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## Feminism and International Law: An Opportunity for Transformation

Rosa Ehrenreich Brooks


*Georgetown University Law Center*, [rosa.brooks@law.georgetown.edu](mailto:rosa.brooks@law.georgetown.edu)

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# Feminism and International Law: An Opportunity for Transformation

Rosa Ehrenreich Brooks\*

## I. A MAN'S WORLD?

On September 11, 2001, the world collided with the United States, forcing Americans to remember that although we may sometimes prefer to ignore the rage and pain of those who live far away, we have no guarantees that we will be ignored in return. The long-term impact of September 11 on U.S. government policy is still far from clear: the U.S. may ultimately become more multi-lateral, or we may merely become more imperialist. Regardless of how we move forward, however, it has become clear that isolationism is no longer possible in today's globally interconnected world, and international issues in both politics and law are taking on ever-increasing importance.

This could have been said even before September 11, of course: from the Gulf War to the Kosovo air campaign, from NAFTA<sup>1</sup> to the World Bank, the past decade has seen the U.S. drawn into a wide range of international alliances and adventures. Correspondingly, more and more lawyers have found themselves working on international issues, whether these are international business transactions or international human rights law cases. Law schools have responded by increasing course offerings in these areas, and students have eagerly signed up for international classes and projects.

Given this, you would expect to find both women and men populating the world of international law. Nonetheless, if you look for the women in international law and policy, you look almost in vain. Despite Madeleine Albright's much-heralded presence on the State Department's Seventh Floor during the last half of the Clinton Administration, and Condoleezza Rice's role as Bush's National Security Advisor, the world of international law and foreign policy remains very much a male world. Several years ago, I served as a senior advisor at the State Department's Bureau of Democracy, Human Rights, and

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\* Rosa Ehrenreich Brooks is Associate Professor of Law at the University of Virginia School of Law. She also serves on the Board of Directors of Amnesty International USA, and is the former Acting Director of Yale Law School's Schell Center for International Human Rights.

1. The North American Free Trade Agreement.

Labor; at State Department meetings, I was almost always one of a handful of women in a room full of men. My female friends at the State Department and the Pentagon today report that women remain scarce once you move beyond secretarial positions.

Women are similarly absent from the highest ranks of the United Nations, NATO,<sup>2</sup> the OSCE,<sup>3</sup> and other influential international and regional organizations.<sup>4</sup> And as even a quick document search on Lexis or Westlaw demonstrates, women are equally few and far between as authors of articles on international law. A search of law school catalogues shows the same shortage of women in the ranks of international law faculty.

Why is this still true, when international issues are of ever-increasing importance? Thinking in particular about international law, perhaps it is because the traditional subjects of international law appear, at first glance at least, to have very little to do with the immediate concerns of women. International law has historically looked at relations between states, at issues of sovereignty, international security, territorial integrity, and so on. These rarified concerns may seem to have little to do with women's lived experiences, little to do with issues of "traditional" concern to feminist legal scholars: gender relations, reproductive rights, family law, domestic violence, property, workplace equality, harassment, sexual violence. The domain of international law may strike many feminists as largely irrelevant to these compelling domestic concerns.

To the minimal extent that women have entered the male domain of international law and policy, they are often to be found clustered in its "softer" corners, where you find the more "feminine," "human interest" subjects such as refugee law and human rights law. When I was at the State Department, meetings about transnational economic policy or international security involved few women, but meetings about purely "humanitarian" issues often reversed the usual male-female ratios; the men, busily planning air wars and contemplating the future of "failed" states, were content to leave to their female colleagues the "softer" and less appealing problems of how to shelter and feed the thousands of refugees who fled those air wars and failed states.

Even in the realm of international human rights and humanitarian law, however, there are still few women, in absolute terms. The top officers of the largest U.S.-based human rights NGOs are all men, for instance; it is only when you get to the women's rights and children's rights divisions of these NGOs that leadership positions are consistently filled by women.

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2. The North Atlantic Treaty Organization.

3. The Organization for Security and Cooperation in Europe.

4. See, e.g., Press Briefing by Rosario Green, UN Assistant Secretary-General, 16 March 1996; UN, *WOMEN IN POLITICS AND DECISION-MAKING IN THE LATE TWENTIETH CENTURY: A UNITED NATIONS STUDY* (1992).

In part, this may be because international human rights law has historically reified civil and political rights at the expense of social, economic and cultural rights. Here too, although civil and political rights are of pressing concern to political elites all the world over, they may be of distinctly lesser concern to most of the world's three billion women, for whom the daily struggle to feed a family is of more urgent interest than freedom of the press. And international humanitarian law is, to a significant extent, about how soldiers should treat other soldiers in the context of armed conflict. Until quite recently, the fate of women in times of armed conflict received only passing attention in international humanitarian law.

