

INTRODUCTION TO THE SYMPOSIUM ON FEMINIST APPROACHES TO INTERNATIONAL LAW THIRTY YEARS ON: STILL ALIENATING OSCAR?

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This symposium explores where feminism has traveled and where it has yet to travel in international law since the groundbreaking 1991 article that Hilary Charlesworth, Christine Chinkin, and Shelley Wright published in the *American Journal of International Law*, “Feminist Approaches to International Law.”¹ Their article emerged following a “particularly frustrating conference where female voice was notably absent,” at which point Charlesworth, Chinkin, and Wright “retired to a pub and scribbled thoughts on a napkin that ultimately became [their 1991 article].”² At a subsequent meeting of eminent (mostly male) international law scholars, the three feminist co-authors presented this work, which generated a degree of controversy. Charlesworth humorously alludes to the controversy in *Alienating Oscar*, referring to Oscar Schachter, the preeminent former *AJIL* editor-in-chief.³ In fact, as Charlesworth noted, even while Schachter disagreed with some of the analysis that they had advanced, he was curious and encouraging, as was characteristic of him.⁴

The central premise of *Feminist Approaches to International Law* was that international law had largely ignored feminist analysis. The authors examined the challenges of developing an international feminist perspective, noting that international law was a thoroughly gendered system. Their method went beyond the state-centered arrangement typical of international law to examine the discipline based on the lived experience of women. By challenging the system, feminist theory could identify possibilities for progressive development of international law.⁵ The authors queried “whether an altered humanized international law has capacity to achieve social change in a world where most forms of power continue to be controlled by men?”⁶

Mapping feminist approaches to international law, the article marked a watershed moment—just as scholars and practitioners were demanding recognition of the embedded, yet ostensibly invisible nature of gender in international law. Then-First Lady Hillary Clinton proclaimed that “human rights are women’s rights and women’s rights

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¹ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 *AJIL* 613 (1991).

² See Devika Hovell, *Professor Christine Chinkin: Recasting the Third Party as International Law’s Protagonist*, *RATIO: THE MAGAZINE OF LSE LAW* 16 (Sept. 2014).

³ Hilary Charlesworth, *Alienating Oscar, Feminist Analysis of International Law*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 1, n. 2 (Dorinda G. Dallmeyer ed., 1993).

⁴ *Id.*

⁵ Charlesworth, Chinkin & Wright, *supra* note 1, at 614–15.

⁶ *Id.* at 645.

are human rights” at the 1995 United Nations (UN) World Conference on Women in Beijing.⁷ After waging internal battles, feminists within organizations such as Human Rights Watch established women’s rights divisions. Similar battles were fought across a variety of institutions, including the UN, which only established UN Women in 2010. By the end of the twentieth century, the ad hoc war crimes tribunals had developed a jurisprudence recognizing rape and other forms of sexual violence as forms of torture and as constituting other violations of human rights and humanitarian law,⁸ in part due to significant contributions by gender law experts, including Patricia Sellers, a contributor to this volume who served as the legal advisor for gender for both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

To honor the work of the three authors, on the thirty year anniversary last year, one of us (Wing) highlighted the seminal contributions and impact of this landmark article in “Bookmarked,” a series of videos that “bookmarks” and explores important articles from *AJIL*’s archives.⁹ The other of us (Powell) co-taught a workshop on feminist approaches to international law in 2001—at the ten-year anniversary of the Charlesworth, Chinkin, and Wright article, inspired by their work.¹⁰ Indeed, their article began the basis for countless seminars and subsequent scholarship, including anthologies.¹¹

Decades before the publication of *Feminist Approaches to International Law*, an initial wave of feminist theory was characterized by adherence to a formal liberal equality paradigm—one that has turned on an Aristotelean notion of treating likes alike and differences differently. This formal equality approach—based on a white male comparator group—is often associated with the women’s suffragist movement and women’s right to vote (in other words, first-generation civil and political rights) in the United States, the United Kingdom, and beyond. Famously, in the United States, Ruth Bader Ginsberg pioneered a litigation strategy—which, with the assistance of Black feminist civil rights attorney, Pauli Murray—“reasoned from race.”¹² However, because (along with other shortcomings) gender as a social construct is different from race, second wave “cultural” feminism noted the limits of first wave feminism and celebrated women’s “different voice.”¹³ Carol Gilligan posited that women were inherently different and embodied values of, for example, caregiving and the ethic of care.¹⁴

Another prominent critic within second wave feminism is Catharine MacKinnon, who scathingly asked how women’s “different voice” could be heard so long as men had their foot on our necks.¹⁵ On the transnational

⁷ See Hillary Clinton, [Women’s Rights Are Human Rights](#), UN Fourth World Conference on Women (Sept. 5, 1995).

