Lauritz Wilde

Feminist Approaches to International Law – an Overview

In recent decades, feminism has developed from a niche topic to one that is discussed in the political and social mainstream. In the process, the term is often used as a buzzword, both by proponents and opponents. But feminism has also found its way into academic discourse, including in the field of law. The last two decades of the 20th century then saw the development of a feminist approach to international law. Based on the various currents of feminism, the article offers an introduction to feminist perspectives on public international law and presents a selection of criticisms of existing norms.

I. Introduction

Although feminist debates in general and feminists' engagement with law began in the 17th and 18th centuries, there were only sporadic approaches to transfer feminist criticism to the level of international law. Therefore, the article named "Feminist Approaches to International Law" by the international legal scholars Hilary Charlesworth, Christine Chinkin and Shelley Wright published in 1991 was seminal.[1] Building on this article, a decade of intensive engagement with the issue began. The present work starts with an overview of the main feminist approaches in general and continues with their transmission to international law. Since the original primary literature assumes a binary understanding of gender roles, this article does not go beyond that. In the meantime, however, international law is also being considered from a queer perspective.[2]

Due to the large body of feminist theory dealing with a wide variety of topics in international law, only a few examples of feminist critique can be highlighted here. I chose the critiques that seemed to me to be the most considerable, but feminist approaches are much more far-reaching than described here and could also be analysed against the background of intersectional discrimination[3]. For instance, the criticism of the international economic order,[4] the concept of the state and state sovereignty[5] or a debate on women and environmental justice[6] could not be addressed.

Before examining feminist approaches to international law, I should remark that I am not perceived as a woman. My engagement with the topic is therefore based exclusively on literature and discussions and not on experience.

II. Theoretical Base

The starting point of this article must be the question of what specifically constitutes feminist approaches to international law. The guiding concept of this approach is feminism, so that a theoretical base must be created starting from it. The political scientist Nancy Hartsock wrote that "[...] feminism is a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of politi-

1 *Charlesworth* et al., Feminist Approaches to International Law, AJIL 85 (1991), p. 613 ff.

2 See e.g. the AJIL Unbound Symposium on Queering International Law.

3 Intersectional discrimination refers to a situation in which several grounds of discrimination operate and interact with each other.

4 E.g. *Beveridge*, Feminist Perspectives in International Economic Law, in: Buss/Manji (ed.), International Law: Modern Feminist Approaches, 2005, p. 173 ff.; *Pahuja*, Trading Spaces: Locating Sites for Challenge within International Trade Law, AFLW 14 (2000), p. 38 ff.

5 E.g. *Knop*, Re/Statements: Feminism and State Sovereignty in International Law, TLCP 3 (1993), p. 293 ff.

6 E.g. *Verchick*, In a Greener Voice: Feminist Theory and Environmental Justice, HWLJ 19 (1996), p. 23 ff.

cal conclusions about the oppression of women"[7]. This quote illustrates well how the method of feminist scrutinising should be understood: rather as questioning and exposing the limits of international law and its claim of objectivity and impartiality than as the fabrication of a single overarching theory of feminist international law.[8] Therefore, feminist approaches cannot be pinpoint to a common point of view or methodological procedure but rather are linked by a shared concern – the domination of women by men – and a shared goal – the challenge of the structures that permit this dominance.[9] Regarding the multiple approaches, Charlesworth notes the following: "When confronted with a concrete issue, no theoretical approach or method seems adequate. A range of feminist theories and methods are necessary to excavate the issues."[10] This understanding is supported by the context-dependent experiences and demands of women.[11] Feminist approaches have to cover such a wide range of experiences which is why a variety of approaches is necessary.[12] Although the individual theories clearly were useful and necessary to advance the feminist goal, the bigger picture will only be received by not pinning oneself down to one approach concerning the male dominance and its mechanisms in society.[13]

1. Schools of Thought

Since women around the world make diverse experiences and the understanding of gender equality changed over time, different schools of thought of feminist (legal) theory have emerged. The first one being liberal feminism which arose out of the liberal dogma that all men are created equal.[14] This approach aims to ensure women the same rights, opportunities, and treatment as men. Therefore, it is also called equal treatment theory.[15] It has been criticised that this theory is gender-blind as its supporters attempt to lift women up to the status of men, but do not question the underlying system of norms or engage with potential differences between the genders.

