

INTEGRATING QUESTIONS OF GENDER INTO DISCUSSION OF “THE USE OF FORCE” IN THE INTERNATIONAL LAW CURRICULUM

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Occupying the heartland of international law are rules which profess to regulate, and thereby restrain, violence between states. The normative regime governing violence between states consists of three categories of law: first, laws outlawing the use of force by states unilaterally, except in narrow circumstances like self defence;¹ second, laws which establish the acceptable methods of combat;² and third, the body of humanitarian law designed to protect certain categories of war victims.³ These laws have sanctioned the use of increasingly destructive means of war and have failed to provide significant protection to civilians. In fact the percentage of civilian, as opposed to military, casualties of war has progressively increased since the first World War reaching the alarming current level of 90 per cent.⁴ Such an extraordinary outcome results from legally authorised acceptance that military goals have priority over humanitarian considerations.⁵

In this note I will first outline the shortcomings of the international legal approach to violence and its repercussions for women; and second, discuss some implications this has for the teaching of international law.

INTERNATIONAL LAW AND VIOLENCE

Laws dealing with violence between states are shaped by the primary purpose of international law which is to maintain world order through the promotion of international peace and security. Consistent with the central strategy of the United Nations (UN) Charter, the maintenance of order is achieved, not uncontroversially by buttressing the existing distribution of world power and fortifying it against challenge.⁶ As a result, international law tends to legitimate violence that is aimed at defending the *status quo* and outlaw violence which threatens it. The world order thereby safeguarded is hierarchically organised, reliant on a multitude of inequalities, and fundamentally dependent on violence, including violence against women, as a means of asserting its authority,⁷ so both the means of (en)forcing the current world order and the order itself are based on violence which is authorised by international law.⁸

The gendered effects of international law's authorisation of violence are not considered relevant to the regulation of the use of force by states or to the legal preference for endorsing *status quo* arrangements. This “blindness” has been an important focus for feminist intervention.⁹ It has been cogently argued that violence against women is a critical technique supporting the maintenance of the current militarised international order and that international legal discourse provides a means to justify gendered violence and disguise its structural dimensions.¹⁰ In the subterfuge provided by legal terminology, the doctrine of “military necessity” inevitably comes up trumps over the doctrine of “non-combatant (or civilian) immunity”.¹¹

This can be illustrated by reference to the most obvious example, that of legally sanctioned war. Through the doctrine of military necessity, international law justifies, normalises and camouflages the gendered consequences of legal aggression. Among these consequences are the alarming incidence of civilian casualties mentioned earlier, the wanton destruction of entire local communities,¹² the rape and

sexual exploitation of women,¹³ the creation of huge refugee populations predominantly made up of women and children,¹⁴ the prioritisation of defence spending over the provision of basic food, housing, health and education services¹⁵ and the adoption of economic sanctions to force recalcitrant states into line despite their disproportionate effects on women and children.¹⁶

What makes the formal erasure of gendered consequences possible is the construction of human (male) citizenship and identity on a foundation of militarism and the companion construction of female identities as secondary (not soldiers), maternalised (having the responsibility to produce more soldiers), and objectified (being available for use and humiliation by soldiers).¹⁷ As a result, such consequences are not cognisable when it comes to determining the legality of force used between states. The belated recognition of rape as a war crime, in response to the atrocities committed in the former Yugoslavia, is a major victory but only a small advance in the general scheme of things.¹⁸

The gendered violence implicitly, and often explicitly, condoned by international law extends beyond that directly associated with the use of force between states. Concepts like self-determination,¹⁹ nationalism,²⁰ democracy,²¹ development and the international economic order,²² in their current forms, all have violent repercussions for women. Obvious examples include the transnational trafficking of women as cheap labour and sex workers²³ and the deepening feminisation of poverty resulting from the global enforcement of economic rationalism and market-based liberalisation of economies.²⁴ Further, the efficacy of all forms of gender subordination, including the disciplining of women through limited role expectations, rely on the threat of violence against those who transgress.²⁵

The normalisation of the gendered violence which maintains and is maintained by the international legal regime, has been so effective that violence against women was not explicitly acknowledged as a form of gender discrimination in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²⁶ More recently, the 1993 Declaration on the Elimination of Violence Against Women,²⁷ while acknowledging the broad scope of gendered violence,²⁸ falls short of assigning it the status of a fundamental human rights violation.²⁹ Despite this shortcoming, the Declaration breaks important new ground for women in other ways, notably by holding states accountable for violence against women in private as well as public life³⁰ and by recognising that inequalities in power between women and men, which benefit men, are the fundamental problem.³¹

The deeply gendered outcomes of the activities condoned by international law are disguised by its gender-neutral claims. Various aspects of the form of international law ensure these outcomes and are similar to those identified by feminists in domestic law — the creative use of the liberal distinction between public and private spheres,³² the construction of universal standards on the basis of male experience³³ and the malleability of the liberal notion of equality.³⁴ The result is the denial and obfuscation of the reality that the most common form of violence perpetrated around the globe is violence against women by men.³⁵

IMPLICATIONS FOR TEACHING

What implications do feminist analyses of the use of force in international law have for teaching?

