CSICL

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Reading Humanitarian Intervention

Human Rights and the Use of Force in International Law

ANNE ORFORD

CAMBRIDGE

more information - www.cambridge.org/9780521804646

In his later work, Said developed this idea further in an exploration of the enormous cultural work necessary to make possible 'the *idea* of *having an empire*', an idea that is as central for Said to the enterprise of empire as are guns, boats, soldiers and administrators.[53] The puzzle he seeks to solve in *Culture and Imperialism* is one that seems pertinent to a consideration of international intervention. Given the 'immense hardships' faced by those who were engaged in the imperial project, the lack of domestic, European resistance to the project of empire, and the energy and resources involved in ruling or managing people on their home territory, what produced the 'will, self-confidence, even arrogance necessary to maintain such a state of affairs'?[54] One answer for Said lies in the power to create a narrative that gave a moral and heroic purpose to empire.

> The main battle in imperialism is over land, of course: but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time decided in narrative . . . The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.[55]

As Leela Gandhi has shown, this insight has been central to shaping the work of many scholars working as postcolonial literary critics, who 'take their cue from Said's monumental reading of imperial textuality' to undertake 'textual mappings of the colonial encounter'.[56] Gandhi notes that scholars have read the colonial novel, as well as letters, histories, biographies, censuses, newspapers and travel writing, to explore the ways in which empire 'came to define the textual self-representation and narrative sensibility of metropolitan [European] culture'.[57] Legal documents have also been studied for their part in the 'frenzied verbosity' of metropolitan European culture.[58] Indeed, writing and reading law has been a key textual practice in the constitution of the idea of having an empire.[59] In particular, international law and the narrative of empire are inextricably intertwined – as I noted in Chapter 1, the heroic narrative of the march of civilisation supplies international law with its 'history and destiny, beginning and end, explanation and purpose',[60] while international law as a universal system of humanitarian values supplies the

[53] Said, *Culture*, p. 10. [54] *Ibid*. [55] *Ibid*., p. xiii.
[56] Gandhi, *Postcolonial Theory*, p. 142. [57] *Ibid*., p. 143. [58] *Ibid*.
[59] Ian Duncanson, 'Scripting Empire: the "Englishman" and Playing for Safety in Law and History' (2000) 24 *Melbourne University Law Review* 952.
[60] Robert M. Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4 at 5.

narrative of empire with its moral. Spivak argues that 'as the North continues ostensibly to "aid" the South – as formerly imperialism "civilised" the New World – the South's crucial assistance to the North in keeping up its resource-hungry lifestyle is forever foreclosed'.[61] She uses *foreclosed* here in the sense developed in Lacanian psychoanalysis – the ego rejects an incompatible (and here crucially needed) idea together with an affect. She adds 'this rejection of affect served and serves as the energetic and successful defense of the civilizing mission'.[62]

The study of the culture and texts of imperialism has not been without its critics. In her discussion of debates within the discipline of English, Gandhi points to hostility expressed by critics such as Aijaz Ahmad and Arif Dirlik to the work undertaken by those exploring the 'textual politics' of postcolonialism.[63] Such critics argue that there has been a tendency to treat reading practices as if they were revolutionary, when this is just an alibi for the academic migrant or self-styled marginal critic aspiring to a particular class position in the West. For Ahmad, postcolonial literary theory is an indulgence of elites, irrelevant to the stuff of revolution. Thus one theme that concerns postcolonial theory is the relationship between postcolonialism as a textual practice and as a political practice. In part, what is at stake in this debate is the place of the text as an instrument of power.

Law occupies an interesting place in this debate, for while the law is a product and effect of power relations, it is also clearly a text-based practice. International legal texts in particular can be read for their part in producing objects of knowledge as colonisable. Yet legal texts also explain and enable violence in a more traditionally political manner – the legal text is marked out as 'law' in part through the founding violence (neither legal nor illegal) that gives law its authority,[64] while legal texts themselves authorise particular violent acts as legitimate.[65] These texts exhibit many of the features discussed by postcolonial critics

[61] Spivak, *A Critique*, p. 6. [62] *Ibid*., p. 5.