Building on the demand of gender-neutral laws, difference or special treatment theorists nevertheless identify fundamental differences between women and men that allow different treatment in areas like pregnancy or childbearing/rearing.[16] Difference theorists were influenced by psychologist Carol Gilligan, whose research indicates that, when confronted with moral problems, young boys rely on an "ethic of rights" and base their decision-making on abstract logic and objectivity whereas young girls, who rely on an "ethic of care", are concerned with values of caring and relationships.[17] Therefore, they state that women and men have different methods of acquiring knowledge and making decisions.[18] With regard to law, they criticize that the language of law and the base it operates on privilege the attributes ascribed to men over the ones ascribed to women, thereby failing to account for differences.[19] The theory itself is criticised for constructing a strong dichotomy between male and female thus neglecting people who do not fit in either category[20] and for appearing to promote the idea that men cannot be included in feminism.[21]

Radical feminists stop asking whether women are like men or not and deem the determining aspect of social relations between women and men to be domination and subjugation.[22] Catharine MacKinnon, who is one of the most prominent exponents of this approach, criticises that the above-mentioned

7 *Hartsock*, Feminist Theory and the Development of Revolutionary Strategy, in: Eisenstein (ed.), Capitalist Patriarchy and the Case for Socialist Feminism, 1979, p. 56 (58 f.).

8 *Charlesworth*, Feminist Methods in International Law, AJIL 93 (1999), p. 379 (379).

9 *Charlesworth* et al., AJIL 85 (1991), p. 613 (621).

10 *Charlesworth*, AJIL 93 (1999), p. 379 (381).

11 Which is why one must be careful using "women" as an analytical category, cf. *Bartlett*, Feminist Legal Methods, HLR 103 (1990), p. 829 (834). Nevertheless, for convenience I will use the term "women".

12 Cf. *Buss/Manji*, Introduction, in: Buss/Manji (ed.), Modern Feminist Approaches, 2005, p. 1 (6 f.).

13 Cf. *Charlesworth/Chinkin*, The Boundaries of International Law: A Feminist Analysis, 1. Edition 2000, p. 50.

14 *Williams*, Feminism and Post-Structuralism, MLR 88 (1990), p. 1776 (1783).

15 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 38 f.

16 *Levit*, Feminism for Men: Legal Ideology and the Construction of Maleness, UCLA Law Review 43 (1996), p. 1037 (1044 ff.).

17 *Gilligan*, In A Different Voice: Psychological Theory and Women's Development, 1982, p. 9-23, 164, 174.

18 *Levit*, UCLA Law Review 43 (1996), p. 1037 (1045).

19 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 40 f.

20 *Levit*, UCLA Law Review 43 (1996), p. 1037 (1046).

21 E.g. *West*, Economic Man and Literary Woman: One Contrast, MLR 39 (1988), p. 867 (869).

22 *MacKinnon*, Feminism Unmodified, 1994, p. 3.

theories accept a male benchmark.[23] She calls attention to social institutions and practices such as sexual harassment, prostitution, restrictions on abortions and inadequate responses to violence against women that promote gender inequality and the oppression of women.[24] Radical feminists argue that gender coincides with power, which is why gender equality can only develop through a shift in power.[25] Radical feminism is criticised for considering men as a unitary collective: "none are better, some are worse, and all are guilty."[26]

Postmodern feminism is sceptical of all universal explanations of the oppression by men made by the modern feminist theories[27] since there is no universal experience of women. Instead, realities vary based on the women's class, religion or culture.[28] It shoves aside the sameness/difference-debate regarding men and centres the differences between women. The knowledge of women is contextual and partial. Hence there are multiple points of view.[29] Absolute knowledge about e.g. "the female" is questioned and, in contrast to essentialism,[30] the category "woman" is seen as constituted through the social context rather than determined by a core identity.[31] Language, especially legal language, plays an important role constructing and reconstructing categories like "female" and "male".[32] Postmodern feminists, therefore, advocate applying different approaches to eliminate gender inequalities.[33]

The last school of thought I would like to introduce is Third World feminism[34] which is critical of the blanket transfer of western/white/northern feminist theories to realities of women in the Global South.[35] Third World feminists argue that there is more to the oppression of women than sex or gender. Aspects as race, colonialism, or global capitalism typically do not play a role in western feminist theory. Therefore, they focus on topics like the eradication of poverty and the ways the global economy maintains poverty.[36] Essentialism is, just as it is by postmodern feminists, rejected and a more complex analysis of the oppression of women is demanded.[37]

