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## WPS AND FEMINISM: POSITIVISM, MILITARY DICTATORSHIPS, AND REVOLUTIONARIES

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## 1. INTRODUCTION

In this essay, I will inquire into whether the Women, Peace and Security (“WPS”) agenda is—normatively and conceptually—a feminist international law proposition.

In the first instance, I will deconstruct the rights and duties included within the WPS resolutions and which states are called upon to observe. I will also characterize the nature of those rights (*sine ira et studio*). I will then briefly sketch the main arguments for the feminist critique of international law showing the major propositions proffered by the feminist legal academy. Finally, I will map-out the WPS agenda on the broader landscape of the feminist theory of international law, with the aim of juxtaposing both legal structures, seeing whether the former fits within the normative boundaries of the latter.

I will argue that the normative and conceptual foundations of the WPS agenda have a positivist point of departure; in my opinion the WPS agenda seeks to reinforce women’s rights in a human rights framework that is largely derived from already existing—positivist—international human rights law and general international law instruments and norms. Therefore, I will demonstrate that, the WPS agenda is not a small planet in the larger universe of the feminist deconstruct of international law, on the contrary, it is a small planet in the already existing *lex lata* of international human rights.

The public conceptual baggage that comes with the WPS agenda is that; the agenda is a smaller part of a larger international law transformative critical theory (a small part of an already fragmented pluralistic international law discourse), that aims to deconstruct the current international law discourse and reconstruct it again in a different manner.<sup>1</sup> While I see the importance of critical legal studies, they are often conceived by international lawyers as theoretical, academic, aspirational, and hard to realize.<sup>2</sup> Confining the WPS agenda as a part of a larger feminist theory negatively impacts the prioritization and the realization of the former, and at the same time, undermines the canon of the scholarship of the latter.

Separating the WPS agenda from the broader feminist canon of scholarship will; on the one hand, advance the WPS agenda as a human rights based agenda, seeking to protect women’s rights (in separation from the conceptual transformative baggage that is usually attached to the feminist approach); and on the other hand protect the feminist approach from being reduced to a mere “right” seeking approach, bootstrapped in the current international law construct with its formal sticky sources. Therefore, it is for the best to separate the WPS agenda from the larger feminist critique and approach to international law—this does not thwart feminist scholars from supporting the WPS agenda, but rather support knowing that it is not really a feminist agenda.

To formulate my arguments, this essay will proceed as follows. Part I sets the foundation for my argument. In Part I, I will unpack the main concepts of the WPS agenda and trace those concepts to their international law instrumental origins, in doing so, I will try to elaborate on the main *meta*-principles that the WPS agenda aims to advance. I will also analyze the legal status of the main instrumental foundation of the WPS agenda. For the purposes of this essay, I will focus my study on the United Nations Security Council Resolution (“UNSCR”) 1325 (2000) (“Resolution 1325”).

In Part II, I will sketch the main normative and conceptual foundations of the feminist critical theory and underscore the main legal arguments that are proffered by the feminist critical legal academy. I will underscore that the normative core of the feminist theory is not “right” acquiring, but rather moral and transformative (not one calling for more rights, but one calling for a true change). Nothing in Part I and II should be controversial.

In Part III, I will map-out the WPS agenda onto the broader landscape of the feminist critical theory and elaborate on where I think tension occurs and where the dichotomy takes place between the two. My main argument in this section will be that while the WPS agenda, facially, seems like

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<sup>1</sup> Steven Ratner, *Ethics and international law: integrating the global justice project(s)*, 5:1 INTL. THEORY, CAMBRIDGE UNIV. PRESS (2013), 1-34, 7 (2013).

<sup>2</sup> Id, at 8-9; See e.g., Bruno Simma, ‘From Bilateralism to Community Interest in International Law’, RECUEIL DES COURS DE L’ ACADEMIE DE DROIT INTERNATIONAL, 217 (1994); See also Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals For Human Rights Abuses In Internal Conflicts: A Positivist View*, 93:2 AJIL 302 (1999).

a feminist agenda, both constructs have multiple points of tension among them. The first major point of tension that I posit is relates to the normatively different points of departure; while the WPS agenda accepts the *lex lata* as is (actually its acceptance of the formal legal sources of law is axiomatic since it is a creature of those sources), the feminist agenda seeks to overthrow this *lex lata* by proposing a normatively different vision of the legal system a *lex ferenda*. The second major tension finds its roots in the ultimate goals of both; the WPS traces women’s marginalization to rights. The feminist approach refuses—as a matter of principle—the rights approach and seeks a transformation that cures the inextricable gender power imbalances in the international legal system. Finally, in Part IV, I will provide a conclusion for my essay.