⁸ See, e.g., Prosecutor v. Delalic, IT-96-21-T, [Judgment](#) (Nov. 16, 1998) (rape as torture); Prosecutor v. Akayesu, ICTR-96-4-T, [Judgment](#) (Sept. 2, 1998) (rape as war crime).

⁹ [AJIL Bookmarked—Adrien K. Wing on Feminist Approaches to International Law](#) (Nov. 2021).

¹⁰ Powell co-taught the International Law Workshop: Gender, Culture, Difference with Professors Karen Knop and Julie Peters at Columbia Law School, where Powell was on the faculty at the time as founder of Columbia’s Human Rights Institute and Clinic.

¹¹ See, e.g., [WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW](#) (Kelly Dawn Askin & Dorean M. Koenig eds., 1999); [RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW](#) (Dorinda Dallmeyer ed., 1993); [HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES](#) (Rebecca J. Cook ed., 1994).

¹² SERENA MAYERI, [REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION](#) (2014) (documenting the pivotal role of Pauli Murray in bridging the sex and race equality litigation movements). *But see* Ruth Bader Ginsburg & Deborah Jones Merritt, [Affirmative Action: An International Human Rights Dialogue](#), 1 RUTGERS RACE & L. REV. 193 (1998–1999) (acknowledging shortcomings of the formal equality approach).

¹³ CAROL GILLIGAN, [IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT](#) (1982).

¹⁴ *Id.* For further discussion of the feminist ethic of care and, relatedly, relational feminism, see, e.g., NEL NODDINGS, [CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION](#) (1984).

¹⁵ CATHARINE A. MACKINNON, [FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW](#) (1988).

front, MacKinnon represented female survivors of rape in the Yugoslav conflict of the 1990s.¹⁶ Offering a structural critique based on hierarchies of dominance and subordination, MacKinnon attacked the first wave, formal equality “similarly situated” doctrine, noting that, in fact, those women *least* similarly situated are *most* in need of the law’s protection.

Third wave feminists of color and Third World Approaches to International Law (TWAAIL) scholars built on this criticism, pointing out the failure of formal equality law to address inequalities at the intersections of race, economic disadvantage, geography, and other vectors of disadvantage.¹⁷ One of us (Wing) has edited collections of essays on critical race feminism, which emphasize the unique disadvantages faced by women of color.¹⁸ The other of us (Powell) has published at the intersection of race, gender, and economic precarity.¹⁹ Along with other critics of first wave feminism, queer theorists have also attacked mainstream feminist theory for its heteronormativity and inattentiveness to sexual orientation as well as the instability of gender as a category of analysis.²⁰ Intersectional and queer theory critiques have helped pave the way for further critiques based on additional bases, *inter alia*, including sex positivity, transfeminism, ecofeminism, and postmodern feminism.²¹ Many subfields of international law have now incorporated intersectional analyses²²—ranging from international criminal law²³ to international refugee law.²⁴

In this symposium, we have enlisted a group of leading scholars and practitioners who have theorized about and litigated feminist approaches to international law in a variety of regions and contexts. The four essays do not include all potential subjects or viewpoints. We hope they inspire readers to make their own new contributions to the field.

Karen Engle of the University of Texas School of Law looks back at the origins and early years of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²⁵ adopted in 1979, and which largely contains elements from all waves of feminist theory. It addresses economic, social, and cultural rights as well as civil and political rights. Further, Engle notes that CEDAW’s preambular paragraphs

¹⁶ *Litigators of the Month*, Katherine MacKinnon and Maria Vullo, LAW.COM (Sept. 28, 2000).

¹⁷ See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For significant, related work outside of law (as this Article draws on other disciplines indicated), see, for example, ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* (1981) (feminist studies).

¹⁸ See *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* (Adrien K. Wing ed., 2000); *CRITICAL RACE FEMINISM: A READER* (Adrien K. Wing 2d ed., 2003).