2. Transmission of Feminist Ideas to International Law

An innocent observer might ask whether there is a need for a feminist approach to international law since international law governs the relations between states, regardless of the gender of their citizens. But the idea of an unbiased, objective (international) law is outdated, which can e.g., be seen in the law adapting to social developments.[38]
Feminism as a way of analysing life by following academic principles can help to identify and illuminate inequities. Just as the New Haven school, that analyses public international law through a policy-oriented perspective, or Critical Legal Studies, that analyse law with the understanding that it cannot be entirely separated from politics and often serves the powerful and wealthy, a feminist perspective on international law contributes to understanding law and its influence on society. What follows from the discoveries has to be deter-

23 *MacKinnon*, Feminism Unmodified, 1994, p. 33 f.

24 See e.g. *MacKinnon*, Not a Moral Issue, YLPR 2 (1984), p. 321 (325 ff.).

25 *Levit*, UCLA Law Review 43 (1996), p. 1037 (1049).

26 *Levit*, UCLA Law Review 43 (1996), p. 1037 (1049).

27 Modern meaning the second wave of feminism beginning in the 1960s.

28 *Frug*, Sexual Equality and Sexual Difference in American Law, NELR 26 (1992), p. 665 (674).

29 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 44 f.

30 *Frug*, NELR 26 (1992), p. 665 (672).

31 *Bartlett*, Feminist Legal Methods, HLR 103 (1990), p. 829 (877 f.).

32 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 45.

33 E.g. *Radin*, The Pragmatist and the Feminist, SCLR 63 (1990), p. 1699 (1718 f.).

34 Although the use of the phrase "third world" is critically viewed, the authors of Third World feminist literature frequently and deliberately use it to describe their scholarship (cf. inter alia *Mohanty*, "Under Western Eyes" Revisited: Feminist Solidarity through Anticapitalist Struggles, Signs 28 (2003), p. 499 (505 f.)) Therefore, I chose to follow their handling.

35 *Johnson-Odim*, Common Themes, Different Contexts: Third World Women and Feminism, in: Mohanty et al. (ed.), Third World Women and the Politics of Feminism, 1991, p. 314 (314 f.).

36 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 47; for a critical overview of the economic world order cf. inter alia *Anghie*, Legal Aspects of the New International Economic Order, Humanity 6 (2015), p. 145 ff.

37 *Mohanty*, Under Western Eyes: Feminist Scholarship and Colonial Discourse, boundary 2 12 (1984), p. 333 (344).

38 In the context of international law the transformation of the right of colonizing states into a (human) right to development is an examples of this.

mined by a debate in the community. But taking the academic path and analysing the power structures women and men (and everyone else) live in is indispensable.

Whether one calls it patriarchy or not, there is a male pre-eminence in our daily lives, in politics as well as in international law. To illustrate this, I will now turn to the critique that follows from a feminist approach to international law.

III. Critique Based on Feminist Approaches

The critique of international law from a feminist perspective is comprehensive and evolving, as are the life circumstances that international law addresses. I decided to consider the critique on (1.) international institutions and organisations, (2.) the public/private distinction, (3.) human rights and (4.) the law of armed conflict. The following discussion is of course only an overview of the topics.

1. Institutions and Organisations

The first glance is directed at a few institutions and organisations within international law, the common feminist question in mind: "Where are all the women?"[39] Until 1995, when Rosalyn Higgins was elected, the bench of the International Court of Justice (ICJ) was entirely male. By 2021, the bench consists of three women and eleven men. In this regard it is interesting, and perhaps questionable, that the international community minds an equitable geographic distribution of the members of the court,[40] but not an equitable distribution of gender.[41] In contrast, the Statute of the International Criminal Court (ICC) holds that the need for a fair representation of female and male judges should be considered in the selection of the judges.[42] It was drafted in the 1990s, decades later than that for the ICJ, and thus after the international community had had its first experience with the International Criminal Tribunal for the former Yugoslavia and Rwanda, where the differences were visible that exist when women judges are present.[43] Due to this, the court started with seven female judges out of 18 and, by now, has reached gender equality on the bench. Concerning the treaty-based bodies of the United Nations (UN), considerably more men than women are members,[44] except for the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), which is composed of only one man and 22 women. Similarly, in 2017 only 23.7 percent of the seats in national parliaments were held by women[45] and in 2023 only 31 out of 193 UN member states have a female head of state and/or government.[46] The composition of international institutions reflects the composition in national parliaments and governments, thus women are usually underrepresented. This is the case despite the recognition that the equal participation of women and men in all spheres of society is necessary for the development of a country, the achievement of lasting peace and the well-being of the world in general.[47] According to the CEDAW Committee, the exclusion of women in political and public life also creates a democratic deficit.[48] It states that for women to have real influence and to counterbalance the effects of male numerical superiority, a participation rate of 30-35% is required.[49] Since this is often not the case, the conclusion of some feminist scholars is: because men are long-term represented in international institutions, their concerns become seen as human concerns which leads to negligence of the experiences of women.[50]