Little wonder, then, that few women have troubled to enter the man's world of international law. International law seems to have very little to say to women.

But if international law appears to have little relevance to us as women, that is precisely why we—as feminists—must engage with it, far more than we have done in the past. Although it may not be readily apparent, international law can and does oppress and injure women. At the same time, international law (and particularly human rights law) has a transformative potential that we ignore at our peril.

In this essay, I want to outline briefly both some of the ways in which the assumptions and categories of international law can be damaging to women, and also some of the ways in which creative feminists could use international law to transform both international policy and the domestic political and legal discourse. In the wake of September 11, a robust feminist engagement with international law and policy is more urgent than ever before.

## II. MAPPING THE SILENCES

I have already spoken briefly about a few of the ways in which international law (and even human rights law) might seem initially to have little to say on subjects important to women. This should not lead us to decide that international law is irrelevant to women, however, for to a significant degree, the ways in which international law oppresses and injures women are coextensive with the ways in which international law is silent on many of the subjects most obviously central to women. Our project, as feminists, must in large part be to map the silences of international law, and fill those silences with our own voices. In a recently published book,<sup>5</sup> Hilary Charlesworth and Christine Chinkin have exhaustively discussed the many “silences” of international law, and I would refer interested readers to that excellent book for

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5. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* (2000).

a thorough and thought-provoking analysis. I will outline just a few of these “silences” in this essay.

Take, first, international law’s historic insistence that it is the state, and only the state, that is the subject of international law. To the traditionalist, national law governs the relations between individuals *within* the state, while international law governs the relations *between* states. Women have rarely been heads of state, of course,<sup>6</sup> so this exclusive focus on state relations renders women—and, for that matter, most other individual humans—more or less invisible from the Olympian perspective of international law.

Until quite recently, international law viewed the state as a black box into which international law could not see—and did not wish to see. International law’s proper focus was order between states, not justice within them. In the past fifty years, this perspective has come under siege by the emerging field of human rights law, which has insisted that sovereignty has its limits, and at least some of what states do within their own borders is properly of concern to the community of nations as a whole. After the Holocaust, few scholars were willing anymore to accept an international legal order in which the mass killings of millions of citizens could be seen as solely the concern of their murderous state.

Nonetheless, if human rights law has succeeded in replacing the old international law model of the sovereign state as black box with a somewhat more translucent model of the state, into which other nations may legitimately peer, human rights law has continued in other ways to insist on the state’s centrality. For most of the past fifty years, human rights law has concerned itself solely with the question of what state agents may legitimately do to the people within their state’s borders. State action has been the *sine qua non* of human rights law violations, just as for the most part state action was the *sine qua non* in domestic civil rights cases. If security forces torture political dissidents, or a state media regulatory board arbitrarily shuts down opposition newspapers, we have “clear” cases of human rights law violations.

But in this traditional understanding of human rights law, if thousands of men systematically beat or rape thousands of women, this is not a human rights abuse, unless the men are state agents acting on the orders of the state. If the men are merely “traditional” fathers or husbands, using age-old methods of maintaining their domestic authority, we have, perhaps, a regrettable state of affairs, but no human rights law violation. Similarly, if thousands of women and girls are trafficked into sexual or domestic near-slavery, we have no human rights law violation, unless the trafficking is carried out by state agents acting in their official capacity.

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6. In 2000, there were only nine female heads of state. Women similarly made up only 8 percent of cabinet ministers and 11 percent of parliamentarians worldwide. See THE WORLD’S WOMEN: TRENDS AND STATISTICS 2000, UN Publication ST/ESA/STAT/SER.K/WWW/16 (May 2000).

Thus, international law's insistence on the centrality of the state—an insistence that even human rights law left largely unchallenged until quite recently—has had the effect of defining out of existence many of the most prevalent forms of female injury and oppression. Domestic violence, sexual trafficking, and other forms of discrimination mar the lives of millions of women around the globe, but international law's blindness to violence that doesn't involve state action has meant that such abuses have, for years, been largely invisible—or, at any rate, relegated to the domain of national criminal law, rather than international human rights law.<sup>7</sup> (It will not escape the feminist scholar that this distinction between national and international law maps almost precisely onto equally problematic domestic law distinctions between the private and the public realms of behavior).

Indeed, the very understanding of what constitutes a “state” is a highly gendered understanding. International law requires four minimal criteria to be met before recognizing the existence of a “state”: a state must have a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.<sup>8</sup> These are, of course, requirements that are arbitrary, and increasingly so in this more global era: for instance, why must a group of people occupy a defined territory before they are permitted a state, given that electronic communications may make physical location less important than ever before?