Where do we begin? How do we integrate questions of gender into the international law curriculum's discussion of violence when the form as well as the substance of the whole discipline militate against defining this as a serious legal issue? As a teacher, my intention is to emphasise issues of power and to encourage critical thinking in the classroom. This suggests certain strategies for teaching, four of which I will briefly outline.

First, it is important to “name”, or give voice to, what currently goes unspoken. It is critical to pinpoint who is doing what to whom. That is, to encourage students to ask whose interests are being served by the dominant legal discourse and whose interests are subjugated. For example, it is important to find ways to talk about power and to present relations of power as legitimate legal issues. One aspect of the new ground broken by the Declaration on Violence Against Women, referred to above, is that it recognises that violence against women “is a manifestation of historically unequal power relations between women and men”.³⁶ The Declaration not only acknowledges power differences but also identifies men as the beneficiaries of women's subordination. It provides a model for speaking about power in other contexts.

A second example of a “naming” strategy is to find ways to acknowledge and legitimate the narratives

behind the dominant narrative. A current illustration is the 1995 celebration of the 50th anniversary of the establishment of the UN. The official history tells of great men steering the course of international affairs towards global peace and respect for human rights. Yet what made this vision possible in 1945, by giving it a language and legitimacy was the social context that had been created by activists, mainly women, in peace movements and NGOs.³⁷

A further teaching strategy is to problematise the foundational legal constructs. Unless we premise our teaching on questioning what are currently taken for granted as benign and neutral “givens”, we are not equipping students with critical conceptual tools which enable them to question the legal rules they are learning, rather than just repeat them. In international law this means pointing to the gendered effects of established constructs like the current sources of international law, the state-based structure of the international community and the distinction between domestic and international law. Implicit in this strategy is a recognition of the importance of theory for transformative³⁸ legal argument and conceptual development.

Such a shift in teaching about the “use of force” could begin with placing as much emphasis on the Hague and Geneva Conventions (the humanitarian laws of war) as on the high profile law of the UN Charter which regulates the use of force between states. This could be done in such a way as to encourage a critical rethinking of the UN’s approach to violence and the promotion of peace.

A third strategy is to find ways to link the global with the local. This strategy is another formulation of the feminist insistence that the “personal” is “political”. It involves emphasising the importance of situatedness, of detail and context, in the construction of knowledge. The strategy is important because it militates against grand global theories which are inevitably masculinist and Euro-centric. It also provides the opportunity for students to make connections with their own experience and to link the critical awareness they are developing in class to their everyday practice. As with the second strategy, a focus on the humanitarian laws of war could provide a framework for such a contextualisation.

Finally, it is important to promote an understanding of law as a discourse that is socially constructed and contestable, rather than a set of rules that is largely static. This strategy comes from the postmodernist emphasis on knowledge as power, and the understanding of knowledge as something that is produced discursively within a system of rules that govern what is considered “true” or “false”. In this view, transparent truth is an impossibility and the dominant discourse is the result of continual contestation in which feminists and other critical legal scholars, students, NGOs and others participate alongside legal positivists. This is a significant point because it indicates that feminist knowledges, while acknowledging their partiality and diversity, are also powerful.

CONCLUSION

In conclusion, there is cause for both optimism and caution about the task of integrating gender analyses with the international law curriculum’s traditional coverage of rules about the use of force. First to the caution: there is a paradox involved with appealing to law to censure violence against women when the legal system itself can be characterised as relying on violence to assert its own authority.³⁹ But then, more optimistically, nothing is an absolute obstacle. This is amply illustrated by the growing body of feminist theory and practise in the area of international law which provides an extensive resource base from which to develop curricula and teaching practices which acknowledge and challenge inequitable global gender relations.

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¹ This includes: the General Treaty for the Renunciation of War 1928 (Kellogg-Briand Pact) and the United Nations Charter 1945.