[63] Aijaz Ahmad, *In Theory: Classes, Nations, Literatures* (Oxford, 1992); Aijaz Ahmad, 'The Politics of Literary Postcoloniality' (1995) 36 *Race and Class* 1; Arif Dirlik, 'The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism' (1994) 20 *Critical Inquiry* 328. See the discussion of anti-postcolonial criticism in Gandhi, *Postcolonial Theory*, pp. 56–8.

[64] Jacques Derrida, 'Force of Law: the "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (London, 1992), pp. 3–67.

[65] Robert M. Cover, 'Violence and the Word' in Martha Minow, Michael Ryan and Austin Sarat (eds.), *Narrative, Violence, and the Law: the Essays of Robert Cover* (Ann Arbor, 1992), pp. 203–38.

of imperial culture – they are premised upon a narrative according to which the invaders bring civilisation, here humanitarianism, to those in need of saving; they provide a schema for making sense of intervention in a manner that is palatable to domestic constituents; they create characters for those doing the invading, formed against the other as an underground self; they authorise violence. At the same time these texts offer possible resources for those who are subject to intervention.[66]

Yet as with postcolonial literary theory, readings of legal texts in the terms I propose give rise to the kinds of criticisms made by Ahmad, who treats 'all postcolonial theoretical practice as purely recreational'.[67] For those who criticise such readings, any reflexive, theoretical engagement with law is a luxury, the stuff of recreation. The pragmatic focus of international legal scholarship requires that all critique be directed towards programmatic change. If theory is necessary in the field of humanitarian intervention, its aim should be to 'work to make law respond consistently' to incidents of human rights abuses or crimes against humanity.[68] The self-representation of international law as a discipline concerned with peace, security, decolonisation and humanitarianism reassures lawyers that there is no time to waste on dealing with theoretical irrelevancies, when our profession is engaged in more important life and death matters. Lawyers have to deal with the facts on the ground and the problems facing real people in the real world. There is no time for abstract theoretical questioning when issues of life and death are at stake. A recent response by Brad Roth to critical scholarship on governmental illegitimacy provides a good example of the demands that orthodox scholarship makes of critique.

> 'Critical' scholars frequently seem to imagine that, in struggling against the methodological norms of their disciplines, they are struggling against the very structure of the power relations that exploit and repress the poor and weak – the metaphor being, in their minds, somehow transubstantiated into reality. The result is, all too often, an illusory radicalism, rhetorically colorful but programmatically vacuous. The danger is that a fantasized radicalism will lead scholars to abandon the defense of the very devices that give the poor and weak a modicum of leverage, when defense of those devices is perhaps the only thing of practical value that scholars are in a position to contribute.[69]

According to such critics, legal scholarship is at best vacuous and impractical, at worst narcissistic, if it engages in reflection upon the textual

[66] See further Chapter 6 below.
[67] Gandhi, *Postcolonial Theory*, p. 56.
[68] Berman, 'In the Wake', 1544.
[69] Roth, 'Governmental Illegitimacy', 2056.

practices of the law, providing no programme for action, institutional design or norm creation. The important question that legal scholarship must address is what doctrinal and institutional changes would help to achieve systemic goals. In other words, the principal thing that is going on in legal texts is the derivation of rules and institutions. To suggest that anything else can be said about the texts of law is frivolous. Programmatic solutions or 'alternatives' are the necessary conclusion to any attempt at critique. As Roth suggests, 'it would be different if [this] methodological radicalism . . . entailed a programmatic alternative. But it does not. Instead, it disdains to engage in the only consequential struggle in which its adherents are, by training and position, equipped to participate.'[70]

Such comments are familiar within the legal tradition, when its proponents are faced with challenges to the traditional priorities and ordering practices of international law. For example, the marginalisation of critical approaches to international law, and thus the avoidance of any ethical reflection on law's role in facilitating imperialism and exploitation, is evident in those legal texts which engage with feminist and progressive scholars.[71] Responses to postcolonial and feminist critiques both within and outside of the law are 'premised upon the assumption that structural shifts in forms of governance affect people more directly than imaginative shifts in critical methodologies'.[72] Any method of engaging with texts, whether literary, legal or political, that departs from orthodox forms of interpretation, is portrayed as illegitimate, and a dangerous waste of time and energy. Such critiques are part of a broader pattern of negative reactions to the use of cultural and critical theory to study issues of capitalism, globalisation, neoimperialism and militarism, both within international law and within the social sciences more generally. They represent a tradition that treats as opposites 'real' political action and irresponsible critical theory. Writing in 1990, Terry Threadgold criticised a similar tendency emerging in feminist theory to support forms of feminist writing that privileged ' "real" political action', imagined as non-theoretical, over theoretical work seen as 'a kind of intellectual game'.[73] The approach taken by Roth and other critics of legal theory suggests that focusing on representation makes it impossible to think about these issues of the effects of power in the

