Nations Economic and Social Council (ECOSOC) in 1997:

Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.⁵⁶

This definition is so wide and inclusive that it is hard to implement. If gender mainstreaming is 'the process of assessing the implications for women and men of any planned action', how can we define what it means in any particular context and how it is different from a standard policy consideration of impact?

On the other hand, the ECOSOC definition is also a very narrow one: it reads as if animated by an idea of equality as equal treatment of women and men, assuming symmetry of position between women and men. It does not address the complex ways that gender is created and sustained by

⁵³ See, eg, the discussion of Bougainville in Charlesworth, above n 10, 352–54.

⁵⁴ L Handrahan, 'Rhetoric and Reality: Post-Conflict Recovery and Development—the UN and Gender Reform' in ND White and D Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester, Manchester University Press, 2005) 404, 414–18; compare Hall and True, above n 45.

⁵⁵ See further H Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights' (2005) 18 *Harvard Human Rights Journal* 1. See also S Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Sweden, Iustus Publications, 2004).

⁵⁶ United Nations, *Platform for Action, ECOSOC Agreed Conclusions 1997/2* (1997) at www.un.org/womenwatch/osagi/pdf/ECOSOCAC1997.2.PDF.

social and power relations.⁵⁷ Treating women and men as though they face similar obstacles will perpetuate existing disparities between them. In some accounts of gender mainstreaming, the strategy has become simply a head count of women in particular positions, a modest variation on the 'equal opportunity' agenda.⁵⁸ While increasing women's participation in institutions is important, it does not itself change institutional agendas.

Moreover, the definition of gender mainstreaming in international institutions contemplates a limited sphere for its operation. It is regarded as primarily relevant to policy development in particular areas, such as development, human rights and some aspects of labour markets. Other fields appear immune to gendered scrutiny. For example, the European Union has not extended gender mainstreaming to competition policy.⁵⁹ Within the UN, most areas of law have been treated as if they were impervious to concerns of gender: gender mainstreaming mandates have not been given to either the International Law Commission or the International Court of Justice. The Statute of the International Criminal Court refers to 'gender' in the definition of some of the crimes within the Court's jurisdiction, but defines it in a curiously restrictive way as 'the two sexes, male and female, within the context of society'.⁶⁰

Perhaps the most fundamental problem with the strategy of gender mainstreaming is that it rests on an insipid and bland concept of gender that has little cutting edge. In some contexts, the UN has followed the second wave of feminist thought in drawing a clear distinction between the concepts of 'sex' and 'gender'.⁶¹ It has thus defined sex as a matter of biology and gender as the constructed meaning of sex, the designation of social roles. This distinction has now come under scrutiny from feminist scholars, who have questioned whether the category of 'sex' can be regarded as natural and uncontentious.⁶²

In the case of gender mainstreaming, however, the sex/gender distinction has been elided. UN gender mainstreaming policies assume that 'gender' is a

⁵⁷ E Reid, 'Transformational development and the wellbeing of women' (2004) 64 *Development Bulletin* 19.

⁵⁸ A Woodward, 'Gender Mainstreaming in European Policy: Innovation or Deception?' Discussion Paper FS 101-103 Wissenschaftszentrum Berlin für Sozialforschung October 2001, 22.

⁵⁹ M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) 7 *Journal of European Public Policy* 432, 446.

⁶⁰ United Nations, *Rome Statute of the International Criminal Court*, ICC-ASP/2/Res.3, 12 September 2003 Article 7 (3). Available at www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

⁶¹ Eg Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into Human Rights Activities and Programmes UN Doc. E/CN.4/1996/105 (1995) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/144/87/PDF/G9514487.pdf>.

⁶² N Lacey, 'Feminist Legal Theory and the Rights of Women' in K Knop (ed), *Gender and Human Rights* (Oxford, Oxford University Press, 2004) 13.

synonym for women. This is evident in the influential ECOSOC definition, quoted above. This elision causes a number of problems. First, it links gender with biology, implying that gender is a fixed, objective fact about a person. It does not capture the ways that gender is constructed in society to make some actions seem natural and others controversial. It reaffirms the 'naturalness' of female/male identities and bypasses the performative aspects of gender. Understanding gender as essentially about women does not capture the relational nature of gender, the role of power relations and the way that structures of subordination are reproduced.⁶³ It allows problems facing women to be understood as the product of particular cultures, lack of participation in public arenas or lack of information or skills and obscures the way that gender shapes our understanding of the world. Most significantly, the association of the term 'gender' primarily with women leaves both the roles of men and male gender identities unexamined, as though they were somehow natural and immutable.