² The basis of these laws are: the Convention With Respect to the Laws and Customs of War on Land 1899 and the Convention Respecting the Laws and Customs of Wars on Land 1907 (the Hague Conventions).

³ This includes: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949; Convention Relative to the Treatment of Prisoners of War 1949; and Convention Relative to the Treatment of Civilian Persons in Time of War 1949 (the Geneva Conventions) and several later protocols.

⁴ C Lamb, The Laws of Armed Conflict, in H Smith ed, *The Force of Law: International Law and the Land Commander* (Canberra: Australian Defence Studies Centre, 1994) 1, at 17 referring to the results of a study in United Nations Development Project, *Human Development Report* (New York: Oxford University Press, 1994).

- ⁵ C Jochnick & R Normand, *The Legitimation of Violence: A Critical History of the Laws of War* (1994) 35 *Harv Int'l LJ* 49; J Gardham, *Proportionality and Force in International Law* (1993) 87 *Am J Int'l L* 391.
- ⁶ For example, membership of the Security Council includes the permanent membership of the 5 dominant post World War II states and gives each the power to veto Security Council action which ensures that decisions are not taken if they conflict with superpower interests. *Charter of the United Nations* arts 23(1) and 27(3). Y Sakamoto, Introduction: The Global Context of Democratization (1991) 16 *Alternatives* 119.
- ⁷ H Charlesworth & C Chinkin, *Violence Against Women: A Global Issue*, in J Stubbs ed, *Women, Male Violence and the Law* (Sydney: Institute of Criminology, 1994) 13; K Barry, *Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression* (1981) 3 *Hum Rts Q* 44; R Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in R Cook ed, *Human Rights of Women* (Philadelphia: University of Pennsylvania Press, 1995) 116.
- ⁸ A Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?* (1989) 12 *Harv Women's LJ* 25.
- ⁹ H Charlesworth, *Transforming The United Men's Club: Feminist Futures for the United Nations* (1994) 3 *Trans'l L & Contemp Probs* 421; D Dallmeyer ed, *Reconceiving Reality: Women and International Law* (Washington DC: American Society of International Law, 1993).
- ¹⁰ VS Petersen, *Security and Sovereign States: What is at Stake in Taking Feminism Seriously?*, in VS Petersen ed, *Gendered States: Feminist (Re)Visions of International Relations Theory* (Boulder: Lynne Rienner, 1992) 31; K Mahoney & P Mahoney eds, *Human Rights in the Twenty-First Century: A Global Challenge* (Boston: Martinus Nijhoff, 1993); D Otto, W Morgan, & K Walker, *Rejecting (In)Tolerance: Critical Perspectives on the United Nations Year for Tolerance* (1995) 20 *Melb UL Rev* 192.
- ¹¹ J Gardham, *The Law of Armed Conflict: A Feminist Perspective*, in Mahone & Mahoney, *supra* note 10, at 419.
- ¹² N Rosca, *Effects of Militarism and State Violence on Women and Children*, in Mahoney & Mahoney, *supra* note 10, at 237.
- ¹³ P Strange, *It'll Make a Man Out of You*, in D Russell ed, *Exposing Nuclear Phallacies* (New York: Permagon Press, 1989) 104; R Morgan, *The Demon Lover: On the Sexuality of Terrorism* (London: Methuen, 1989); C Enloe, *The Gulf Crisis, Making Feminist Sense of It* [1990] *Pac Res* 4.
- ¹⁴ J Greatbach, *The Gender Difference: Feminist Critiques of Refugee Discourse* (1989) 1 *Int'l J Refugee L* 518.
- ¹⁵ Rosca, *supra* note 12.
- ¹⁶ Jochnick & Normand, *supra* note 5.
- ¹⁷ R Grant, *The Quagmire of Gender and International Security* in VS Petersen, *supra* note 10, at 83; S Levin, *Women, Peace, and Violence: A New Perspective* (1992) 59 *Tenn L Rev* 611.
- ¹⁸ J Green et al, *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique* (1994) 5 *Hastings Women's LJ* 171; A Stiglmayer ed, *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Omaha: University of Nebraska Press, 1994).
- ¹⁹ J Gardham, *A Feminist Analysis of Certain Aspects of International Humanitarian Law* (1992) 12 *Austl YB Int'l L* 265.
- ²⁰ K Jayawardena, *Feminism and Nationalism in the Third World* (London: Zed Books, 1986); C Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of international Politics* (Berkeley: University of California, 1990).