[70] *Ibid*., 2065. [71] See further the section on 'Disciplining Feminism' below.
[72] Gandhi, *Postcolonial Theory*, p. 56.
[73] Terry Threadgold, 'Introduction' in Terry Threadgold and Anne Cranny-Francis (eds.), *Feminine–Masculine and Representation* (Sydney, 1990), pp. 1–35 at pp. 11, 13.

'real' world. Such critiques set up false dichotomies between politics and the private, and between reality and theory. As Trinh T. Minh-ha argues:

> Although much has been said and done concerning the 'apolitical' character of the narrow 'political', is it still interesting to observe the endlessly varying ways the boundaries of 'the political' are being obsessively guarded and reassigned to the exclusive realm of politics-by-politicians. Thus, despite the effectiveness and persistence of the women's movement in deconstructing the opposition between nature (female) and culture (male) or between the private (personal) and the public (political); despite the growing visibility of numerous Third Worldist activities in de-commodifying ethnicity, displacing thereby all divisions of Self and Other or of margin and center based on geographical arbitrations and racial essences; despite all these attacks on pre-defined territories, a 'political' work continues unvaryingly for many to be one which opposes (hence remains particularly dependent upon) institutions and personalities from the body politic, and mechanically 'barks at all the after-effects of past inhumanity' – in other words, which safely counteracts within the limits of pre-formulated, codified forms of resistance.[74]

Similarly, I argue for a reading of humanitarian intervention that does *not* assume that a 'political' response to militarisation and neocolonialism is one which 'opposes . . . institutions and personalities from the body politic'. It is necessary to consider intervention stories as the result of ongoing cultural processes in order to understand how it is that these stories do the work of making brutality and exploitation appear legitimate and useful. I argue throughout the book that it does not make sense to talk about separating representation from reality, or intellectual games from real political action.[75] While there may be limits on when such critique should take place, my sense of those limits is not the same as that proposed by Roth and others. I agree with the argument that theoretical work should not be simply a frivolous game, played as some kind of elitist distraction from something called 'reality'. I would put this somewhat differently, perhaps following Threadgold as she argues, 'the models for legal writing should come from the law first and only borrow from other contexts if they need changing for political, gendered, racial or other reasons'.[76] In my view, the abandonment of the disciplinary or generic rules of law is called for in the context of humanitarian intervention, as I hope this book will demonstrate.

[74] Trinh T. Minh-ha, *When the Moon Waxes Red: Representation, Gender and Cultural Politics* (New York, 1991), p. 95.

[75] Threadgold, 'Introduction', pp. 13, 18.

[76] Threadgold, 'Book Review', 841.

Cultural criticism is necessary to understand the apparent naturalness and inevitability of both militarism and economic globalisation. Critics of cultural and critical theory reproduce a gendered division and privileging of labour, where the real work of dealing with power and its effects involves an exclusive focus on a 'public' sphere of states, corporations and international organisations, while the soft option of dealing with fantasy, desire and identity is done in a pink ghetto of devalued scholarship.[77]

This book makes use of the insights of postcolonial theory in one further way, to explore law as a form of pedagogy. As I have already noted, despite the exploitative nature of imperial regimes, imperialists did not see their actions in those terms. Rather, as Edward Said has shown so clearly, while 'profit and hope of further profit were obviously tremendously important' in the expansion of European imperialism, so too was a particular imperial culture which supported the notion that 'certain territories and people *require* and beseech domination'.[78] Imperial culture 'on the one hand, allowed decent men and women to accept the notion that distant territories and their native peoples *should* be subjugated, and, on the other, replenished metropolitan energies so that these decent people could think of the *imperium* as a protracted, almost metaphysical obligation to rule subordinate, inferior, or less advanced peoples'.[79] Central to this civilising-mission rhetoric was the idea of colonialism as pedagogy, and the coloniser as an educator. As Gandhi notes, the 'perception of the colonised culture as fundamentally childlike feeds into the logic of the colonial "civilising mission" which is fashioned, quite self-consciously, as a form of tutelage or a disinterested project concerned with bringing the colonised to maturity'.[80] For example, as Thomas Babington Macaulay famously explained, the British in India understood themselves as 'governors' who owed a duty 'as a people blessed with far more than ordinary measure of political liberty and of intellectual light' to educate the Indians, 'a race debased by three thousand years of despotism and priestcraft'.[81] Colonial peoples were to

