

FEMINIST INTERVENTIONS INTO INTERNATIONAL LAW: A GENERATION ON

I INTRODUCTION

Volume 19 of the *Adelaide Law Review*, published in 1997, contains the papers of a symposium held at the University of Melbourne Law School in September 1996 entitled ‘Feminist Interventions into International Law’. The opening address of the symposium was presented by Christine Chinkin, currently Professor Emerita at the London School of Economics. Professor Chinkin is a pre-eminent international lawyer and is acknowledged as being at the forefront of bringing the lens of Western feminism to bear on her discipline. In her 1997 address, written some six or seven years after feminism first found its voice in international law at a conference at the Australian National University in 1990,¹ Professor Chinkin assessed to what extent gains had been made in developing an international legal system that ‘takes seriously the interests of all women’.² In her address she also identified potential challenges to further progress. As an aside, it is worth noting that the thoughts Professor Chinkin expressed at that time are still cited by scholars and remain as influential today as they were then.³

In 2015, a quarter of a century after the Australian National University conference, Professor Chinkin was interviewed on the eve of her retirement and asked to reflect on her career. In doing so, she was asked how she perceived the feminist project today within international law and institutions.⁴ In this article, I take her observations at these two points of time in the trajectory of the feminist project in international law and see what insights they provide today for those interested in this field of scholarship.

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¹ One of the two themes of that conference was a feminist analysis of selected areas of international law and the papers are published in (1992) 12 *Australian Yearbook of International Law*.

² Christine Chinkin, ‘Feminist Interventions into International Law’ (1997) 19(1) *Adelaide Law Review* 13.

³ See, eg, the citation to the address in Catherine O’Rourke, ‘Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions’ (2017) 28(4) *European Journal of International Law* 1019, 1023 n 26.

⁴ Andrew Lang and Susan Marks, ‘Proper and Improper Stuff: an Interview with Christine Chinkin’ (2015) 3(1) *London Review of International Law* 201.

II AN ASSESSMENT OF THE FLEDGLING FEMINIST INTERVENTION INTO INTERNATIONAL LAW

It is in the area of human rights that Professor Chinkin identified the most gains for women in the early stages of feminist encounters with international law. This was particularly evident in the case of the impact of gender-specific violence on women's enjoyment of their human rights. She pointed to a recognition of the significance of gendered imbalances in societal power in determining the outcome for women in international initiatives to confront such violence. In her opinion, such an appreciation opened up the possibility of structural change.⁵ Certainly this idea of transformative change, namely a fundamental reworking of existing gender relations, was very much part of the vision of legal feminists at that time.⁶ There was a clear appreciation of the limitations of equality discourse in achieving real change as long as underlying structures of systemic inequality and discrimination against women continued to prevail. What was required were strategic initiatives designed to deliver substantive, not merely formal, equality.

Another positive development identified by Professor Chinkin at the time, although still within the framework of women's human rights and gender based violence, was the ground-breaking emergence of criminal accountability for such violence in times of armed conflict. This was being achieved through the work of the ad hoc international criminal tribunals established by the Security Council — the International Criminal Tribunal for the Former Yugoslavia in 1993, and the International Criminal Tribunal for Rwanda in 1994.

Even at this early stage, however, there were signs of obstacles to progress. In particular, as Professor Chinkin observed, there was little indication that a comprehensive feminist approach to international law generally was ever going to eventuate. Feminist scholars were confining their critiques to a limited number of topics of international law such as human rights law, international humanitarian law ('IHL') (dealing with the victims of armed conflict) and international criminal law. The bulk of international law and its core areas, such as state responsibility and the law of treaties, remained unexamined.

A further concern was whether there was in fact any real prospect of the feminist project in international law delivering true transformative change. Although optimistic of such an outcome in the middle of the 1990s, Professor Chinkin had already observed the 'add women and stir' approach that mistook the formal inclusion of women in international fora with real integration and required no radical rethinking of policies or gender awareness.⁷

I now turn to Professor Chinkin's observations of the feminist project in international law some 22 years after her *Adelaide Law Review* article.