- ²¹ VS Petersen, *Reframing the Politics of Identity: Democracy, Globalisation and Order* (1995) 1 *Pol Expressions* 1; D Cornell, *Gender Hierarchy, Equality and the Possibility of Democracy*, in *Transformations: Recollective Imagination and Sexual Difference* (New York: Routledge, 1993) 156; D Otto, *Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women* (1993) 3 *Trans'l L & Contemp Probs* 371.
- ²² M Waring, *Gender and International Law: Women and the Right to Development* (1992) 12 *Austl YB Int'l L* 177; C Chinkin & S Wright, *The Public-Private Distinction and the Right to Development*, in *International Law* (1992) 12 *Austl YB Int'l L* 262; M Waring, *Counting For Nothing* (Wellington NZ: Allen & Unwin, 1988).
- ²³ Asia Watch Women's Rights Project, *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* (New York: Human Rights Watch, 1993).
- ²⁴ K Bardhan, *Women and Rural Poverty: Some Asian Cases*, in MG Quibria ed, *Rural Poverty in Asia: Priority Issues and Policy Options* (Hong Kong: Oxford University Press, 1994).
- ²⁵ C Chinkin & S Wright, *The Hunger Trap: Women, Food, and Self-determination* (1993) 14 *Mich J Int'l L* 262; K Thomas, *Beyond the Privacy Principle* (1992) 92 *Colum L Rev* 1431.
- ²⁶ GA Res. 34/180, UN GAOR 34th Sess Supp 46, at 193, 19 ILM 33 (1980), opened for signature 18 December 1979, 1249 UNTS 14. See R Holt, *Women's Rights and International Law: The Struggle for Recognition* (1991) 1 *Col J Gender & L* 117; Note (S Zearfoss), *The Convention for the Elimination of All Forms of Discrimination Against Women: Radical, Reasonable or Reactionary?* (1991) 12 *Mich J Int'l L* 903. It should be noted that the Committee on the Elimination of Discrimination Against Women has clearly stated that it considers violence against women to be a form of gender discrimination, General Recommendation 19 (1992).
- ²⁷ GA Res 104.48 UN GAOR, UN Doc A/Res/48/104 (1993).
- ²⁸ *Id* at art 2, defines violence against women as "...any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life".
- ²⁹ D Otto, *Violence Against Women: Something Other than a Violation of Human Rights?* (1993) 1 *Austl Feminist LJ* 159.
- ³⁰ *Supra* note 27, at art 1. This is reinforced in article 2 which refers to violence in the family and in the community, as well as that perpetrated and condoned by the state. Article 4(c) reiterates that the Declaration encompasses acts by private persons as well as states.
- ³¹ *Id* at preamble, clause 6.
- ³² K Walker, *An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law* (1994) 26 *NYUJ Int'l L & Pol* 173; H Charlesworth, *The Public/Private Distinction and the Right to Development in International Law* (1992) 12 *Austl YB Int'l L* 190.
- ³³ H Charlesworth, C Chinkin, & S Wright, *Feminist Approaches to International Law* (1991) 85 *Am J Int'l L* 613, at 642.
- ³⁴ A Bayefsky, *The Principle of Equality or Non-Discrimination in International Law* (1990) 11 *Hum Rts LJ* 1; R Cook, *Women's International Human Rights Law: The Way Forward* (1993) 15 *Hum Rts Q* 230; J Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism* (1988) 14 *Feminist Stud* 33.
- ³⁵ C Chinkin, *Women and Peace: Militarism and Oppression*, in Mahoney and Mahoney, *supra* note 10, at 405, 410.

³⁶ *Supra* note 27, at preamble.

³⁷ HH Alonso, *Peace As A Women's Issue: A History of the U S Movement For World Peace and Human Rights* (Syracuse NY: Syracuse University Press, 1993); BA Reardon, *Women And Peace: Feminist Visions of Global Security* (Albany NY: State University of New York Press, 1993); RR Pierson, *Women and Peace: Theoretical, Historical and Practical Perspectives* (London: Croom Helm, 1987); B Brock-Utne, *Educating For Peace: A Feminist Perspective* (London: Permagon Press, 1985).

³⁸ Cornell describes two interpretations of "transformation" as follows: "By transformation I mean change radical enough to so dramatically restructure any system — political, legal or social – that the 'identity' of the system itself altered. The second meaning, defined as broadly as possible, turns us to the question of what kind of individuals we would have to become in order to open ourselves to new worlds." (Cornell, *supra* note 21, at 1.)

³⁹ J Derrida, Force of Law: The "Mystical Foundation of Authority" (1990) 11 *Cardozo L Rev*, 921.