All categories are inevitably somewhat arbitrary, but in the case of the definition of the state, the particular requirements for state recognition may injure women more than they injure men. In many refugee populations, for instance, women outnumber men, and regardless of the sex ratios, women refugees are generally far more vulnerable to attack, starvation and abuse than are male refugees.<sup>9</sup> Refugees are, by definition, people who have fled their state of origin, usually because their state of origin is either persecuting them or failing to protect them.<sup>10</sup> But with no state to protect them, and virtually no ability to form a new state, refugee populations slip between the cracks of international law, receiving no formal recognition. Since often more women than men find themselves in this situation, in some regions far more women

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7. See generally *Women's Human Rights: Human Rights Developments*, in HUMAN RIGHTS WATCH WORLD REPORT 2001, available at <http://www.hrw.org/women/reports.php>.

8. See 3RD RESTATEMENT ON FOREIGN RELATIONS (1987); Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, U.N.T.S.

9. See 2001 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES POPULATION STATISTICS (Provisional), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=statistics>.

10. See Convention Relating to the Status of Refugees, July 28, 1951, art.1, reprinted in OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES-UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES (2d ed. 1979) (defining a refugee as “A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution.”).

than men find themselves effectively disenfranchised within the international system.

Similarly, the international law understanding of what constitutes a state far predates the human rights revolution, and is entirely neutral with regard to how a state conducts itself. Thus, the Vatican qualifies as a state under international law (and is a Member State of the United Nations) even though it systematically excludes women from high-level state decision-making. Similarly, Kuwait is a state with full UN voting rights, even though it denies the vote to women within its own borders.

Although today international law theoretically includes strong norms against at least such egregious forms of gender discrimination,<sup>11</sup> there is no international law mechanism for denying a state the right to participate fully in the international system on the grounds of gender discrimination.<sup>12</sup> As long as a state maintains its defined territory, permanent population, and some form of government with the capacity to engage in relations with other states, its statehood is more or less unassailable within international law. Since many UN and other international forums operate on a consensus basis, even a single state can often prevent or hold up a decision it doesn't like, giving even those states which engage in systematic and de jure discrimination against women the ability to block implementation of international programs they dislike.

Some scholars have noted that even the very notion of the state is gendered. To fulfill the international law requirements for effective statehood, an entity must be bounded and self-determined, rather than fluid and porous: that is, like the male body, as conceptualized in the domestic legal discourse, rather than the female body (soft, boundary-less, subject to "invasion" by the male body). Invasion of one state by another is a violation of international law, and the invaded state is often conceptualized as "female" relative to the aggressive, masculine invader. Thus Belgium, invaded by Germany during World War One, was conceptualized as vulnerable and feminine (and thus in danger of losing its claim to independent statehood; Kuwait was similarly "feminized" in relation to Iraq when it failed to defend its borders).<sup>13</sup>

Another example of the ways in which international law's silences can harm women lies in the easy assumption, common still even in human rights law, that "maleness" is the norm, and progress in gender equity will come only when women are treated "the same" as men. This sort of assumption has been challenged for several decades in the domestic legal discourse, but it goes relatively unremarked upon in the international human rights law discourse.

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11. See Convention on the Elimination of all Forms of Discrimination Against Women, Nov. 1, 1991 (hereinafter CEDAW), available at <http://www.un.org/womenwatch/daw/cedaw/ratifica.htm> ("specialized" convention ratified by over ninety percent of the world's states).

12. Much more attention is given to race discrimination, e.g., apartheid.

13. See, e.g., J.A. Ticknor, *Inadequate Providers? A Gendered Analysis of States and Security*, in *THE STATE IN TRANSITION* 129, 133 (Joseph A. Camilleri et al. eds., 1995).

Take a close look at the Universal Declaration of Human Rights—or even, more recently, at The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—and you see a conception of equality that would not have seemed odd at Seneca Falls in 1848<sup>14</sup>: the goal for women is “equality,” to have access to education, jobs, and political power on the *same* basis as men.

To give a typical example, CEDAW calls on states to ensure that women and men are given “the same conditions for career and vocational guidance [and] for access to studies . . . this equality shall be ensured in preschool, general, technical, professional and higher technical education, as well as in all types of vocational training. . . .”<sup>15</sup> To feminists whose outlook has been informed by Carol Gilligan or Catharine MacKinnon, the brand of feminism reflected in such provisions is apt to seem somewhat simplistic. Why, after all, should women want the very same thing men already have? Women face different reproductive choices and different social constraints than do men. Is the male standard the right standard for women? For that matter, is the male standard the right standard for *men*? Yet in CEDAW we see no hint that there is anything fundamentally wrong, or even questionable, in the way social and political relations and structures are organized within the state (much less, of course, do we see any hint that the state itself is not the most reliable guarantor of women’s rights, or that the very conception of the state is arbitrary and problematic). CEDAW suggests that nothing need be changed except stereotypes and formal barriers to access: just let the women in, and that’s that.