39 Cf. *Buss/Manji*, Introduction, in: Buss/Manji (ed.), Modern Feminist Approaches, 2005, p. 1 (8); *Chinkin* et al., Feminist Approaches to International Law: Reflections from Another Century, in: Buss/Manji (ed.), Modern Feminist Approaches, 2005, p. 17 (19 f.).

40 Art. 9 ICJ-Statute.

41 *Chinkin* et al., in: Buss/Manji (ed.), Modern Feminist Approaches, 2005, p. 17 (21).

42 Art. 36 VIII lit. a) no. (iii) ICC-Statute.

43 For further insights into the drafting process and significance of Art. 36 see *Rwelamira*, Composition and Administration of the Court, p. 153 (166 f.) and *Steains*, Gender Issues, p. 357 ff., both in: Lee (ed.), The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, 1999.

44 The Committee against Torture comprises three women and seven men and the Human Rights Committee comprises seven women and eleven men.

45 *UN Women*, Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development, 2018, p. 95.

46 *UN Women*, Women's Leadership and Political Participation (11 May 2023).

47 Preamble of the Convention on the Elimination of All Forms of Discriminations against Women (adopted 18 December 1979, entered into force 03 September 1981) 1249 UNTS 13 (CEDAW).

48 CEDAW Committee, General Recommendation No. 23, Political and Public Life, 16th session (1997), para. 14.

49 CEDAW Committee, General Recommendation No. 23, Political and Public Life, 16th session (1997), para. 16.

50 *Charlesworth* et al., AJIL 85 (1991), p. 613 (625).

2. The Public/Private Distinction

A common feminist critique, based on cultural and radical feminism, is the supposed distinction between a public and a private sphere. The public realm being the workplace, the law, economics or politics and the private realm of the home, family, and care work. One of the functions of the distinction is the demarcation between areas appropriate for legal regulation and those who are not. It is argued that this distinction is gendered and a means to preserve the male dominance, since the private sphere is regarded as the domain of women whereas the public sphere is regarded as the province of men.[51] As a consequence of this division, "the privacy of domestic life makes women's concerns invisible and ensures the preservation of the status quo"[52]. Furthermore, it makes women economically invisible, because work at home or in the community is not reflected in the Gross Domestic Product and therefore regarded as less valuable or non-work.[53]

In international law the distinction between matters of international concern and matters private to the nation states is made in order to define which areas of life are open for regulation by international law and which are left within the sovereignty of the nation states.[54] Thus, the UN Charter speaks of "matters which are essentially within the domestic jurisdiction of any state"[55], with the consequence that the UN may not intervene in these areas.

a. The CAT and the ASR as Examples

One example in international law where the distinction is thought to work to the detriment of women is the protection against torture, codified by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and being a norm of customary law and jus cogens as well.[56] The preamble of the Convention traces the foundation of the right to the "inherent dignity of the human person". However, the definition of torture in art. 1 I CAT only comprises actions by, at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity. The Convention distinguishes between public and private conduct and is therefore criticised for disguising violence that is usually experienced by women,[57] namely domestic violence by private individuals.[58]

With regard to international responsibility of states it is also argued that the distinction between public and private leads to unsatisfying results concerning women's rights. According to the Articles on State Responsibility (ASR) a state can only be held accountable, if a violation of international law can be linked to it. In other words: States can only be called to account for "public" actions, but not for conduct of persons not acting on the state's behalf.[59] Since a lot of violence women are subjected to is domestic violence,[60] the norms of state responsibility are countered as being gender-blind and not offering women sufficient protection.
Therefore, feminists demand the renunciation of the notion of the public/private distinction. This should, inter alia, result in the expansion of the term "torture" in the CAT and the same legal consequences for violence against women as for violence by state officials against people e.g. because of their political beliefs.[61]

b. Comment

Against this criticism it can be objected that international law regulates the relations between states and deals with behaviour that can be attributed to them, not with solely private conduct. Against this background, it could be argued that the feminist critique fails to recognize the typical structure of international law. Historically, conventions such