[77] V. Spike Peterson, 'The Politics of Identity and Gendered Nationalism' in Laura Neack, Patrick J. Haney and Jeanne A. K. Hey (eds.), *Foreign Policy Analysis in its Second Generation: Continuity and Change* (New Jersey, 1995), pp. 167–86 at p. 183 (arguing that the 'gendered dichotomy of public–private structures the study and practice of international relations and foreign policy' and that one result is the 'discipline's neglect of activities associated with the private sphere').

[78] Said, *Culture*, p. 8 (emphasis in original).

[79] *Ibid*., p. 10 (emphasis in original).

[80] Gandhi, *Postcolonial Theory*, p. 32.

[81] Thomas Babington Macaulay, 'Speeches in the House of Commons, dated 2 February, 1835' in G. W. Young (ed.), *Speeches* (Oxford, 1935), pp. 153–4.

be educated in the operation of the state machinery that had been created to enable the governance and exploitation of colonial territories, so that a smooth transition from colony to decolonised state could be made. Both in India, and later in England when the techniques learnt in the colonies were repatriated, the training of a docile bureaucracy guarded against the dangers posed by decolonisation and democracy.[82] As Gandhi argues, 'the simple transference of State machinery' from colonial regimes to their 'decolonized' successors enabled a 'generic continuity' between the two forms of administration.[83]

The pedagogical imperative, and its conservative effects, continues to shape intervention discourse. As I discuss in detail in Chapter 4, the relationship between the international community and the people of states subject to intervention is portrayed as one of tutelage, particularly in discussions of 'postconflict peacebuilding' or reconstruction. As that chapter shows, some of the most 'productive' work done by the law in the realm of intervention is focused on establishing the architecture of the new post-conflict state in the 'peacebuilding' phase.[84] For example, in the case of Kosovo and of East Timor, the international community has set itself the task of creating the machinery and institutions of a reconstructed state, such as a police force, a judiciary, local administrators, and the institutions of the capitalist market.[85] Its role is understood in the pedagogical terms that mark colonial discourse – the international community brings its tutees in places like Kosovo and East Timor to political and economic maturity through the creation and transfer of the bureaucratic machinery of the modern nation-state, and the training of the functionaries required to operate that machinery. Chapter 4 shows that the idea of the international community having a mission to educate and develop is reflected in Security Council resolutions establishing post-conflict mandates, and in reports

[82] Duncanson, 'Scripting Empire', 962. [83] Gandhi, *Postcolonial Theory*, p. 119.

[84] See generally Michael J. Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *American Journal of International Law* 76; Ralph Wilde, 'From Bosnia to Kosovo and East Timor: the Changing Role of the United Nations in the Administration of Territory' (2000) 6 *ILSA Journal of International and Comparative Law* 467.

[85] In the case of Kosovo, see clause 10, Security Council Resolution 1244, S/RES/1244 (1999), adopted on 10 June 1999; UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo, paras. 1 and 6, 25 July 1999, http://www.un.org/peace/kosovo/pages/regulations/reg1.html (accessed 28 November 2001); Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/1999/779 (1999), 12 July 1999. In the case of East Timor, see clauses 1 and 2, Security Council Resolution 1272, S/RES/1272 (1999), adopted on 25 October 1999. These documents are discussed in detail in Chapter 6.

of those involved in the reconstruction of states under international administration.

The imperial feminist

My reading of international intervention is enabled by the energies and insights of feminism. Yet to develop a feminist reading of an international project is to be haunted by the shades of those nineteenth-century European feminists whose role in facilitating empire is undergoing much exploration.[86] In order to think through the ethical issues involved in the politics of producing such a reading of humanitarian intervention, this section will outline some of the ways in which feminist legal theory is invited to participate in the project of constituting both the women of target states, and the international community. I will consider some of the dangers involved in accepting this invitation, and propose alternative methodologies for undertaking the risky project of (mis)reading the law of international intervention.