⁵ Chinkin (n 2) 15.

⁶ See, eg, Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989).

⁷ Chinkin (n 2) 18.

III THE FEMINIST PROJECT IN INTERNATIONAL LAW A QUARTER OF A CENTURY ON

The fears expressed by Professor Chinkin in the middle of the 1990s as to the vigour of the feminist project in international law have come to pass. First, it is the case that the bulk of international law remains unchallenged in feminist scholarship and practice. There is very little work that engages with international law as a whole.⁸ This is partly a product of the increasing fragmentation of international law itself through diversification and expansion. This phenomenon, in the words of the International Law Commission, creates ‘the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices’.⁹ This process has had distinct implications for the feminist project that remain relatively unexplored. One author has described the current system for women in times of conflict as a ‘scattered landscape of international legal regulation ... in which there is no evident hierarchy, a lack of substantive enforcement, disjointed expertise, and ongoing norm splintering’.¹⁰ Moreover, even the considerable in-depth and thorough feminist engagement with specialist areas of international law that has occurred over the years has been received with ‘vast indifference’ by the mainstream legal fraternity.¹¹ Hardly an encouraging state of affairs for further commitment of time and effort.

Secondly, maintaining a focus on gender and its connection with discrimination against women, a concern expressed by Professor Chinkin the middle 1990s, has proven to be just as challenging in the international context as it has been in the domestic context. Indeed, this failure to recognise the difference in the way gender is experienced by men and women can be seen in hindsight as one of the main obstacles to the international legal system ‘taking seriously the interests of women’.¹² In the 1990s the concept of ‘gender’ was primarily used in feminist encounters with international law to explain that women’s life experiences were different from that of men and that this had implications for international law. The vulnerability of women was based to a large extent on the unequal power relations of men and women deriving from their socially-constructed gender roles. It was argued that international law

⁸ A notable exception is Chinkin and Charlesworth’s comprehensive feminist study of international law: Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).

⁹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) 14.

¹⁰ Fionnuala Ní Aoláin, ‘International Law, Gender Regimes and Fragmentation: 1325 and Beyond’ in Cecilia Bailliet (ed), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge University Press, 2012) 53, 68.

¹¹ See, eg, Hilary Charlesworth, ‘Talking to Ourselves? Feminist Scholarship in International Law’ in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart Publishing, 2011) 17.

¹² Chinkin (n 2).

failed to reflect this reality, with very adverse consequences for women.¹³ Over the intervening years, this link between gender and discrimination against women to some extent has been lost. ‘Gender equality’, in the sense of formal equality, and/or ‘gender neutrality’, have become in many cases the preferred terms in international initiatives relating to women and less frequently is the concept of a gender hierarchy acknowledged. This change in how gender is employed is proving to be problematic for women. For example, in the context of violence against women, Rashida Manjoo, the United Nations Special Rapporteur on Violence Against Women, has noted that this perceived need for gender equality or neutrality

suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims thus ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination.¹⁴

Consequently, we are not dealing with equals in terms of the way such violence is experienced. For a start, the level of violence against women vastly exceeds that experienced by men and, moreover, takes different forms and is almost exclusively inflicted by men.

We find Professor Chinkin lamenting a refusal, amongst state delegates to the 2011 negotiations leading to the adoption of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence,¹⁵ to recognise violence against women as a gendered crime at the domestic level let alone at the international level.¹⁶ This Convention is the first binding instrument to prevent and combat violence against women, from marital rape to female genital mutilation. The objection was made by delegates from some states that men also suffer violence, so why should there be such a concentrated focus on what happens to women?

This is not an isolated illustration of the failure to differentiate the impact of gender on women and men, but part of a growing resistance against efforts to improve protections for women in not only legal initiatives but much more broadly, such as in the provision of humanitarian assistance. For example, it is argued that the centering of women and girls in humanitarian action over gender-based violence and the focus on the punishment of such violence in times of armed conflict has in some way contributed to preventing an appreciation of the extent and ways in which men

¹³ See, eg, Rebecca Cook, ‘Women’s International Human Rights Law: The Way Forward’ in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 3.