## 2. THE WPS AGENDA

In this part of the essay, I will dissect Resolution 1325 (2000) and distil its underpinning normative foundations, and their relation to the pre-existing legal sources. I will also argue that the WPS agenda is a positivist agenda derived from formal legal sources. In fact, the relationship between the WPS agenda and the existing formal legal sources can be described as axiomatic; absent the formal legal sources, there would be no agenda.

The WPS agenda came into light in the year 2000. Resolution 1325 is seen, by many<sup>3</sup>, as a significant milestone in women’s activism and their push to change gender power dynamics in general, and more specifically in armed conflict, and post-armed conflict reconstruction. Resolution 1325 is a Security Council thematic resolution adopted under Chapter VI of the UN Charter. The simple idea behind 1325 is that “... peace is only sustainable if women are fully included, and that peace is inextricably linked with equality between men and women”.<sup>4</sup>

The main themes and normative underpinnings of Resolution 1325 can be grouped into three broad categories; (1) impact of armed conflict on women (specifically brute sexual violence as a weapon of war); (2) importance of women participation in conflict resolution and post-conflict peacebuilding; and (3) peacekeeping operations and women: training peacekeepers and streamlining gender perspectives into peacekeeping operations.<sup>5</sup> Those main themes conform with the four pillars of the WPS agenda; (1) prevention; (2) participation; (4) peacebuilding; and (5) recovery.<sup>6</sup> As would be expanded upon *infra*, I agree with the viewpoint that postures 1325 as a human rights resolution aimed at promoting the rights of women among within the general human rights framework.<sup>7</sup>

Adopted under Chapter VI of UN Charter (peaceful settlement of disputes), the enforceability and binding nature of Resolution 1325 is highly contested. Most legal scholars argue that only resolutions adopted under Chapter VII of the UN Charter have a coercive element to them and therefore are binding on member states.<sup>8</sup> On the other hand, it is also argued that Chapter VI resolutions should also be observed by the UN members.<sup>9</sup> In my opinion, the operative paragraphs

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<sup>3</sup> See generally Catherine O’ Rourke, *Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions*, 28 EJIL, 1019 (2017) (Discussing the development of the WPS agenda and showing at some instances that the WPS agenda may be considered as a success—in the viewpoint of some feminist scholars—for the international law feminist critical movement)

<sup>4</sup> CYNTHIA ENLOE, A GLOBAL STUDY ON THE IMPLEMENTATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325, PREVENTING CONFLICT TRANSFORMING JUSTICE SECURING PEACE, 29 (2015)

<sup>5</sup> S.C. Res. 1325, U.N. SCOR, 1,2, U.N. Doc. S/RES/1325 (2000).

<sup>6</sup> Enloe *supra* note 4, at 28.

<sup>7</sup> A GLOBAL STUDY ON THE IMPLEMENTATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325, PREVENTING CONFLICT TRANSFORMING JUSTICE SECURING PEACE, *supra* note 4, at 15 (2015)

<sup>8</sup> E.g., W. Michael Reisman, *The Constitutional Crisis of the United Nations*, 87:83 AJIL, 83; See also Fernando Teson, *Collective Humanitarian Intervention*, 17 Mich. J. Int’l L. 323 (1996).

<sup>9</sup> See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21); Christine Chinkin & Madeleine Rees, *Commentary on Security Council Resolution 2467 Continued State Obligation Action on Sexual Violence in Conflict*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE CENTER FOR WOMEN, PEACE AND SECURITY, 4. (However, it has been long pointed out, including by the International Court of Justice (ICJ), that article 25 makes no reference to Chapter VII but rather asserts that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. In the Namibia opinion the ICJ determined that article 25 could not

of Resolution 1325 lack the binding language of UNSC resolutions, and therefore, 1325 is not binding on member states.

Regardless of the binding element of Resolution 1325, one can trace the rights and duties that, the UN member states, are urged and encouraged to respect and observe to either International Human Rights Law (“IHRL”) or International Humanitarian Law (“IHL”). For example, operative paragraphs 9, 10 and 12 of Resolution 1325 mirror Customary International Law obligations on the law of armed conflict.<sup>10</sup> Operative paragraphs 7 and 8 can be traced directly to IHRL; specifically they can be traced directly to the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). Responding to the argument that tries to frame WPS as a security agenda that ought to be observed only in times of conflict; first, both IHRL and IHL are not mutually exclusive regimes, women’s rights under IHRL ought to be observed in times of peace, and conflict;<sup>11</sup> and second, Resolution 1325 has duties that do not squarely fit, logically or legally, the boundaries of IHL.<sup>12</sup>