Disciplining feminism

One gesture that feminist international lawyers may be tempted, or invited by our legal brethren, to perform when engaging with international law is to participate in the ongoing project of saving the Third World, or in the grammar of Spivak, 'white men . . . saving brown women from brown men'.[87] 'White women' are seen as ideally placed, indeed duty-bound, to contribute to this project. For example, in his review of a book of essays entitled *Human Rights of Women: National and International Perspectives*, Anthony D'Amato admonishes Hilary Charlesworth for questioning the justice of the international legal order, arguing that feminists should line up behind the project of saving the vulnerable

[86] Gandhi, *Postcolonial Theory*, pp. 81–101; Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Conquest* (New York, 1995); Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in Mohanty, Russo and Torres, *Third World Women*, pp. 51–80; Spivak, *A Critique*.

[87] Spivak, *A Critique*, pp. 284–311. Spivak there begins to plot the history that produces the sentence 'White men are saving brown women from brown men.' She borrows the general methodology developed in Freud's predication of the history that produces the sentence 'A child is being beaten' in Sigmund Freud, ' "A Child Is Being Beaten": a Contribution to the Study of the Origin of Sexual Perversions' in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, (trans. James Strachey, Anna Freud, Alix Strachey and Alan Tyson) (24 vols., London, 1955), vol. XVII, pp. 179–204.

women of the Third World.[88] D'Amato there reproduces a vision of a world structured according to stereotypes of race and gender. The role of international law is to 'compensate women' for their weakness and vulnerability, particularly during child-bearing years, thus contributing to the creation of an 'advanced civilisation'.[89] D'Amato argues that such a civilisation is marked by its distance from one in which we behave 'like animals'.[90] In the animal world, according to D'Amato, bullying behaviour is the norm: 'on the whole, animals decide questions of life and death on the basis of physical power and brute force', and 'if an animal is weak, lame or infirm, other animals of its own species may kill or abandon it'.[91] As women are 'on average' in this weaker position and thus likely to be murdered or abandoned, D'Amato argues that international law should aim to bring all cultures close to those of 'highly industrialized countries', where in recent times women have made great progress in resisting institutionalised bullying.[92] As women are weak and the likely targets for violence, the role of international law and international lawyers is to protect them.

According to D'Amato, feminists should commit themselves to this task, rather than seeking to dismantle the system set up to save women from the laws of the jungle. He is particularly scathing of those feminist scholars who go beyond a traditional critique of the content of international law by 'accusing international law itself for having an andocentric nature that privileges a male view of world society'.[93] He challenges that approach on the grounds that it is like 'criticizing a house for having oppressively straight walls that meet each other at 90-degree angles and unnaturally level floors that do not tilt, and then blaming the end

[88] Anthony D'Amato, 'Book Review: Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*' (1995) 89 *American Journal of International Law* 840.

[89] *Ibid*., 840–1. According to D'Amato, it is 'a fact of nature that women are on the average physically weaker than men. Moreover, they pay the physical price for perpetuating the human species; during their child-bearing and child-nurturing years they are especially weak and vulnerable.'

[90] *Ibid*., 840. D'Amato assumes that 'we' are not animals.

[91] *Ibid*. For an analysis of the way in which such stories about animals and nature are produced in order to legitimate certain social hierarchies or methods of ordering, see Donna Haraway, *Primate Visions: Gender, Race and Nature in the World of Modern Science* (New York, 1989).

[92] Hilary Charlesworth, 'Cries and Whispers: Responses to Feminist Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 557 at 563. Charlesworth argues that D'Amato attempts 'to quarantine more generally the problem of women's oppression to a few hot countries' by drawing a distinction between 'highly industrialized' and 'patriarchal' states.

[93] D'Amato, 'Book Review', 843.

product on the fact that the T square was set at 90 degrees instead of 80, the saw was *not* warped, and the nails were excessively straight'.[94] If feminists want to 'use law to transform an oppressive society', they would be better off 'taking law as it is, with all its rationality, objectivity and abstraction'.