¹⁴ Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, UN Doc A/HRC/26/38 (28 May 2014) 17.

¹⁵ *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 210 (entered into force 1 August 2014).

¹⁶ Lang and Marks (n 4) 212.

experience such violence during these times.¹⁷ It has been suggested that Security Council Resolution 1820, dealing with sexual violence against civilians, was framed and implemented in a manner that ‘has had the impact of contributing to the relative silence through the exclusion of male victims from its framework’.¹⁸

These concerns that the focus on women is detrimental to men have spread into the field of operation of IHL. It is one of the specialist areas of international law that has come under intense scrutiny from feminist scholars, although the scrutiny is very much limited to sexual violence during times of armed conflict. So we find in the case of IHL that the term ‘gender’ is now often used to argue that men have been overlooked in either its implementation and/or its provisions. Much is made currently of the ‘special’ and extra provisions of IHL for women and why these are not also applicable to men. For instance, it has been said that

[t]here are myriad other issues found within IHL that could benefit from a gender examination. For example, the obligations found in the 1977 Additional Protocols relating to the prohibition of the death penalty for ‘mothers having dependent infants’ and ‘mothers of young children’ raises a range of questions in relation to situations when fathers are exclusively raising young children.¹⁹

This type of analysis completely overlooks the gendered nature of this provision. It is designed to protect children, not women, and will lapse as the children acquire independence from their mothers. Moreover, how often do men exclusively raise children and is that experience commensurate with women undertaking the same task?

This failure to recognise the relationship between gender and discrimination and an insistence on a gender-neutral approach, risks the triumph of form over substance and the effective blocking of transformative change. The overall effect of framing the debate in these terms tends to blunt gender’s radical edge as a tool to address the structural disadvantages that exist in all societies for women.²⁰ A somewhat cynical observer might be drawn to the conclusion that the focus in the case of conflict situations is moving inexorably back to men and their experiences during such times.

¹⁷ See, eg, Chris Dolan, ‘Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence’ (2014) 96(894) *International Review of the Red Cross* 485.

¹⁸ Sandesh Sivakumaran, ‘Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict’ (2010) 92(877) *International Review of the Red Cross* 259, 265.

¹⁹ Helen Durham and Katie O’Byrne, ‘The Dialogue of Difference: Gender Perspectives on International Humanitarian Law’ (2010) 92(877) *International Review of the Red Cross* 31, 51.

²⁰ Jeanne Ward, ‘It’s Not About the Gender Binary: It’s About the Gender Hierarchy: A Reply to “Letting Go of the Gender Binary”’ (2016) 98(901) *International Review of the Red Cross* 275, 281-2, 294.

In addition, the meaning to be attributed to the terms ‘women’, ‘sex’ and ‘gender’ and the idea of the construction of the ‘masculine’ as premised on a binary construction of the ‘feminine’ as its devalued opposite, has become a source of deep difference between feminists themselves.²¹ The lack of clarity about the conceptual basis on which so much of the feminist project is based has been accompanied by a failure of strategy. Gender mainstreaming has been the major strategy adopted within the United Nations and its institutions to progress the empowerment of women. The idea behind this initiative was to assess the implications for men and women of any policy, programme or legislation in any area and at all levels with the ultimate aim to achieve gender equality.²² It was originally viewed as of great promise and having the potential to overcome the problem that the treatment of women’s issues by specialist bodies had the effect of consigning their issues to the margins. It has, however, to date turned out to be a disappointment in practice.