CEDAW and other human rights conventions thus take it for granted that the rights that “matter” most are precisely the rights that have, historically, mattered most to male political elites: that is, civil and political rights. For women, of course, such civil and political rights have often seemed impossible to separate cleanly from social, economic, and cultural rights—and, what’s more, civil and political rights have often seemed like distinctly lower priorities. If your daily struggle involves keeping your children from starving or being killed or maimed in the fields, the factories, or the army, freedom of the press is likely to be of academic interest, at best. Yet the international community—human rights law groups included—continues to resist giving social and economic rights equal standing with civil and political rights.<sup>16</sup>

A major part of the feminist project, as I have said, must be to point out those assumptions of international law that allow women’s concerns to be

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14. In 1848, Elizabeth Cady Stanton and Lucretia Mott called the first U.S. conference on women’s rights in Seneca Falls, New York. The resulting Seneca Falls Declaration was a classic call for women’s formal equality.

15. CEDAW, *supra* note 11, at art. 10(a).

16. Notably, Amnesty International, the world’s largest human rights organization, recently changed its mandate to permit limited work on social, economic and cultural rights in addition to civil and political rights.



dismissed as trivial. We need to map the silences, and fill them. Perhaps better still, we need to alter the discourse entirely. Just as, in the domestic realm, feminist scholars have challenged the artificial and damaging ways in which the distinction between the public and the private has been drawn, so should we be challenging the way international law has drawn certain distinctions between, for instance, “international” and “national”. In recent years, feminist scholars and activists have made tremendous strides in this direction. Thanks to the work of women such as Hilary Charlesworth,<sup>17</sup> Christine Chinkin,<sup>18</sup> Rhonda Copelon,<sup>19</sup> Dorothy Thomas,<sup>20</sup> and many, many others, women have begun to break into international law, and they have brought to it the same feminist clarity of vision that has begun to transform the domestic legal discourse. Women have insisted, for instance, that trafficking and violence against women *must* be viewed as proper subjects for international human rights and humanitarian law: After all, widespread domestic violence is possible only when state structures encourage, tolerate, or consistently fail to remedy it. Rape of women during armed conflicts only occurs when commanders encourage it, or choose not to prohibit it or punish men who engage in it. Trafficking in women is possible only when state agents refuse to make preventing it a priority and refuse to engage in the collaborative international efforts necessary to stamp it out.<sup>21</sup> If we use a more nuanced and expanded definition of state action—one that recognizes that willful blindness or deliberate inaction is just as much a state choice—many injuries that affect women in particular suddenly appear on our maps with startling clarity.

As a result of careful criticism and imaginative lobbying by women’s human rights advocates, the nature of international human rights and humanitarian law is beginning to change, albeit slowly. The criminal tribunals on Rwanda and the former Yugoslavia have acknowledged that rape can be an aspect of genocide, for instance,<sup>22</sup> and the statute of the International Criminal Court acknowledges concerns previously marginalized as “women’s issues” to an unprecedented degree.<sup>23</sup> Similarly, both human rights organizations and international organizations such as the UN are gradually beginning to give greater priority to social and economic rights and the role of non-state actors,

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17. *Supra* note 5.

18. *Supra* note 6.

19. Professor of Law and Director of the International Women’s Human Rights Law Clinic (IWHR) at the City University of New York School of Law, and a pioneer in the field of women’s human rights.

20. The first director of the Human Rights Watch Women’s Rights Project.

21. It is worsened when women who are “trafficked” for sexual purposes are treated as criminals rather than as victims.

22. *See, e.g.*, Prosecutor v. Jean Paul Akayesu, International Criminal Tribunal for Rwanda Case No. I.C.T.R.-96-4-T (finding that a communal leader’s encouragement of rape and sexual abuse of Tutsi women was an aspect of genocide in the context of Rwanda).

23. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), available at <http://www.un.org/law/icc/>.

whether they are armed rebel groups, NGOs, criminal gangs, or multinational corporations.