> If you want an unusual house and are dissatisfied with existing models, you are better off using traditional tools rather than eccentric ones, because the latter are less likely to produce the house that you want – the resulting house may well be skewed, but in a quite different way from what you had in mind.[95]

The comparison of international law to an orderly, systematic and efficient 'end product' of a building project reassures D'Amato and his audience that feminist criticisms are no threat to international law's rationality, civilising mission and responsibility for world order. That mission and responsibility involves bringing 'oppressive societies' up to the standards we are used to in 'highly industrialised countries', a project to which feminists can contribute by seeking to protect the weak through the rule of law.

In a similar vein, Bruno Simma and Andreas L. Paulus have suggested that feminists should not 'dispense with neutrality and objectivity' to engage in 'highly subjective' readings of legal doctrine, but should instead join in 'the dialogue with decision makers' aimed at 'setting general standards for human behavior'.[96] Such norms are 'urgently needed to hold the perpetrators of crimes against women accountable under the rule of law'.[97] Thus for Simma and Paulus, the role of feminist critique is to harness the 'transformative potential of the adaptation of positive law to meet women's concerns'.[98] The appropriate audience for critique is 'decision makers', the object of feminist work is 'women's concerns' and the appropriate end of critique is development of the rule of law. While there may be many instances where justice is served by such an approach, I want to question here the command that feminist work should unthinkingly be limited to joining the humanitarian mission of international law.

Such responses suggest that feminists are not welcome to develop an alternative practice of reading international law, one that tries 'to

[94] *Ibid*. (emphasis in original). [95] *Ibid*.

[96] Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View' (1999) 93 *American Journal of International Law* 302.

[97] *Ibid*. [98] *Ibid*.

effect change by making the genres "mean" differently'.[99] Instead, feminists appear authorised to contribute to international law in two ways. First, women from 'highly industrialised countries' can gain access to female 'native informants' and produce knowledge about the victimised women of the Third World. In my own and others' experience, feminist international legal theory that departs from this role is criticised as 'unrelated to the real world', insufficiently linked to 'particular cases' or unable to deal with the 'facts on the ground'. Such criticisms suggest that there is an identifiable 'real world', namely the Third World, about which international lawyers can discover facts and gather information. The production or reproduction of knowledge about the real world of women is one of the ways in which some feminist international legal texts continue to be part of a tradition of imperialism. In this version of the appropriate disciplinary role of feminist theory, the suffering of the Third World Woman becomes the object of knowledge of First World International Lawyers. Feminists, in other words, can take their place as part of a 'set of human sciences busy establishing the "native" as a self-consolidating other'.[100] This is a direction that may at first glance appear a helpful response to the discovery that the silence of women is one of the foundations of international law. Yet as Hilary Charlesworth has commented more generally, if we find that the silence of women is 'an integral part of the structure of the international legal order, a critical element of its stability', we cannot respond by simply undertaking some remedial 'reconstruction work'.[101] Spivak warns that we cannot usefully respond to the silencing of the 'subaltern' woman by 'representing' that figure, or by constructing her as a speaking subject. Even when undertaken with 'good intentions', the attempt to rewrite the Third World as the subject of a reconfigured, decolonised Law cannot succeed. 'No perspective *critical* of imperialism can turn the other into a self, because the project of imperialism has always already historically refracted what might have been an incommensurable, discontinuous other into a domesticated other that consolidates the imperialist self.'[102]

Throughout her work, Spivak points to the ethical problems that arise if imperial feminists try to 'speak for' or 'know' Third World Women. This is particularly so in the context of an internationalism that positively welcomes those forms of 'sisterhood' aimed at producing new female

[99] Threadgold, 'Book Review'. [100] Spivak, *A Critique*, p. 131.
[101] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379 at 381.
[102] Spivak, *A Critique*, p. 130 (emphasis in original).

subjects of development without unsettling the priorities of globalisation. For example, Krysti Guest has criticised the absurdity of some of the 'grotesque' attempts to give voice to 'the poor' on the part of the UN,[103] using as one example the 'Seminar on Extreme Poverty'.[104] This was a seminar that 'broke new ground' by inviting thirty 'very poor persons' to New York to engage in 'direct dialogue' with UN bodies.[105] According to the report of the UN Special Rapporteur on Human Rights and Extreme Poverty, Mr Leandro Despouy, 'the seminar expressed a desire for knowledge while realising a partnership right for the very poor'.[106] Guest points to the dangerous effects of this belief that UN experts could 'gain a better understanding of the living conditions and thoughts' of a homogenous category of 'very poor people' through a process authored in the name of human rights and global partnerships.[107]