The WPS agenda, can therefore be argued, to exist in the overall framework of IHRL; “... it must not be forgotten that the original Security Council resolution was fully conceived as being part of the international tradition of human rights and that any interpretation of its provisions and any strategies for implementation must be done with that in mind”.<sup>13</sup> The CEDAW Committee in General Recommendation 30 highlights the intersection between human rights and the WPS agenda. The relationship has been described as follows:

26. All areas of concern addressed in those resolutions [including 1325] find expression in the substantive provisions of the Convention, their implementation must be premised on a model of substantive equality and cover all rights enshrined in the Convention.
27. Using the reporting procedure to include information on the implementation of the Security Council Commitments can consolidate the convention and the Council’s agenda and therefore broaden, strengthen and operationalize gender equality.

In addition to the above provisions, General Recommendation 30 has other detailed provisions related to the implementation of the WPS agenda in the broader context of CEDAW. General Recommendation 30 is also noticeably clear on the extension of its reporting procedure to the implementation of the WPS agenda by member states. Paragraph 83 of General Recommendation 30 seeks to bring national implementation of the WPS agenda under the supervision of the CEDAW committee and within the ambit of its monitoring mandate:

State parties are to provide information on the implementation of the Security Council agenda on women, peace and security, in particular resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1960 (2010) and 2016 (2013), including by specifically reporting on

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apply to Chapter VII resolutions with respect to UN enforcement action for if that had been the case “then article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.”; *See also* ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL*, 372-386 ( Hart Publishing 2004) (2004).

<sup>10</sup> Fourth Geneva Convention of, Relative to the Protection of Civilian Persons in Time of War art. 27, (Aug. 12, 1949). Women shall especially be protected against any attack on their honour, in particular, against rape enforced prostitution, or any form of incident assault.

<sup>11</sup> *See Case Concerning Armed Activities in the Territory of the Congo (DRC v. Uganda)*, Judgement 2005 I.C.J. Rep (19 December); *See also: Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion 2004), 2004 ICJ REP. 595 (Advisory Opinion of July 9); *See also* Common Article 2 of the Four Geneva Conventions, Aug. 12, 1949

<sup>12</sup> Those are more general recitations of women’s rights already existing in instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Right, and the Convention on Elimination of all Forms of Discrimination Against Women. An example of those recitations that would not possibly squarely fit in the IHL category would be operative paragraph 8 (c) of Resolution 1325: “Measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police and judiciary;”

<sup>13</sup> Enloe *supra* note 4, at 34.

compliance with any agreed United Nations benchmarks or indicators developed as part of the agenda.

After showing the relationship between Resolution 1325 and IHL and IHLR, I will now proceed to examine the normative foundations of Resolution 1325. The normative foundations of Resolution 1325 can all be traced to positivist formal sources of international law.

To positivists, law is an institutional social construct separate from social institutions, and the one most single aspect of law making is state consent. Therefore, it has been observed that formal sources of law form a unified legal system which has its own unique social construct, distinct from and independent of other social institutions such as; morals, ethics, natural reason... etc.<sup>14</sup> In other words, it has been argued that formal sources make law an autonomous objective creature living in isolation from the society that it hopes to regulate.<sup>15</sup> Formal sources further accept international law as it is (*lex lata*) and separates it from how it should be (*lex ferenda*).<sup>16</sup> My analysis of the underlying sources upon which the WPS agenda is constructed is that they are all positivist formal legal sources. As I will posit in the next few paragraphs, the positivist school of law is one that gives due regard to only formal sources of law, disregarding others. Therefore, according to positivists, only formal sources can create law, and should be considered law.

In international law, the typical feature of—classic—positivism is the relationship between law creation and state will or voluntarism. States create objective laws when they give consent to norms.<sup>17</sup> The Permanent Court of International Justice has opined on positivism and voluntarism in the *Lotus* case by saying that:

The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>18</sup>

Finally, looking at the international legal sources upon which the WPS agenda is constructed, one can argue that all the sources conform to the definition of “formal legal sources” from a positivist perspective. IHLR, CEDAW and IHL are all legal sources (whether treaty based or custom based) that states have voluntarily assented to (whether expressly forming treaties or tacitly forming custom), and which reflect the current *lex lata*.<sup>19</sup> One other—apparent—feature of the WPS agenda is that it is an objective “rights” based agenda, with women foreseen as bearers of those rights only.<sup>20</sup>

Having characterized WPS as a rights agenda built on positivist legal sources, I will now move to Part II and examine the feminist critique of international law.

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<sup>14</sup> Simma & Paulus, *supra* note 2, at 4; See also H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958); HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., Univ of Cal. Press 1967) (1960). Kelsen observed that: The Pure Theory of Law is Positive Law... It is called a “pure” theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.