### III. A FEMINIST CRITIQUE OF THE FEMINIST CRITIQUE OF INTERNATIONAL LAW?

So far, I have been giving what we might call a “first phase” feminist critique: pointing out the ways in which international institutions and international legal categories tend to exclude women and the issues of most concern to women. Naturally, this first phase critique of international law—and its subcategories, human rights and humanitarian law—has already generated a “critique of the critique” by some legal scholars. To begin with, critics argue, the first phase feminist critique of international law and human rights takes little account of the critique of the very concept of rights,<sup>24</sup> a critique that has shaken the domestic legal discourse to its foundations (if it can be said to have any solid foundations). Needless to say, the feminist/crit/post-modern critique of rights is as applicable to the international sphere as it is to the domestic sphere;<sup>25</sup> it is pre-figured, perhaps, by feminist questions about the centrality of civil and political rights in international human rights law, but its full implications were not teased out in the first phase feminist critique.<sup>26</sup>

Just as some scholars have questioned a rights-based approach, in recent years some feminists have begun to raise questions about essentialist/universalist approaches in the context of international law. Influenced by the work of Carol Gilligan and others, feminists have long criticized both domestic and international civil and human rights documents that take it for granted that maleness is the norm<sup>27</sup>—but, for example, the “first phase” feminist critique of CEDAW itself assumes that there is in fact something we can refer to as “maleness,” and that it is opposed by something we might call “femaleness.” The second phase critique asks whether there is really any such thing as “femaleness.”<sup>28</sup> Is there a distinct and uncontested “women’s perspective” that is different from a “male perspective,” and if so, is that women’s perspective simple to identify and define?

“Second phase” critics note that even within elite Western feminist scholarly circles, one woman’s bread is another woman’s poison. Surely, then, it is a form of arrogance to insist that the world’s three billion women have a

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24. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Radika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN (R.Cook ed., 1994).

25. Feminist scholars have since corrected this. See, e.g., Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

26. See Karen Engle, *International Human Rights and Feminism: Where Discourses Meet* 13 MICH. J. INT’L L. 317 (1992).

27. See, e.g., Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59.

28. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

common perspective on such a highly problematized subject as “rights.” Does an illiterate women on a subsistence farm in rural Cameroon have anything much in common with prostitute working in Thailand’s sex industry, or a Chicana laborer in New Mexico, or a female astrophysicist in Germany? And what the about cross-cutting commitments to tribe, religion, ethnicity, or community that many women may feel? If we wish to develop a conception of “rights” that embraces the communal as well as the individual, “peoples” as well as “people,” how should feminist international lawyers respond to Taliban-style “religious” restrictions on women? To Female Genital Mutilation (FGM)? To Indian women’s cults that reify *suttee*?<sup>29</sup> To put it bluntly, can a small group of privileged, first world women lawyers presume to say *anything at all* about “women” as an international class?

#### IV. THE PROMISE OF INTERNATIONAL HUMAN RIGHTS LAW AS A TRANSFORMATIVE DISCOURSE

These questions are troubling. But that way, I would suggest, lies madness, or at any rate a uniquely disabling form of post-modern paralysis. Despite all the difficulties, I believe it is critical that we, as women—with all of our similarities and all of our differences—engage in the international law project. I believe, in particular, that universalist, liberal conceptions of human rights have much to offer—that we can do quite a lot with the language of human rights, however limited its vocabulary and incoherent its grammatical rules.

Consider, to start, the range of problems women face around the world. First, of course, women face direct abuses by state agents. Under many repressive regimes, women are censored, detained, beaten, tortured, imprisoned, executed, kidnapped, and so on. When states decide to cannibalize their citizenry, they generally find women just as tasty as male victims.

Second, women around the world suffer from both *de jure* and *de facto* discrimination. In some states, women are inferior to men as a matter of law; they cannot inherit property, cannot obtain a divorce, cannot hold public office, cannot receive the same education as men, are forbidden to enter certain professions, are fined if they wear “improper” clothing, and can legally be beaten or raped by their husbands. (The Taliban may be gone from Afghanistan, but women in most parts of that troubled country find today that they are still subject to numerous restrictions<sup>30</sup>—as are women in many other parts of the Islamic world). In many other states, the laws on the books are gradually changing, but women still face widespread societal discrimination.

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29. *Suttee* is defined as self-immolation following a husband’s death.

30. HUMAN RIGHTS WATCH BRIEFING PAPER, TAKING COVER: WOMEN IN POST-TALIBAN AFGHANISTAN (May 2002), available at <http://hrw.org/backgrounder/wrd/afghan-women-2k2.htm>.

They find it difficult to obtain jobs and promotions easily available to men, they face mockery and harassment if they enter “male” professions, and they face extreme social pressures to conform to traditional and confining conceptions of proper female roles.<sup>31</sup>

Third, women often face serious abuse at the hands of private actors, while the state turns a blind eye. Women are beaten, raped, or virtually enslaved by husbands or other male “heads of families,” they are forced into particularly dangerous jobs, they are sold into bonded labor or trafficked, often across international borders, into domestic or sexual slavery.<sup>32</sup>