Ethical questions aside as to the implications of this exchange on the lives of those people, the audacity of the assumption that one can know 'the poor' through the reductio ad absurdum of flying thirty 'extremely poor people' to New York reveals the seminar as a paradigmatic site of imperialist homogenising of 'the poor'. This creation of an homogeneous 'poor' continues in the substance of the 'direct dialogue', which proceeds by way of the thirty extremely poor people telling their story to the attentive UN representatives, the governing assumption being that one can 'know the poor' through their concrete experience. However, by staging the speaking subaltern through the positivism of 'concrete experience', the seminar erases all trace of the ways in which any re-presentation of such experience is overdetermined by the historical circuits of imperialist law and education or by the epistemic violence wrought on 'the poor' by the international division of labour. Unsurprisingly, these overdetermined representations by 'the extremely poor' do not offer a subversive analysis of international political economy, but are merely depoliticised accounts of poverty as a vicious cycle of misery.[108]

As Guest argues, the idea of a 'partnership with the poor' operates to mask the ways in which the 'systemic logic' of economic globalisation as implemented by international institutions generates poverty.[109] Feminism in states like the USA can in turn operate to reinforce that dynamic,

[103] Krysti Justine Guest, 'Exploitation under Erasure: Economic, Social and Cultural Rights Engage Economic Globalisation' (1997) 19 *Adelaide Law Review* 73.

[104] Commission on Human Rights, *Report of the Seminar on Extreme Poverty and the Denial of Human Rights*, E/CN.4/1995/101, 15 December 1994.

[105] Leandro Despouy, *The Realisation of Economic, Social and Cultural Rights: Second Interim Report on Human Rights and Extreme Poverty*, E/CN.4/Sub.2/1995/15, 5 July 1995, paras. 14, 15.

[106] *Ibid*., para. 15. [107] *Ibid*., para. 13. [108] Guest, 'Exploitation', 88–9. [109] *Ibid*., 90.

so that we are left with the image produced in a World Bank pamphlet discussed by Spivak, where 'a hard-hatted white woman points the way to a smiling Arab woman in ethnic dress' under the heading of 'Gender and Development'.[110]

As well as producing knowledge about Third World Women, the discipline of international law authorises feminists to design rules that contribute to the protecting or saving of other women within the realms of international human rights law or international criminal law. However, as the experience of some of the women who attended the Beijing Fourth World Conference on Women in 1995 revealed, feminists are neither welcome to question the broader international legal commitment to trade and financial liberalisation, nor to challenge the international community's practice of supporting certain kinds of militarism, while outlawing that conducted on the part of 'terrorists' or 'rogue states'.[111] Some of the risks of contributing to the 'readily identifiable and paradoxically impossible solutions' proposed for women by international institutions can be seen from two of the growing body of UN-sponsored resolutions and documents concerning women and security.[112] In October 2000, the Security Council held a meeting on women and peace and security. In his address to that meeting, the UN Secretary-General Kofi Annan provided an example of the ways in which a 'gender perspective' can be mapped onto existing ways of doing business without questioning any of the bases upon which peace, security or even the category 'woman' is understood.[113] The place of this address is a world divided into two groups – men and women. The time of this address is an 'age of ethnic conflict', in which militias and the proliferation of small arms are marked out as threats to the peace. Women need protection in these kinds of conflict situations. To think about the links between women and peace or security is therefore to think about women's 'special needs' in relation to the needs of 'men' as a general category. This staging of

[110] Spivak, *A Critique*, p. 148.

[111] Anne Orford, 'Contesting Globalization: a Feminist Perspective on the Future of Human Rights' (1998) 8 *Transnational Law and Contemporary Problems* 171 at 192–4.

[112] Security Council Resolution 1325, S/RES/1325 (2000), adopted on 31 October 2000; *Windhoek Declaration: the Namibia Plan of Action on 'Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations'*, 31 May 2000, www.unifem.undp.org/unseccouncil/windhoek.html (accessed 23 August 2001). On the 'readily identifiable and paradoxically impossible solutions' offered to women by liberalism, see Alison Young, *Femininity in Dissent* (London, 1990), p. 12.