<sup>15</sup> Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL, 613, 613 (1991)

<sup>16</sup> Simma & Paulus, *supra* note 2, at 4; Ratner *supra* note 1, at 3. According to Steven Ratner: As a consequence [of positivism], many scholars write for an imagined audience, in particular a judicial one, that would consider moral arguments *ultra vires*. They often move beyond description—what is the content of law—to prescribe and advocate legal norms and institutions that we should support, but they generally do the latter within a methodology that relies on accepted practices regarding sources and interpretation, with perhaps occasional nod to political realities, or efficiency, to guide among competing choices.

<sup>17</sup> See, Prosper Weil, *Towards Relative Normativity in International Law?* 77 AJIL 413 (1983). E.g., W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255 (1994).

<sup>18</sup> S.S. “Lotus” (Fr. v. Turk.), 1927 PCIJ (Ser. A) No. 10, at 18 (Sept. 7)

<sup>19</sup> Simma & Paulus, *supra* note 2, at 5; See Reisman *supra* note 17.

<sup>20</sup> See generally Charlesworth, Chinkin & Wright, *supra* note 15.

### 3. FEMINIST CRITIQUE OF INTERNATIONAL LAW

In this part of the essay, I will underscore the feminist discourse of international law and highlight the main feminist arguments in critique of international law. I will further argue that the feminist approach to international law strongly opposes positivism as a source of law. I will proceed by first highlighting the major propositions of the feminist theory of international law, and will then, secondly, proceed to show why feminism is conceptually, against positivism as a source of law.

One of the major international law critical theories, is the feminist theory. In general, critical approaches to international law aim to dismantle the current international law discourse, by engaging with its building blocks and then reconstructing it again in a—foundationally—different way (be it post-modern or otherwise).<sup>21</sup> The common denominator for most critical legal scholarship is that power has constituted and corrupted international law and therefore it ought to be reformed in a way that takes into account the voices of those “marginalized for centuries”.<sup>22</sup>

Feminist scholars, beginning with the conceptual undergird laid-out by Hilary Charlesworth and Christine Chinkin, saw that international law is “dominated by male views of society and individuals...”<sup>23</sup> Examining the foundational blocks of the international legal order, they concluded that certain *a priori* assumptions made by positivists reflect male biases.<sup>24</sup> “At bottom 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 political conclusions about the oppression of women.”<sup>25</sup> Reflecting the gender hierarchy foundations of the feminist theory, Bridget Brock-Utne articulated that:

Though patriarchy is hierarchical and men of different classes, races or ethnic groups have different places in the patriarchy, they are united in their shared relationship of dominance over their women. And, despite their unequal resources, they are dependent on each other to maintain the domination.<sup>26</sup>

There is a common pushback against the feminist critique of international law; this pushback questions the relevance of the feminist approach to general public international law issues such as state sovereignty, state responsibility and territory, as these issues appear to be gender free in their construction and application.<sup>27</sup> This, in fact, is where the tension occurs; the feminist critical approach argues that flawed gender dynamics have been inextricably woven in the fabric underpinning international law, making the law male like; Hilary Charlesworth has argued that “if law is a ‘human artifact,’ is it not relevant that its makers are invariably men”.<sup>28</sup> Another argument proffered in this respect is that, while women are not completely absent from the international legal order, they enter into focus in a very limited way; whether as mothers, caregivers or victims.<sup>29</sup>

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<sup>21</sup> Ratner *supra* note 1 at 7; See generally B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL, 1 (2018).

<sup>22</sup> Ratner *supra* note 1 at 8; CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF STATE 241-44 (1980). According to Mackinnon: They have taken [Anglo-American Feminists] the task of deconstructing the dominant masculine modes of speech and writing. “We must reinterpret the whole relationship between the subject and discourse, the subject and the world, the subject and the cosmic, the microcosmic and the macrocosmic”.

<sup>23</sup> HILARY CHARLESWORTH & CHRISTIN CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); See *e.g.*, Charlesworth, Chinkin & Wright, *supra* note 15

<sup>24</sup> Ratner *supra* note 1 at 9; See generally CHARLESWORTH & CHINKIN, *supra* note 23.

<sup>25</sup> Charlesworth, Chinkin & Wright, *supra* note 15 at 614.

<sup>26</sup> Brock-Utne, *Women and Third World Countries—What Do We Have In Common?*, 12 WOMEN’S STUD. INT’L F. 495, 500 (1989).

<sup>27</sup> Charlesworth, Chinkin & Wright, *supra* note 15 at 614.

<sup>28</sup> Hilary Charlesworth, *Feminist Methods IN International Law*, 93 AJIL 379, 392 (1999).