¹⁹ See, e.g., Catherine Powell, *Color of COVID and Gender of COVID: Essential Workers, Not Disposable People*, 33 YALE J. L. & FEMINISM 1 (2021).

²⁰ See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

²¹ See, e.g., Linda A. Malone, *Environmental Justice Reimagined Through Human Security and Post-Modern Ecological Feminism: A Neglected Perspective on Climate Change*, 38 FORD INT’L L.J. 1445 (2015).

²² See Adrien K. Wing, *International Law and Feminism*, in *RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* 468 (Robin West & Cynthia Grant Bowman eds., 2019).

²³ See, e.g., *Akayesu*, *supra* note 8 (finding that rape and sexual assault may constitute acts of genocide based on targeting a particular ethnic group).

²⁴ See, e.g., *In re Fauziya Kasinga*, File A73 476 695, *Decision* (U.S. Dept. of Justice, Board of Immigration Appeals, June 13, 1996) (landmark case finding that persecution on the basis of gender—by virtue of the petitioners opposition to female genital mutilation—could constitute a ground of asylum in the United States under the theory that it was a form of persecution on the basis of political opinion).

²⁵ *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 UNTS. 13.

reveal commitments to anti-imperialism, peace, and disarmament.²⁶ Linkages to critiques of militarism and imperialism stopped when the end of the Cold War deradicalized the women's peace movement. International law and institutions remain constrained in their inability to prevent war as the recent Russia-Ukraine conflict illustrates. Although Engle does not examine the broader commitment to peace that lay a foundation for the UN, her insight concerning the betrayal of CEDAW's anti-militarist roots echoes Louis Henkin's criticism of questionable uses of force against the backdrop of what he described as the UN Charter's virtual abolition of war as a legitimate lever of international relations.²⁷ By exploring the international women's movements of the 1970s and '80s and their understandings of the patriarchal roots of war and imperialism, Engle hopes to spur similar inquiries today. She warns that the next thirty years might well depend upon it.

Another contributor to this symposium, Ratna Kapur of Queen Mary University of London School of Law, discusses the twenty-year U.S. war in Afghanistan and its effect on women, through the lens of TWAIL.²⁸ Kapur criticizes the motivation to "emancipate" Afghan women in what some referred to as the first "feminist war." Echoing critiques of "rescuing" Muslim women made by other scholars in the aftermath of the U.S. invasion of Afghanistan following the September 11 terror attacks,²⁹ Kapur notes that along with postcolonial feminist critiques, TWAIL has "exposed the racial and civilizational discourses that shape these rescue missions and the epistemic violence they engender."³⁰ Kapur discusses the need to delink acquisition of rights from a rescue mission mentality. Those in the West must engage with non-liberal alternative systems of knowledge. They must acknowledge that efforts to reduce horrific suffering and to provide for immediate needs have been implicated in producing suffering as well. She writes:

Being open to understanding that there is something to be learnt about how to be human in the world and flourish in lifeworlds that are not completely aligned with the logic of pro-, and anti-feminist or human rights positions is non-negotiable if feminism is to remain relevant in the field of international law and human rights.³¹

Karima Bennoune, Lewis M. Simes Professor of Law, University of Michigan Law, writes that advancing feminist international law in the twenty-first century requires a renewed commitment to universality, along with multidirectional resistance.³² She asserts that there is increasing ideological gatekeeping within the academic field of feminist international law by those espousing "critical" perspectives. Bennoune's counter-critical critique should be seen as a (partial) friendly amendment since she shares some of the same underlying concerns. Among the problems with the critical literature is that feminism may be cast as "Western" and "white" in an attempt to deconstruct

²⁶ Karen Engle, *Looking Back to Think Forward: What We Might Learn from Cold War Feminist Movements*, 116 AJIL UNBOUND 264 (2022).

²⁷ See, e.g., Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 817–24 (2005) (after famously proclaiming, "away with the S word"—referring to the use and abuse of the notion of state sovereignty—Henkin also sought to "take on" the "W" word, "war," which he noted was virtually abolished (at least as a formal, legal matter) by the UN Charter Article 2(4)'s prohibition on the use of force against the territorial integrity or political independence of another state, subject to certain exceptions, such as self-defense). Henkin argues: "[T]he U.N. Charter was designed to abolish war, both as a concept in international law, and as a legal institution. . . . The international law of the U.N. Charter replaces 'war' and law of war with an international regime for maintaining—or restoring—international peace and security." *Id.* at 821.