Finally, in times of armed conflict, women are particularly victimized. Women suffer when men abandon (or are forced, themselves, to abandon) the home for the army, as women often face, alone, the task of feeding a family. They must often flee from the conflict, and women and children comprise three-fourths of the population of refugee and internally displaced persons’ camps.<sup>33</sup> In the camps, run by well-intentioned international agencies, women may have little direct access to food, because relief agencies frequently distribute food to “heads of households,” often self-appointed men, who may not bother to pass much on to the women or children. In an increasing number of recent conflicts, women have been deliberately targeted by hostile forces, and systematically subjected to rape and sexual torture. In other conflicts, women and young girls have been systematically abducted and made to serve as “wives” to male soldiers.<sup>34</sup>

The point of this painful litany is not to numb, but to remind us that the harms this world inflicts upon women are often not particularly subtle. In the face of such overwhelming wrongs, the universalist human rights discourse has been extraordinarily powerful, indeed transformative, for women around the world. The discourse of rights is not unassailable, and universalistic conceptions of rights will never be unproblematic. Nonetheless, as Patricia Williams has noted in the domestic context of race-based oppression, for the oppressed, at least, talk of rights can be “deliciously empowering. . . . It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power.”<sup>35</sup>

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31. For a comprehensive set of statistics and information on the status of women worldwide, see THE WORLD’S WOMEN, *supra* note 6, especially Chapter 6 (Human Rights and Politics). For a comprehensive overview of human rights abuses against women, see HUMAN RIGHTS WATCH, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS (1995).

32. HUMAN RIGHTS WATCH, *supra* note 31.

33. See, e.g., REFUGEE WATCH, CHRONICLES OF SUFFERINGS: REFUGEE WOMEN OF SOUTH ASIA (June 2000); *Refugee Watch*, No. 10 & 11 (July 2000), available at <http://www.safhr.org/contents3310.html>.

34. See, e.g., HUMAN RIGHTS WATCH, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO (2002).

35. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C. L. L. REV. 401 (1987).

Williams and others have already made this observation more eloquently than I can, so I will not belabor the argument here. But I do want to point out that for women struggling to survive in the face of the most terrible abuses, a post-modern critique of rights may seem rather beside the point. However subtle and intellectually sound, it is apt to seem a luxury best left for that far off day when secret police no longer pound on the door in the middle of the night, traffickers no longer come round to purchase girls from their fathers and sell them into slavery a thousand miles a way, and paramilitary forces no longer operate rape camps in the center of town. Rights-talk, for all its flaws, offers a powerful way to understand the world. Rights-based narratives are not the only powerful narratives—and in some cultural contexts they may be much less effective than in others—but for many of the world's women, they offer the best way to buttress arguments for change. Put another way, there are times, as Gayatri Spivak has said, when a certain “strategic essentialism” is not a bad idea.<sup>36</sup>

Of course, we should never let short-term strategic concerns push us into damaging over-simplifications or prevent us from thinking in more long-term, complex or even utopian ways. So I do not at all mean to suggest that the second phase, post-modern feminist critique of human rights discourse is either pointless or wrongheaded. What I do want to do is suggest that for all the undoubted force of that critique, we should not, as feminist activists, be too quick to conclude that the universalist human rights discourse is fatally flawed, and worthy only of quick abandonment.

Consider a brief and utopian thought experiment: if human rights-oriented feminists had been in charge of developing the U.S. policy response after September 11, would anything be different today? I think so. Feminist thinkers have traditionally valued attentiveness to nuance; if feminists ran the world, perhaps we would have responded to September 11 not just (or not at all) through military action but through programs that acknowledge the economic and political desperation felt by so many of the world's disenfranchised, since it is that desperation that helps fuel misdirected acts of terrorist violence. Intense poverty and the absence of democratic government—that is, the absence of many basic human rights—create a fertile breeding and recruiting ground for terrorists. What's more, the intensive military response in Afghanistan was devastating to Afghan civilians,<sup>37</sup> and women civilians are particularly vulnerable in times of conflict. Feminist policy-makers might have looked harder for ways to target Al Qaeda without so much devastation to Afghan civilians.

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36. Gayatri Spivak, *Subaltern Studies: Deconstructing Historiography*, in THE SPIVAK READER: SELECTED WORKS OF GAYATRI SPIVAK (Donna Landry & Gerald MacLean, eds., 1995).

37. See, e.g., Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2002, at A1.

Feminist, rights-oriented policy makers would also insist, in the wake of September 11, that regimes and cultures which systematically exclude or oppress women must change if they are to be our allies. In parts of the Islamic world, women are systematically shut out from formal political participation and indeed from political discourse. In these settings, it should be little surprise if the resulting political discourse is violent and impoverished. I do not mean, here, to suggest that women would “by nature” bring a more pacifistic view of things to the table. I do mean, however, that any political discourse premised on the exclusion and subjection of half the adult population will inevitably be narrower and more violent.