<sup>29</sup> *Id.*, at 381; Charlesworth, Chinkin & Wright, *supra* note 15 at 641.

One of the commonly used arguments by feminist scholars to sketch the gender biases in international law is the various dichotomies that are imbedded in its structure to “factor out the realities of women’s lives and build its objectivity on limited basis”.<sup>30</sup> Among the dichotomies used, is the public/private distinction; feminist scholars argue that this distinction separates the “public” world of politics and state from the “private” world of home and family, where women are usually of concern. The direct effect of this distinction can, for example, be seen in the Declaration on the Elimination of Violence against Women, adopted by the General Assembly in 1993.<sup>31</sup> Hilary Charlesworth has commented on the Declaration by stating that it “makes violence against women an international concern but refrains from categorizing violence against women as a human rights issue in its operative provisions”<sup>32</sup>, this is seen by Charlesworth as a result of the public/private distinction.

Another point of tension that the feminist academy highlights is between legal positivism and the feminist approach to international law. As underscored in Part I *supra*, legal positivism has two prongs: (a) what we accept as law is a matter of social fact, thereby, *lex lata* is separated from *lex ferenda* (separating law as is from law as it should be); and (b) the one most fundamental criteria for the validity of law is states’ consent, specifically through the process of custom or treaty making.<sup>33</sup>

The feminist construct of international law (being a critique of the current discourse) diametrically opposes the positivist construct. The feminist approach departs from a normative point that may very well reject formal legal sources and finds law elsewhere. Describing critical legal studies more generally, Martti Koskenniemi and Steven Ratner have posited that:

These approaches [critical methodologies] have not merely engaged with morality, but in many ways put it at the center of their agenda. These approaches seek to identify hidden agendas and biases within international law... and reform it... Where positivists saw consent and acceptance, critical legal scholars saw power and hegemony; where positivists saw international law as a language of communication, critical scholars’ lawyers seeking to preserve their own relevance in a changing world<sup>34</sup>

Besides the general tension between critical legal studies and positivism, the feminist critical approach has specific criticism of positivism. In addition to rejecting the gender power dynamics embedded in international law, feminist scholars are very skeptical of the manner in which formal sources of law are created.<sup>35</sup> From a feminist perspective, the patriarchal structure of states is represented on the international legal order; women are excluded from elite positions and the law making process (state consent and voluntarism) is overwhelmingly dominated by males.<sup>36</sup> The formal legal sources produced from those law-making process are, therefore, by their very conceptual nature opposed by feminist scholars.

Take for example IHL; while the Geneva Conventions extend special protections to women, the Geneva conventions are also seen to reinforce the idea of the “warrior’s honor” and further reinforce the male perspective of woman as a bearer of rights but not necessarily equal.<sup>37</sup>

Describing the tension between the feminist critical construct and positivism—as a source of law— Hilary Charlesworth has posited that:

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<sup>30</sup> Charlesworth, *supra* note 28, at 382.

<sup>31</sup> GA Res. 48/104 (Feb. 23, 1994), reprinted in 33 ILM 1049 (1994).

<sup>32</sup> Charlesworth, *supra* note 28, at 382.

<sup>33</sup> Ratner, *supra* note 1, at 3; *See generally* Stephan Hall, *The Persistent Specter: Natural Law, International Order and the Limits of Legal Positivism*, 12 EJIL 269 (2001).

<sup>34</sup> *See generally* MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (1989); Ratner, *supra* note 1 at 7; David Kennedy, *When Renewal Repeats: Thinking Against The Box*, 32 N. Y. U. J. INT’L L. 335, 355 (2000).

<sup>35</sup> O’ Rourke, *supra* note 3 at 1027; *See generally* ALAN E. BOYLE & CHRISTIN CHINKIN, *THE MAKING OF INTERNATIONAL LAW* (2007).

<sup>36</sup> Charlesworth, Chinkin & Wright, *supra* note 15 at 622.

<sup>37</sup> Charlesworth, *supra* note 28, at 386.

unlike these other methods [including positivism], my account of feminism asserts the importance of gender as an issue in international law: it argues that the idea of “femininity” and “masculinity” are incorporated into international legal rules and structures, silencing women’s voices and reinforcing the globally observed domination of women by men. None of the other methodologies represented... displays any concern with gender or, indeed, with the position of women as an international issue.<sup>38</sup>

To wrap up this part of the essay, it is clear that there is a conceptual tension between the feminist approach to international law, and positivism as theory explaining sources of law. This tension is not a minor one that can be reconciled, it is a major tension that questions what ought to be considered law and where the origins of law can be traced to. The feminist approach seeks to overthrow the *status quo*, while legal positivism is grounded in the *status quo*.