51 For the derivation of the argumentation see *Charlesworth*, AYBIL 12 (1992), p. 190 (192).
52 *Charlesworth*, AYBIL 12 (1992), p. 190 (192).
53 *Charlesworth* et al., AJIL 85 (1991), p. 613 (640 f.).
54 *Charlesworth*, AYBIL 12 (1992), p. 190 (194).
55 Art. 2 VII.
56 *Van der Berg*, Folter, unmenschliche und erniedrigende Behandlung in der Rechtsprechung des EGMR und die strafprozessualen Konsequenzen, 2019, p. 28 f.
57 A 2018 WHO analysis of prevalence data from 2000-2018 from 161 countries and territories found that globally, nearly one in three women have experienced physical and/or sexual violence by an intimate partner or sexual violence by a non-partner, or both (*WHO*, Violence Against Women Prevalence Estimates, 2018, p. XVI).
58 Cf. *Charlesworth* et al., AJIL 85 (1991), p. 613 (627 ff.).
59 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 148.
60 *UN Women*, Gender Equality, 2018, p. 86, 188; *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 148.
61 *Charlesworth* et al., AJIL 85 (1991), p. 613 (629).

as the one against torture were intended to protect citizens from violations of their rights by the state.[62] It is not objectionable that a convention was concluded specifically for this area of protection. Above all, the prohibition of torture by public officials does not mean the impunity of private torturers. On the contrary, the Convention requires Member States to legislate to prevent torture within their jurisdiction.

On the other hand, it is also reasonable to ask whether international law would have been constructed to better capture violations of women's rights had female perspectives had more influence in the development of international law.

The paradox remains that states are held responsible if their officials treat someone in a way that is covered by the definition of torture under the CAT, but are not held equally responsible, if they "maintain a legal and social system in which violations of physical and mental health are"[63] inherent. Since the distinction between private and public is unlikely to leave international law anytime soon, a more practical approach to making women's rights more effective would be to focus more on states' obligations to protect, the violation of which could also trigger state responsibility.

3. Human Rights

The development of human rights in the second half of the 20th century changed the boundaries of the public/private divide to some extent. It allowed violations of individuals to be addressed within the context of international law. At first sight one would think that the development of human rights has a lot to offer for the protection of women. But following a more thorough analyses, criticism surfaces.

The basic contention regarding women and human rights is whether human rights can be of use for the feminist objective.[64] Historically, they were designed to regulate the relation between men and the state and only gradually women were given access to them, although to a world of rights already constituted and made for men.[65]

Main human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) or the aforementioned CAT are mainly concerned with civil and political rights. In theory, these rights can be held by all citizens regardless of their gender. However, assuming a traditional – and rejectable, but nevertheless persistent – distribution of roles, women spend more time in the private sphere and are therefore less often in the scope of civil and political rights. It is argued that the male hegemony establishes a system of subordination that organises the economic and social distribution of resources to the detriment of women. This is reinforced by the "socially constructed dependency of women on men, the socialization attaching their self-esteem to men, their underpaid labour, their lack of education, and the commodification of their sexuality"[66]. Therefore, they need some kind of protection that serves them within the social and economic sphere. Economic, social, and cultural rights are indeed recognized by the International Covenant on Economic, Social and Cultural Rights (ICESCR). Yet, a brief look at the individual complaint mechanisms of the Covenants illustrates that the international community ascribes a differing level of importance to these two categories of human rights.[67] The mechanism for the ICCPR entered into force in 1978 and has 116 state parties by now.[68] The mechanism for the ICESCR, on the other hand, entered into force in 2013 and only has 26 state parties.[69] There is a clear discrepancy between the issues and the behaviour protected by existing human rights law and the reality of women's lives.

62 *Tesón*, Feminism and International Law: A Reply, VJIL 33 (1993), p. 6 (662 f.).

63 *Charlesworth* et al., AJIL 85 (1991), p. 613 (629).

64 *Palmer*, Feminism and the Promise of Human Rights: Possibilities and Paradoxes, in: James/Palmer (ed.), Visible Women: Essays on Feminist Legal Theory and Political Theory, 2002, p. 91 (93 ff.).