CONCLUSION

The legitimacy and legality of international state-building projects have become widely accepted in the twenty-first century. However, they have been mixed experiences for both the women and men who have been their objects. Oppressive regimes may have been overthrown, but there have been tough prices to pay. State-building is a nice example of feminist positioning between resistance and compliance. Feminist analysis can identify some of the dark sides of state-building projects by examining how women have fared in the rebuilt state. While the vocabulary of women's rights is now a staple of state-building packages, women's rights are often traded away in the search for stability and strong leadership. Moreover, as the story of gender mainstreaming shows, even where feminist concepts are invoked in state-building, their radical edge is often lost in bureaucratic translations.

Janet Halley argues that feminism fails to acknowledge its power; the case of state-building illustrates however the complexity of feminist success in the international arena. While some feminist vocabulary has become part of state-building packages, feminist projects have had limited success in empowering women and improving their lives, and carrying a brief for women remain important. Halley's critique of feminism is focused on its manifestation in law, but feminist goals and methods extend far beyond the law. In the international arena international law may not be more useful than other forms of regulation. It is partial and porous and can create groups of insiders and outsiders, based on wealth and power.

⁶³ S Baden and AM Goetz, 'Who Needs [Sex] When You Can Have [Gender]?' (1997) 56 *Feminist Review* 3, 7.

Feminist commitments, such as the equality of women, have influenced the development of international law, but they have been incorporated only in a partial manner and implemented without regard to context or with empathy for their intended beneficiaries. This underlines a distinction between feminist messages and feminist methods in international law. The former have been influential in rhetorical terms, while the latter have been ignored. Feminist messages however are likely to be productive only if they are deployed through feminist techniques such as 'world travelling'.⁶⁴ This involves being explicit about our own historical and cultural background, trying to understand how other women might see us, and recognising the complexities of the lives of other women.⁶⁵ Feminist methodologies suggest that prescriptions of women's equality must respond to the needs and desires of the women we think we are helping. Understanding these needs is not always easy and requires patience and empathy, particularly in post-conflict situations. So the challenge is to devise practical and responsive feminist methods to support feminist political projects.

⁶⁴ The term was introduced by Maria Lugones in 'Playfulness, "world-traveling", and loving perception' (1987) 2 *Hypatia* 3.

⁶⁵ I Gunning, 'Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries' (1991-92) 23 *Columbia Human Rights Law Review* 189, 191. See also A McNevin, 'Confessions of a Failed Feminist IR Scholar: Feminist Methodologies in Practice in Peshawar' in B D'Costa and K Lee-Koo, *Gender and Global Politics in the Asia-Pacific* (New York, Palgrave Macmillan, 2009) 115.

3

Searching for Virtue in International Law

YORIKO OTOMO

INTRODUCTION

WE FEMINISTS, INTERNATIONAL lawyers—are called to find ourselves in an era of anxiety and terror. What is this anxiety, this terror? What is virtue, and where are our revolutions? The writings of feminist legal theorists are torn between the impulse to resist¹ and the drive to comply² with the Law. To withhold or to fill up. Are these really our two poles of inhabitation?

Hilary Charlesworth, in responding to Janet Halley's provocation to 'take a break from feminism'³ points out that vis-à-vis international law, both as an academic discipline and as a platform for imperialist state-building operations around the world, feminism still lies 'in a scholarly ghetto', and calls for renewed attention to feminist theories within the discipline. Charlesworth does nuance this call, however, with an acknowledgement of a core tension between feminism's embrace of normative projects that aim to improve the lives of women, and critical theory's concerns with identifying the politics of law itself.⁴

I agree with Charlesworth's call to engage feminist theory in the work towards real and necessary social change, and even more so in light of Halley's

¹ 'Resist': c.1374, from O.Fr. *resister*, from L. *resistere* 'to resist, standing back, withstanding'. Resistance is attested from 1417, from O.Fr. *resistance*, from L.L. *resistentia*, from L. *resistentem* (nom. *resistens*), pp. of *resistere*. Sense of 'organized covert opposition to an occupying power' first recorded 1940 in reference to French opposition to Nazi rule.

² 'Comply' from the early 14c., from O.Fr. *compli*, pp. of *complir*, from L. *complere* 'to fill up'. Originally 'to fulfill, carry out,' sense of 'consent' began c.1600 and may have been a reintroduction from It., where *complire* had come to mean 'satisfy by "filling up" the forms of courtesy'.

³ J Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, Princeton University Press, 2006). Also see discussion of Halley's work in Grahn-Farley, below, this collection.

⁴ Charlesworth, above, this collection.