Many feminists, including Chinkin, are highly critical of the manner in which this strategy has been deployed.²³ There is the perception that the application of the policy has undermined the goal of achieving true equality between men and women. Once again it is the way the various terms are utilised that has been a factor limiting its effectiveness. It has been assumed throughout the gender mainstreaming policies of international institutions that ‘gender’ means only ‘women’. This assumption, however, fails to recognise that true substantive equality not only requires changes for women, but also for men, in the sense of dismantling the gender hierarchy.²⁴

It is in this context that the ‘add women and stir’ approach that Chinkin observed in the 1990s has become pronounced. It is a particular criticism of what was initially seen by many as the zenith of feminist international law strategy — the adoption in 2000 by the Security Council of Resolution 1325 on Women, Peace and Security.²⁵ To have women on the agenda of the Security Council, the organ of the United Nations that deals with the maintenance of international peace and security, was seen as a great triumph for women. This is despite the fact that Resolution 1325

²¹ See, eg, Dianne Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism’ in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2013) 197.

²² *Report of the Economic and Social Council for the Year 1997*, UN GAOR, 52nd sess, Supp No 3, UN Doc A/52/3/Rev.1 (27 April 1998) 24; see also the critical areas of concern identified in the 1995 Beijing Platform for Action: ‘12 Critical Areas’, *UN Women* (Web Page) <<http://www.unwomen.org/en/news/in-focus/csw59/feature-stories>>. For an explanation and history of the concept of gender mainstreaming, see Hilary Charlesworth, ‘Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations’ (2005) 18(Spring) *Harvard Human Rights Journal* 1, 1–3.

²³ Not all feminists, however, view the language of gender or indeed gender mainstreaming as without transformative potential. See, eg, Otto (n 21) 206–10.

²⁴ See, eg, Hilary Charlesworth and Christine Chinkin, ‘The New United Nations “Gender Architecture”: A Room with a View?’ (2013) 17(1) *Max Planck Yearbook of United Nations Law* 1, 47–52.

²⁵ SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000).

was not adopted under Chapter VII of the Charter, and is therefore not binding on states. The overall goal of the resolution, the empowerment of women, was to be achieved primarily through gender mainstreaming. However, the application of the strategy has consisted primarily of increasing the participation of women in various fora without addressing the deeper conceptual issues.²⁶ Despite the initial hopes for what this strategy might achieve on the ground, it has not fulfilled its potential. For example, in 2014 a UN Women Guidance Note on Gender Mainstreaming in Development Programming declared that ‘the strategy design itself and implementation of gender mainstreaming, particularly at country level, are in urgent need of re-clarification and revitalisation’.²⁷

IV CONCLUSION

International law feminists remain deeply divided on the meaning and use of the terms ‘women’, ‘sex’ and ‘gender’, and whether there is a need to dismantle the masculine/feminine binary so that feminism’s ‘brief’ can cast a wider net than just women.²⁸ As a result of this intense focus, there is nowadays increasing concern as to the widening of the division between theory and practice,²⁹ and much reflection on the failure of feminist strategy and why.³⁰

It is not being suggested that there needs to be universal agreement on what are complex and unstable terms, but as Chinkin and Charlesworth write in the context of the United Nations, nowadays the terms women and gender are used interchangeably without any attempt at intellectual coherence.³¹ In such circumstances, how can strategic action have any prospect of being effective? On the one hand it is reassuring to read one feminist’s view that this dissonance between theory and practice is not deterring women utilising some of the institutional achievements without any soul searching as to the purity of its feminist theoretical credentials.³² This is as it should be. On the other hand when leading feminist international law practitioners, such as Michelle Jarvis, Deputy Head of the United Nations Mechanism for Syria and an Adelaide graduate, lament in conversations with myself the fact that she and her practitioner colleagues find so much of the recent feminist theory completely inaccessible, there is cause for concern. In such circumstances, we should not be surprised if we just talk amongst ourselves.

²⁶ Lang and Marks (n 4) 210.

²⁷ UN Women, *Gender Mainstreaming in Development Programming* (Guidance Note, November 2014) 7.

²⁸ See Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) 17–18.

²⁹ See Joanne Conaghan, ‘Feminism, Law and Materialism: Reclaiming “the Tainted Realm”’ in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2013) 31, 33.

³⁰ O’Rourke (n 3) 1019.

³¹ Charlesworth and Chinkin (n 24) 49.

³² O’Rourke (n 3) 1043–5.