²⁸ Ratna Kapur, *"The First Feminist War in All of History:" Epistemic Shifts and Relinquishing the Mission to Rescue the "Other Woman,"* 116 AJIL UNBOUND 270 (2022).

²⁹ See, e.g., LILA ABU-LUGHOD, *DO MUSLIM WOMEN NEED SAVING?* (2015).

³⁰ Kapur, *supra* note 28.

³¹ *Id.*

³² Karima Bennoune, *Multi-directionality and Universality: Global Feminisms and International Law in the 21st Century*, 116 AJIL UNBOUND 275 (2022).

power. This approach may hide the struggles of women in the Global South under the guise of criticizing Western power and patriarchy. Bennoune says we must not undercut dissident feminist voices who exercise their rights to criticize their own contexts, while nevertheless being deeply committed to those circumstances. She wants to ensure that a strategic sense of commonalities among women is not lost.

The final contributor shines a light on the path ahead. Patricia Sellers, special advisor for prosecution strategies to the prosecutor of the International Criminal Court and visiting fellow at Kellogg College of Oxford University, calls for international law to recognize freedom from gender discrimination as a *jus cogens* norm,³³ drawing on earlier scholarship by Charlesworth and Chinkin.³⁴ Sellers argues that masculine approaches to peremptory norms must be eliminated, and *jus cogens* should no longer be seen as “non-female.”³⁵ Yet, the 2019 Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) does not raise freedom from gender discrimination as a peremptory norm. We, as symposium editors, wonder how far off in the future will this status be achieved?

While the conversations initiated in these essays by these international law experts are quite rich, it is also important to consider that international law has ramifications for domestic law. Similarly, more male international law scholars need to incorporate feminist perspectives in their work, including into basic textbooks and treatises. More scholars need to incorporate TWAIL perspectives as well as critical race feminist and other nontraditional perspectives in their work as well.

As we think about the arc of feminist theory for the next thirty years, we can anticipate several outstanding questions. For example, the recognition of various forms of gender identity (including trans, gender nonconformity, gender fluidity, and other challenges to the traditional gender binary) make the category of gender itself unstable. Challenges to the gender binary potentially threaten existing feminist legal doctrine and jurisprudence, which largely turns on the binary, even while these challenges may pave the way for enriched understandings of gender. After all, litigation strategies that challenge discrimination on the basis of gender identity are frequently based on a legal theory that is grounded in the gender binary—namely that using sex stereotypes is impermissible. When, for example, a trans woman is prohibited from participating on a women’s sports team, she is discriminated against based on the stereotype that a trans woman (i.e., a person whose sex assigned at birth is a man) should “act like” and be categorized as a “man” (for the purposes of participating on a single sex sports team). Such contemporary challenges to existing conceptual categories are ripe for discussion as the next generation of feminist theorists and fellow travelers pave the way for future progress.³⁶

Tremendous strides have been achieved: Hilary Charlesworth has now joined the bench of the International Court of Justice, only the fifth woman in its history. Thirty years from now, how many of the principles she and her 1991 coauthors fought to have recognized by the international law community will have been accepted on the highest levels? As the United States moves into a post-*Roe v. Wade* landscape—in light of the reversal of that landmark reproductive freedom case with the recent *Dobbs v. Jackson Women’s Health Organization* case [fn: *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. ___]—women’s rights remain insecure and uncertain. Given the wide avenues of inquiry opened up by the contributors to this symposium, we are, however, quite certain that feminist approaches to international law will continue to disrupt and shape the contours of this field in ways that are valuable.

³³ Patricia Sellers, [Jus Cogens Redux](#), 116 AJIL UNBOUND 281 (2022). A *jus cogens* norm is a peremptory norm that is “accepted and recognized by the international community . . . from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character.” [Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations](#), Art. 53, Mar. 21, 1986, 25 ILM 543.

³⁴ Hilary Charlesworth & Christine Chinkin, [The Gender of Jus Cogens](#), 15 HUM. RTS. Q. 63 (1993).

³⁵ See Sellers, *supra* note 33.

³⁶ See Giovanna Gilleri, [Abandoning Gender “Identity,”](#) 116 AJIL UNBOUND 27 (2022).