For that matter, with regard to the Taliban regime, which harbored or colluded with Al Qaeda, we might note that had feminist human rights lawyers been in charge, the Taliban would have been sanctioned and challenged and possibly even ejected a long time ago. After all, long before George W. Bush declared the Taliban to be supporters of terrorism, feminist rights advocates were drawing attention to the Taliban’s brutal discrimination against women.

Sadly, even in post-Taliban Afghanistan, women continue to suffer disproportionately: Rule by the UN-sanctioned group of warlords who replaced the Taliban means that women in much of Afghanistan remain at risk of sexual violence, excluded from public life, and at risk of retaliation if they throw off the burqa.<sup>38</sup> Feminist policy-makers would have been less quick to assume that just because pre-war Afghanistan was run by male warlords with appalling human rights records, so too post-war Afghanistan had to be run by the same cast of characters. Feminists would have rejected that oft-made assertion that these warlords had popular “legitimacy” and therefore should form the core of a post-conflict transition government. How much “legitimacy” can there be for leaders whose claim to power rests on force, in a context in which half the population was systematically denied access to public goods?<sup>39</sup>

This thought experiment is unabashedly utopian. In real life, feminist rights advocates were few and far between in the Bush administration as it sought a response to the tragic events of September 11. But this thought experiment suggests how different the world might be if enough people took seriously feminist approaches to international issues. Even in the far-from-utopian world we live in, feminist and rights-based arguments *did* make a difference in the United States response to September 11—not nearly as much difference as many would wish, to be sure, but some difference. If feminist rights advocates had not done so much important work documenting the Taliban’s oppression of women, the U.S. would probably have made no effort

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38. HUMAN RIGHTS WATCH BRIEFING PAPER, *supra* note 30.

39. Imagine, if South Africa’s transition from Apartheid had been managed by the U.N., what an outcry there would have been if the vast majority of potential leaders invited by the U.N. to determine the future leadership of the country had been white!

at all to include women in Afghanistan's post-Taliban government. As it stands, at least a few women were included, and United States and other international funds have now been made available for aid and educational programs directed toward women. What's more, for a brief moment, Americans saw President Bush and First Lady Laura Bush on television, decrying gender discrimination under the Taliban. This helped opened up new space in the political discourse to raise questions about the United States coziness with Saudi Arabia and other Middle Eastern regimes that discriminate against women, and it also helped buttress the effort in support of Senate ratification of CEDAW.

These examples in turn point to some ways in which the universalist international human rights discourse can offer something to American feminists, even those who have made domestic U.S. affairs their priority. The international human rights discourse can, in some very practical ways, offer American feminists some new ways to conceptualize—and perhaps remedy—some old problems.

Let me give a concrete example: the Violence Against Women Act (VAWA) represented a federal attempt to protect women from domestic violence, since states have, on the whole, done such a lackluster job. We could defend the constitutionality of VAWA on many traditional grounds, but international human rights law offers us a new and potentially powerful way to argue for VAWA's constitutionality. As a number of feminist international law scholars argued in an amicus brief filed before the Supreme Court, both customary international law and the international human rights covenants give women the right to be free of gender-based violence. Since the U.S. is a party to several of these international human rights covenants, the federal government is arguably permitted—and, indeed, arguably required—to enact legislation to protect women from domestic violence to the extent that it is gender-based. Since international law is part of the law of the United States, and the Constitution empowers Congress to pass laws defining and punishing offenses under the law of nations, there is no constitutional impediment to VAWA.<sup>40</sup>

Ultimately, neither this argument nor any of the more traditional constitutional arguments succeeded in persuading the Supreme Court to uphold VAWA, and the international law argument got not a single mention in the Court's May 15 opinion. Nonetheless, the international law argument was, in my view, both novel and legally persuasive. Its novelty may have doomed it with a Court unaccustomed to international human rights law arguments—but as I write, the Senate seems poised to ratify the Convention on the Elimination

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40. See Brief of Amici Curiae International Law Scholars and Human Rights Experts in Support of Petitioners, *Brzonkala v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-0005, 99-0029).

of Discrimination Against Women (CEDAW);<sup>41</sup> perhaps if CEDAW had been ratified at the time the Supreme Court addressed the constitutionality of VAWA, the outcome would have been a little different.

Perhaps even if CEDAW had been ratified, the Court would have drawn the same conclusions; but with the passage of time, I think international human rights-based arguments will find an increasingly sympathetic audience in U.S. courts and policy fora.<sup>42</sup> Today, more and more law schools are offering human rights law classes and integrating the teaching of human rights law into the mainstream curriculum; more and more programs such as Yale's Global Constitutionalism Project are being designed; more and more A.B.A. and Aspen Institute programs are educating judges and lawyers about the law beyond our own borders, and more and more judges and practitioners are beginning to think creatively about connecting the domestic and the international. International human rights law arguments are becoming increasingly common in both federal and state courts, and the integration of international human rights norms into U.S. legal and political discourse is likely to accelerate.