[113] UN, *Secretary-General Calls for Council Action to Ensure Women Are Involved in Peace and Security Decisions*, UN Press Release SG/SM/7598, 24 October 2000.

a struggle between men and women as a central mechanism for understanding conflict, peace and security threatens to obscure many of the issues that feminists and women's groups have attempted to raise, such as the relationship between insecurity and economic liberalisation, or the ways in which the international division of labour is itself a violent process. Imagining a struggle in these terms strips the world of its imperial history – can we really talk about conflict in the context of globalisation without suggesting that some women may perhaps not see taking 'their rightful and equal place at the decision-making table in questions of peace and security' as the key issue facing them today?

The Secretary-General's text also reinforces stereotypical views about women. Women are understood principally as victims of conflict – 'from rape and displacement to the denial of the right to food and health care, women bear more than their fair share of suffering'. Women are innately peaceful – 'women, who know the price of conflict so well, are also often better equipped than men to prevent or resolve it'. Women support their men and those of the international community – 'we in the United Nations know, at first hand, the invaluable support women provide to our peacekeepers . . . persuading their menfolk to accept peace'. As gentle handmaidens and victims of war, women have an important role to play in helping support peace-keeping and peace-making missions.

The limitations of this role for women are avoided to an extent in the statement to the Security Council meeting by the Australian Permanent Representative to the United Nations, Ambassador Penny Wensley.[114] Wensley seeks to move beyond seeing women as 'victims of armed conflict, as sufferers, as vulnerable people whose rights need protecting', to seeing women as potentially 'contributors and active participants'. Yet women are not imagined as playing a part in changing the rules of the game or the way that game is understood. Instead, the Australian delegation seeks to ensure that women are able to contribute to the existing projects and priorities of the UN – women have been 'denied their full role in national and international peacekeeping and peacemaking operations' and 'the mandates of UN preventive peace missions, peacekeeping operations and peacebuilding should include provisions for women's protection and address gender issues'.[115] An international

[114] Penny Wensley, Ambassador and Permanent Representative of Australia to the United Nations, *Statement at the Open Meeting on Women and Peace and Security of the United Nations Security Council*, 24 October 2000, www.un.int/australia/Statements/ PS Statements.htm (accessed 23 August 2001).

[115] *Ibid*.

feminism conducted in these terms would simply have as its end the pairing of women with men as subjects of militarisation and globalisation. Any more subversive questioning of the way threats to the peace are understood, of the desirability of peace-keeping and peace-making operations as currently conceived, or of the nature and priorities of peace-building, are swept away by the promise to increase women's participation in a project the terms of which are already set. The Australian position implies that the project of advancing women's role as part of the mission to achieve peace and security is to be understood in the old terms of educating colonial tutees – the Australian delegation is able to provide examples of practical steps that can be taken to support the role of women in peace processes from the practical steps taken in its own 'development assistance programs' in Bougainville, the Solomon Islands and East Timor.

Does gender work as a category in such situations, and if so, whose work does it do?[116] How does this officially sanctioned desire to 'include' women as participants relate to the current enthusiasm for exporting the institutions of the free market in the name of democracy?[117] What to make of a refusal or resistance of the form that peace reconstruction takes, when that resistance is carried out in terms of social conservatism and religion over the bodies of women?[118] Such issues are far more complicated than the picture painted by these UN documents of a world in which, to paraphrase Spivak, white women save brown women from brown men. Failing to ask such questions of the role played by 'gender mainstreaming' in the new world order may mean that feminism ends up simply facilitating the existing projects and priorities of militarised economic globalisation in the name of protecting and promoting the interests of women.

Feminist criticism and the axiomatics of imperialism

As I have already implied, I see the invitation to participate in the humanitarian mission of international law as one that carries with it old

[116] For an introduction to this question, see Hilary Charlesworth and Mary Wood, ' "Mainstreaming Gender" in International Peace and Security: the Case of East Timor' (2001) 26 *Yale Journal of International Law* 313.

[117] Anne Orford, 'The Subject of Globalization: Economics, Identity and Human Rights' (2000) 94 *American Society of International Law Proceedings* 146.

[118] Charlesworth and Wood, 'Mainstreaming Gender', 316, discussing East Timorese resistance to the operations of the Gender Affairs Unit established by the UN Transitional Authority in East Timor in April 2000.