#### 4. WPS FROM A FEMINIST LENS

After examining the legal nature of the WPS agenda, and after laying out the basic foundations of the feminist critical theory, I will now argue that while the WPS agenda, on its face, seems to be advancing the goals of the feminist critique. In reality, it actually undermines the *meta*-principles of the feminist approach and its transformative goals. The dichotomy between WPS and feminism starts at positivism as a point of departure, but it does not end there. Therefore, I will further argue that associating the WPS agenda with the broader feminist agenda, may pose a risk of reducing the latter to a mere rights seeking agenda bootstrapped in sticky procedural rules. Another point of tension that I can possibly foresee between WPS and feminism is that WPS could be seen as a wedge creating more fragmentation to women’s rights in general, and thus weakening the foundational structure of women’s rights.

The first point of tension between the WPS agenda and the feminist approach to international law is that the WPS accepts law as is (*lex lata*), while the feminist agenda proposes a different construct of how law should be, taking into account the position of women as a whole. On the one hand, the WPS agenda seeks to secure more—human—rights for women under the already existing framework constructed from formal—positivist— legal sources. On the other hand, global justice and ethics—from a gender perspective—are at the center of the feminist agenda.<sup>39</sup> Due to their rejection of the current state of legal affairs (*lex lata*), often, critical legal projects have been criticized for being far better at identifying the flaws of the international legal system than offering a coherent theory for moving forward.<sup>40</sup> Feminist scholars have proffered a counterargument that questions the benefits of engaging within the current boundaries of the international legal system, since its claimed objectivity is one that excludes women’s voices. Feminist scholars further question the impartiality and neutrality of the current constructed international law standards (the *lex lata*), as to them, it is seen to be coupled with male perspectives.<sup>41</sup> Therefore, the feminist academy proposes a radically different international legal system operates against the backdrop of a normative moral foundation, even if it is attacked to be aspirational or incoherent.

Describing the dominance of positivism, Steven Ratner has argued that positivism remains the “lingua franca” of international law.<sup>42</sup> Bruno Simma, one of the major proponents of the enlightened positivist school of thought, has argued that engaging with moral sources of law, such as human rights, does not threaten positivism as long as the claimed norm relies on formal sources.<sup>43</sup> Feminist scholars have responded to enlightened positivists by arguing that even if the positivist argumentation is based on human rights, as means of norm identification, “the traditional canon of human rights law does not deal in categories that fit the experience of women”.<sup>44</sup> The

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<sup>38</sup> *Id.*, at 392

<sup>39</sup> Ratner, *Supra* note 1, at 8.

<sup>40</sup> *Id.*, at 9.

<sup>41</sup> Charlesworth, *supra* note 28, at 392.

<sup>42</sup> Ratner, *supra* note 1 at 3.

<sup>43</sup> *See generally* Simma, *supra* note 2; *see generally* Simma & Paulus, *supra* note 2.

<sup>44</sup> Charlesworth, Chinkin & Wright, *supra* note 15 at 628

WPS agenda on the other hand, accepts all formal sources of law as they are, without really questioning or objecting their normative underpinnings.<sup>45</sup>

A second point of tension that exists between WPS and the feminist critique of international law, is the WPS's rights only approach. From a feminist perspective, the rights approach can supplant the feminist agenda, imprisoning it into rights acquirement only. A pure rights agenda reduces complex power relations in an over simplified way.<sup>46</sup> Additionally, an agenda centered only around rights, overlooks other major forms of oppression that operate within the cultural, social, and economic realms.<sup>47</sup> Even if acquiring small rights fits an overall feminist strategy, those rights have been patched together into a Chapter VI resolution. The shadowy legal nature of the Resolution 1325—as I have explained in Part I *supra*—casts doubts over its overall effectiveness.<sup>48</sup>

Imagine, *mutatis mutandis*, if the *lex lata* and the standing international system as a military dictatorship, and the feminist academy as revolutionaries. The revolutionaries are not seeking a change of government, a change of faces, or new civil rights laws. The revolutionaries know that all cosmetic changes proposed, would still be contaminated by the disease infecting the core of the system; there is a bad apple in the system, and regardless what the system produces the bad apple is still there. What the revolutionaries want is to overthrow the regime *in toto*; the revolutionaries do not, necessarily, have a problem with the laws and the rights being produced *per se*, the revolutionaries have an ideological moral rejection of the regime and the norms its holds itself upon, which are all embedded in the rights it accepts to give. The revolutionaries want change, the regime wants to maintain the *status quo* and keep its power; therefore, the regime agrees to give the revolutionaries some rights. Those rights are created in the image of how this military dictatorship sees the world, and those rights are tainted by how the regime sees the revolutionaries: outliers that ought to be silenced at the first opportunity, if not, then lets agree to consider them as mere bearers of rights, but not really equals.