Thus, in a very pragmatic sense, international human rights law, however problematic, offers new ways to approach old legal dilemmas—and in the years to come, I believe that international human rights law arguments will become both much more familiar and more persuasive to American courts.<sup>43</sup>

There is another level, too, on which the universalist international human rights discourse holds tremendous promise for us as American feminists. I grew up in a feminist household, and have defined myself as a feminist since I was old enough to pronounce the word. As someone who believes that the feminist project is far from over, it has saddened me, over the years, to watch many women in my own age cohort turn their backs on the feminist label.

We've all seen this: the young women who inform us that they are "post-feminist," or who are reluctant to argue for women's rights without prefacing their arguments with, "Well, I'm not a feminist, but . . ." For reasons that are complicated—reasons that have something to do with our own failure to reach

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41. The Senate Foreign Relations Committee approved the treaty on July 30, 2002. Press Release, Amnesty International, *Amnesty International Applauds Senate Committee Passage of Treaty on the Rights of Women* (July 30, 2002).

42. This trend too has in some ways been accelerated by September 11. The post-September 11 political environment has created short-term threats to civil liberties, but at the same time it has further opened the door to internationalist arguments. Consider the Bush administration's proposed military tribunals: negative reactions to the proposed tribunals by close U.S. allies, and human rights-based refusals to extradite suspects to the U.S., forced the administration to make significant compromises. While September 11 accelerated a willingness to "go it alone" in some quarters of the U.S. government, in many other quarters it forced a new awareness of the importance of multilateral cooperation. It is too soon to say what the long-term impact of September 11 will be on U.S. foreign policy, and on U.S. willingness to incorporate international human rights concerns into domestic policy—but unquestionably, an opportunity now exists that did not exist to the same extent a few years ago.

43. Another example might be the death penalty.



out and communicate, and have quite a lot to do with a well-organized and well-funded anti-feminist backlash—many young women find the feminist discourse alarming, or unintelligible, or irrelevant, or alienating, or all of the above. And this, I think, is a tragedy for all women, for there is so much that remains to be done: As one of my favorite tee-shirt slogans has it, “I’ll be a post-feminist in a post-patriarchy.”

How can we bring these disaffected women back into the feminist fold? It seems to me that the universalist international human rights discourse offers us a way to reach out to the generation of women who see feminism as *passé*—no doubt useful back in the dark days of the seventies, but at this point somewhat embarrassing and *outré*.

Just as an international human rights law perspective allows us a new and different way to argue for the constitutionality of VAWA, so international human rights law offers us a new lens for looking at gender inequality in the broadest sense, and a new language for speaking and thinking about some age-old wrongs. I have seen this myself, in the classroom, as young women who shun the “feminist” label become impassioned advocates of international human rights, often first in the context of considering the restrictions on women under the ousted Taliban or their only slightly less repressive successors, or sexual trafficking, or honor killings, or female genital mutilation. These young women often then turn back around, with their new language, their new toolbox, to examine domestic gender issues—from domestic abuse to welfare reform to the stubborn glass ceilings in law firms—and end up with radical critiques of existing gender relations and law that would make their feminist fairy godmothers proud.

In the United States, international human rights thus offers us a new discourse, a new rhetoric, one that has already demonstrated its ability to inspire, to provoke new intellectual insights, and to lead thousands of American young people to embrace activist agendas. Consider the recent spate of university-based protests over sweatshop labor or living wage ordinances, and the protests at the IMF and World Bank. Although many of these protests have been rightly criticized as naïve, and at times incoherent, we would do well to recognize that they represent a new phase in the evolution of American political activism. Today’s young people show little interest in the debates of the old left, but they have a keen, if often unfocused, awareness that in this era of rapid globalization and the omnipresent threat of terrorism, any effective advocacy agenda must be grounded in a robust conception of international human rights.

For those who came of age politically in an earlier era, this represents both a challenge and a tremendous opportunity. Internationalist, universalist rights-talk is not the only narrative in town, and as Margaret Radin has observed, there is no reason to insist on its primacy at all times: We can make “situated

judgments” about when rights-talk is useful and when it is not.<sup>44</sup> But at a moment in time when left wing politics, feminism, and liberalism are all floundering, unable any longer to persuade or inspire a new generation that worries about wars and jobs and the environment, the discourse of international human rights offers us a new and potentially transformative way to conceptualize the world’s many injustices. As feminist scholars, judges, and lawyers, this is an opportunity we cannot afford to pass up.

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44. Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1718-19 (1990).