65 *Palmer*, Feminism and the Promise of Human Rights, in: James/Palmer (ed.), Visible Women, 2002, p. 91 (93 f.); *Cook*, Women's International Human Rights Law: The Way Forward, in: Cook (ed.), Human Rights of Women: National and International Perspectives, 1994, p. 3 (10).

66 *Romany*, Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, HHRJ 6 (1993), p. 87 (123).

67 Cf. *Edwards*, Violence Against Women under International Human Rights Law, 2013, p. 59 ff.

68 *UN Treaty Collection*, Optional Protocol to the ICCPR (11. May 2023).

69 *UN Treaty Collection*, Optional Protocol to the ICESCR (11. May 2023).

This and the limited scope of the CAT are just two examples that illustrate the neglect of women's issues by human rights law.[70] Nevertheless, a lot of feminists argue in favour of engaging with human rights to enhance them for the benefit of women. First, the enactment of law and the recognition of rights have a symbolic power that can influence discourse and change social behaviour. The power of law in society makes it a potential medium for change that should not be sidelined.[71] Besides, the recognition of rights affords opportunities to introduce perspectives and experiences of women to the courts and committees that have been excluded so far.[72] In this context, the CEDAW is an important instrument against gender discrimination, although the same applies to it as to other human rights treaties, namely that there is hardly any leverage to achieve its implementation.[73] Furthermore, "rights talk" in general could lead to an invigoration of the effects rights have on women, since they are defined by the people talking about them.[74] Thus, human rights have an empowering function that allows women to become visible.[75]

However, it is warned of the imposition of a system of human rights and a blunt transfer from western to non-western societies from a postmodern and Third World perspective. Ilumoka argues that a rights discourse is not the right way to improve the socioeconomic situation of women in countries undergoing structural adjustments.[76] Coomaraswamy accounts for two barriers for the implementation of human rights in South Asia. On the one hand the lack of a proper implementation machinery that would make women's rights effective and on the other hand the refusal to accept the values themselves while holding on to traditional ideologies like the sanctity of the family.[77] An-Na'im contradicts the rejection of conversation about rights and advocates for "internal discourse" as well as "cross-cultural dialogue" to establish cultural legitimacy for human rights.[78]

Overall, the development of human rights had a positive impact for men as well as for women. The very fact that private individuals obtained a stage in international law was seminal and the potential of a recharacterization of human rights[79] is large. Nevertheless, the existing system of human rights does not take women's problems sufficiently into account, and caution is needed when the western understanding of human rights and non-western cultures converge.

4. Law of Armed Conflict

Although women are predominantly not members of the armed forces and therefore not directly involved in warfare, they are arguably the primary victims of it. The biggest issue is sexual violence, especially rape or forced prostitution, that "has appeared in virtually every conflict in history".[80] It happens during and after the conflict and has been well documented.[81] Besides, women and other civilians have been subjected to air bombardments and other methods of mass destruction since the First World War, whereas before they were isolated from the battlefield.[82] In addition, women are mainly responsible for the wellbeing of the family

70 For more, see *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 218 ff.

71 *Palmer*, Feminism and the Promise of Human Rights, in: James/Palmer (ed.), Visible Women, 2002, p. 91 (97); *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 218.

72 *Palmer*, Feminism and the Promise of Human Rights, in: James/Palmer (ed.), Visible Women, 2002, p. 91 (97); See *Charlesworth/Chinkin,* Boundaries, 1. Edition 2000, p. 149 f. for examples of regional human rights courts.

73 *Bunch*, Women's Rights as Human Rights: Toward a Re-Vision of Human Rights, HRQ 12 (1990), p. 486 (495 f.).

74 *Romany*, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction on international Human Rights Law, in: Cook (ed.), Human Rights of Women, 1994, p. 85 (85, 106 f.).

75 *Charlesworth/Chinkin*, Boundaries, 1. Edition 2000, p. 210 f.; *Williams*, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, HCRCLLR 22 (1987), p. 401 (431).

76 *Ilumoka*, African Women's Economic, Social, and Cultural Rights – Toward a Relevant Theory and Practice, in: Cook (ed.), Human Rights of Women, 1994, p. 307 (317 ff.).

77 *Coomaraswamy*, To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights, in: Cook (ed.), Human Rights of Women, 1994, p. 3 (39 ff.).