Now imagine even a more sinister military dictatorship, one that takes advantage of those cosmetic rights and creates propaganda for itself; the revolutionaries are agents of anarchy, they refuse to accept the rights that we are giving them. The military dictatorship understands that the revolutionaries are not looking for participation, they want change; a true normative change. But the military dictatorship is also aware that a true change would irreparably harm their interests, and therefore, the only change they are willing to offer is participation based on their own rulebook. Now, the question that lingers is: should the revolutionaries subscribe to those rights and slowly be normalized and submerged into the system? Or, should they consider these rights as political wins for the population at large (all the other citizens living in the state), but not as part of their revolutionary struggle?

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<sup>45</sup> Rejections by feminist scholars also extend to question the political institutional process in which the WPS resolutions were born; *E.g.*, O' Rourke, *supra* note 3. Catherine O' Rourke observes that: The complicity of Resolution 1325 with militarist state politics has been most forcefully articulated by Dianne Otto, as she draws attention to the place of 'thematic resolutions' such as Resolution 1325 within the broader 'muscular humanitarianism' of the UN Security Council and its need to develop a new *raison d'être* in the aftermath of the Cold War and the consequent danger of Resolution 1325 legitimating Security Council militarism. Sheri Gibbings gives a powerful example of this dynamic in the reference of Resolution 1325 in the preamble of UN Security Council Resolution 1483 on Iraq.

<sup>46</sup> Charlesworth, Chinkin & Wright, *supra* note 15 at 635. Charlesworth, Chinkin & Wright argue that: Right discourse is taxed with reducing power relations in a simplistic way. The formal acquisition of a right, such as the right to equal treatment, is often assumed to have solved an imbalance of power. In practice, however, the promise of rights is thwarted by the inequalities of power: the economic and social dependence of women on men may discourage the invocation of legal rights that are premised on an adversarial relationship between the rights holder and the infringer... the invocation of right of sexual equality may therefore solve an occasional case of inequality for individual women but will leave the position of women generally unchanged.

<sup>47</sup> *Id.*

<sup>48</sup> O' Rourke, *supra* note 3, at 1023; *See generally* Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377 (2002).

Travelling from the world of military dictatorships and revolutionaries back to international law; In my opinion, the WPS agenda may be a good political win, but it should not be used by the international community, or the legal academy, as a “favor” or an act of “courtesy” against the broader feminist—transformative—agenda. The WPS agenda is neither transformative nor feminist.

One final point of tension that I see between the WPS agenda and the feminist agenda is that the WPS agenda poses a risk “fragmenting” and “proceduralizing” women’s right and creating negative externalities on the broader feminist agenda. I will elaborate below on those two ideas:

First the issue of fragmentation: The international legal system, at the moment, is being increasingly fragmented.<sup>49</sup> Such fragmentation has raised many questions about the relationship between the created sub-regimes and their impact on public international law.<sup>50</sup> Powerful states may pursue legal fragmentation—or look favorably upon it—to circumvent observance of their legal obligations.<sup>51</sup> The implications of this fragmentation are of concern to the feminist academy.<sup>52</sup> A highly fragmented international regime of gender norms raises questions of responsibility and enforceability;<sup>53</sup> who has the responsibility to monitor and who has the responsibility to enforce? In a fragmented regime, treaty bodies and states may have better chances of making legal moves to circumvent responsibility and estop enforcement. Feminist international lawyers have argued that the current general trend is that gender norms emerge from fora that are either less representative (including only a group of likeminded states), or less democratic, which makes those emerging norms fragile against states and non-state actors.<sup>54</sup>

Eyal Benvenisti and George Downs have articulated 4 fragmentation strategies for the avoidance of international legal obligations:

- (1) Avoid broad, integrative agreements in favor of a large number of narrow agreements that are functionally defined; (2) formulating agreements in the context of onetime or infrequently convened multilateral negotiations; (3) avoiding whenever possible the creation of a bureaucracy or judiciary with significant, independent policymaking authority and circumscribing such authority when its creation is avoidable; and (4) creating or shifting to an alternative venue when the original one becomes too responsive to the interests of weaker states and their agents.<sup>55</sup>

In light of the fragmentation argument, one can reasonably reflect on whether the WPS agenda, unlike human rights treaty monitoring system, makes accountability more diffusive which in turn carries onto the commitment and enforceability of women’s rights at large.<sup>56</sup>

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<sup>49</sup> The issue of *Lex specialis* and self-contained regimes is a very interesting topic that ought to be researched in a separate paper. The intersections of general public international law and the feminist agenda also requires a separate research independent of this essay

<sup>50</sup> See MENNO T. KAMMINGA, *FINAL REPORT ON THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 1, 72<sup>nd</sup> Conference of the International Law Association (2006); See also Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT’L L.* 533 (2002) ; See also Bruno Simma & Dirk Polkowsky, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 *EJIL* 483 (2006). Simma & Polkowsky argue that: A central, and increasingly difficult task of the jurist consists in allocating authority in a system composed of both elements of hierarchical unity and multiple network structures in diverse issue area....