78 *An-Na'im*, State Responsibility Under International Human Rights Law to Change Religious and Customary Law, in: Cook (ed.), Human Rights of Women, 1994, p. 167 (171-175).

79 *Cook*, in: Cook (ed.), Human Rights of Women, 1994, p. 3 (5 f., 10 ff.).

80 *Hear* et al., Former Combatants on Sexual Violence During Warfare: A Comparative Study of the Perspective of Perpetrators, Victims, and Witnesses, HRQ 37 (2015), p. 609 (610).

81 E.g. *Human Rights Watch*, Central African Republic: Sexual Violence as a Weapon of War (11. May 2023); *Hear* et al., Former Combatants on Sexual Violence During Warfare: A Comparative Study of the Perspective of Perpetrators, Victims, and Witnesses, HRQ 37 (2015), p. 609 (610 ff.).

82 *Gardam*, Women and the Law of Armed Conflict: Why the Silence?, ICLQ 46 (1997), p. 55 (60).

and community by gathering food, water and other resources. To fulfil their responsibilities in times of conflict, they must take great risks such as leaving the shelter of their homes.[83]

The main legal documents governing the law of armed conflict are the Geneva Conventions (GC) and their Additional Protocols (AP). From a feminist perspective it is argued that the Conventions and Protocols fail to take the realities of women in armed conflict into account. First, it is incomprehensible why the norms covering the protection of women are drafted in a different language. Art. 27 GC IV and Art. 76 AP II stipulate that women should be protected, inter alia, against rape and "shall be object of special respect". Although the Conventions and Protocols usually prohibit undesired conduct,[84] the norms specifically concerning women, only urge to protect them.[85] Secondly, the wording of Art. 27 II GC IV holds that women shall be "protected against any attack on their honour, in particular against rape [...]", making sexual abuse an impairment of honour rather than of bodily integrity. The norm fails to recognise what abuse means for women and thus exposes the male view of the authors.[86] Against the background that the idea of honour protection in armed conflicts was/is to protect the honour of combatants,[87] it twists the logic of protecting women. Thirdly, although (sexual) violence against women is a common and major problem in armed conflicts, the provisions on the protection of women are not included in the category of grave breaches of international law. All four Geneva Conventions contain this category[88] which imposes obligations on contracting parties to enact legislation to suppress such breaches.[89] Although some jurists argue that rape is implicitly included in the category of grave breaches, e.g. as "torture or inhuman treatment" or "wilfully causing great suffering or serious injury to body or health",[90] the omission to explicitly include rape in the category of grave breaches demonstrates the weight given to the protection of women by the state parties.

Women experience armed conflict differently from men, but the laws that govern it deal almost exclusively with the concerns of men.

IV. Conclusion

The illustrated criticism shows that the experiences and actualities of women were not incorporated sufficiently when the respective sections of international law were drafted. International law is neither objective nor neutral but made for men's needs and interests. This is partially due to the time in which the treaties were concluded. The Geneva Conventions for example were drafted in the second half of the 19th century and, after several updates, are as they stood in 1949. But international law, as any other field of law, should adapt to scientific progress and the changing realities of society. Feminist approaches are therefore indispensable for identifying, changing, and preventing gender injustices in international law.

• **Der Autor** studiert Rechtswissenschaft an der Universität Hamburg.

83 *Charlesworth*, AJIL 93 (1999), p. 379 (385); *Gardam*, ICLQ 46 (1997), p. 55 (60 f.).

84 E.g. common art. 3 of the GC, art. 11 AP I.

85 *Gardam*, ICLQ 46 (1997), p. 55 (57, 74).

86 *Charlesworth*, AJIL 93 (1999), p. 379 (386); *Gardam*, ICLQ 46 (1997), p. 55 (57, 68, 74).

87 *Department of Defense*, Law of War Manual 2015, p. 66 ff. (11. May 2023); *Charlesworth*, AJIL 93 (1999), p. 379 (386); *Gardam*, ICLQ 46 (1997), p. 55 (68, 74).

88 Art. 50 GC I, art. 51 GC II, art. 130 GC III, art. 147 GC IV.

89 *Charlesworth*, AJIL 93 (1999), p. 379 (386 f.); *Gardam*, ICLQ 46 (1997), p. 55 (75 f.).

90 E.g. *Gardam*, ICLQ 46 (1997), p. 55 (75 f.); *Meron*, Rape as a Crime under International Humanitarian Law, AJIL 87 (1993), p. 424 (426 f.).