*Lex specialis* maxim as a tool for networking ‘traditional’ international law and ‘new’ subsystems of international law. As international law has evolved into an elaborate, but fragmented, structure, in which multiple regimes govern the same legal consequence

<sup>51</sup> See Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 *STANF L. REV.* 595, 600 (2007).

<sup>52</sup> See also CATHERINE O’ROURKE & AISLING SWAINE, *GUIDEBOOK ON CEDAW GENERAL RECOMMENDATION NO. 30 AND THE UN SECURITY COUNCIL RESOLUTIONS ON WOMEN, PEACE AND SECURITY* 1, UN Women, 2015 (2015).

<sup>53</sup> O’ Rourke, *supra* note 3, at 1028.

<sup>54</sup> Boyle & Chinkin, *supra* note 35, at 124-125

<sup>55</sup> Benvenisti & Downs, *supra* note 51, at 600-601.

<sup>56</sup> O’ Rourke, *supra* note 3, at 1029.

The second issue of proceduralization of women's rights: the issue of proceduralization flows directly from the issue of fragmentation. Being in the form of a UNSC resolution, the WPS agenda has caused a legal stir: of how Resolution 1325 should be operated, whether if it is at all binding, and who is responsible of overseeing its implementation. In 2013 the CEDAW Committee adopted General Recommendation 30 on women in conflict prevention and in conflict and post-conflict situations. General Recommendation 30 gives retrospective legal status to the WPS resolutions (1325, 1820, 1888, 1960, and 2016), General Recommendation 30 also seeks to formally bring the domestic implementation of the resolutions under the monitoring of the committee. General Recommendation 30 has been described to be reflective of a "longer-term body of work... to bring domestic implementation of the resolutions under the purview of the CEDAW's formal mechanisms of state accountability".<sup>57</sup> On the one hand, inclusion of the WPS agenda within the purview of the CEDAW committee can be seen as a guarantee of more monitoring, enforceability and efficacy. On the other hand, it can be argued that General Recommendation 30 reduces observing women's rights to a set of institutional procedures and may risk creating internal competition for resource and create political priority for rights that are seen to be inherently natural to women.<sup>58</sup> Additionally, associating WPS with the broader feminist agenda, raises questions of extraterritoriality that are usually attached to CEDAW's application in foreign policy, and would place women's rights extraterritorial application subject to legal argumentation.<sup>59</sup>

In summary, what I have tried to demonstrate in this section is that the WPS agenda advances women's rights, but it is not necessarily a feminist agenda. The WPS could be characterized as a human rights' agenda but associating it with the feminist agenda does not serve the interests of the feminist agenda at large.

## 5. CONCLUSION

The WPS agenda is, without a doubt, a significant win for women in the framework of human rights, but this should not be translated as win for the feminist agenda at large. The feminist agenda is a reformist agenda that questions the very law-making process, and "formal" legal sources that brought the WPS agenda into life. Associating the WPS agenda with the transformative agenda may undermine the ultimate goals of the feminist agenda and reduce it to rights and legal procedures—thus avoiding the normative propositions that are attached to the feminist agenda. In fact, the WPS agenda can be used against proponents of the feminist agenda as proof of feminist transformation. This harms the feminist transformative project.

The feminist transformative project is not one that accepts the *lex lata*, it is one that in fact, challenges the international legal system, its structure, the position of the legal units in this structure and the allocation of authority among them.

Therefore, Resolution 1325 and the subsequent resolutions forming the WPS agenda ought to be, pragmatically, regarded as good political gains or wins—within the Security Council—that create a good framework for women's participation, protection and equality in a human rights context. Nothing should prevent the feminist academy from lending its support to the advancement of the WPS agenda, since the feminist approach—normatively—seeks to bring in those who are marginalized due to gender power dynamics. However, the feminist academy must also be aware that a revolutionary change does not equate giving some rights and letting go of some power!

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<sup>57</sup> Id at 1031; See generally O'Rourke & Swaine *supra* note 52.

<sup>58</sup> O'Rourke *supra* note 3 at 1032-1033

<sup>59</sup> *Id* at 1032-1033.