

# Feminist Curiosity about International Constitutional Law and Global Constitutionalism

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## I. Introduction: A Space of Feminist Resistance

The constitution is gendered and has been for centuries. Male voices and masculine notions of rationality that date from the Enlightenment set the intellectual origins of modern Western constitutions. A discursive narrative of the rationality of ‘the people’, mainly understood to be male and white, was the basis for the philosophies that gave rise to the current understanding of constitutionalism. Power, at that moment in time, was also vested in men, and constitutional law, in its domestic variety, being gendered, gives priority to the place of men. Likewise, the international is also often a site of the masculine that often denies women (but also many others) access to avenues of political agency.<sup>3</sup> The language of international politics, be it about security or diplomacy, is often masculine, where strength and superiority are valued over cooperation and equality. Empirically, women are often not present at the international level, where men continue to dominate politically and professionally in law and governance.

Dianne Otto, in conversation with Anna Grear on the realities of feminist analysis and future spaces of feminist resistance, argued that ‘[w]e are desperately in need of new ways of creating, framing, understanding and applying international law, which enhance rather than diminish the importance and power of local, national and

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<sup>3</sup> As an example of where women’s agency is denied and women are delegated to the role of ‘beautiful souls’ (Jean Bethke Elshtain, *Women and War* (University of Chicago Press 1987)), Ratna Kapur argues that the international women’s right movement has developed the understanding of violence against women in such a way as to reinforce the women as the victim subject. This image is transnational, although Kapur argues that the ‘Third World victim subject has come to represent the more victimized subject’, and that this focus ‘reinforces gender and cultural essentialism’. Ratna Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 *Harv. Hum. Rts. J.* 1, 2. We acknowledge this line of reasoning and suggest that it has a necessary role in the fictional exchanges set out in this article. However, Kapur goes farther in her argument than we do here in taking an intersectional post-colonial feminist approach.

transnational movements for social justice and liberatory change.<sup>4</sup> This article makes a modest attempt to add to this space of feminist resistance by composing fictional exchanges between feminist scholars of constitutional law, international law and International Relations on the presence of constitutionalism at the international/global level.<sup>5</sup>

Constitutionalism constitutes, preserves, and sometimes limits the exercise of power, but does not have the capacity to accord agency where none previously existed or where the intention to create it is absent.<sup>6</sup> Agency is capacity and activity that may be prevented or assisted by power as entrenched authority. If the intention is there, constitutionalism can accord agency through language, institutional structures, or aspirational objectives. Constitutionalism, historically conceived of and applied to the domestic space, is finding its way into the lexicon of international law and politics, in practice and scholarship. Constitutional language and values from the national level to the international level point to an emerging international constitutional method, while the increased constitutionalisation of the international system is grounds on which international law is taking on constitutional features.

In the scholarship on this topic we see two distinct strands of research. These strands reflect two distinct points of view on the process of constitutionalism/constitutionalisation – as a horizontal process, where a constitutional order is understood to be emerging at the global level, or a vertical process, where there is increased porousness between the national and international.<sup>7</sup> Adopting the terminology already used in the literature, we label these fields ‘**International Constitutional Law**’ and ‘**Global Constitutionalism**’. In this article, we explore the importance of constructive exchanges between and among these two fields of scholarship to promote women’s constitutional agency. In what follows, we fashion conversations between International Constitutional Law and Global Constitutionalism scholars on three core concepts of feminist constitutionalism: equality, inclusion, and agency. Within these three conversations, we imagine the beginnings of an exchange between pairs of scholars. Such exchanges should yield insights about substantive norms, as well as about processes, that promote the role of

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<sup>4</sup> Dianne Otto and Anna Grear, ‘International Law, Social Change and Resistance: A Conversation between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)’ (2018) 26 *Fem. Leg. Stud.* 351, 352.

<sup>5</sup> It may be that international/global constitutional structures and frameworks exist only in the imagination of scholars and that claims of an emerging global or international constitutional order are greatly exaggerated. Even so, the international level already evinces notions of constitutions, constitutional law, and constitutionalism. That there are fields of scholarship exploring constitutional frameworks and language at the international/global level may be the first stage to the real emergence of such an order. Whether it does now exist is not the subject of this article.

<sup>6</sup> ‘Agency’ according to Irving ‘entails inclusion, access to, and effective participation in, decision making, both in the political-legal sphere and with respect to one’s person.’ Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (CUP 2008), 3.

<sup>7</sup> We posit that the divide between these fields also reflects a disciplinary one between law and politics; however, this distinction is not obvious from the small selection of scholars with whom we engage in this article.

feminist analysis and critical thinking and the position of women at all levels of power and the everyday.

The small size and limited scope of our inquiry does not yield a conclusion but rather a hypothesis for future research. We hypothesise that research by women who are Global Constitutionalism scholars relies on *gender inclusivity* to subvert patriarchal scholarship whereas that of their International Constitutional Law counterparts invokes *gender specificity* to confront patriarchy. Gender inclusivity and gender specificity both conceptualise valid feminist approaches. A gender inclusive approach challenges power relations from a gender-blind perspective, whereas a gender specific approach recognises and challenges male/female power relations. We argue that inclusivity and specificity are precisely the gender regimes that Global Constitutionalism and International Constitutional Law scholars would respectively justify had we given them the opportunity. We suggest that these concepts open a space for gender-blind/gendered exchanges between the two sets of scholars using a discourse that is familiar to both.

## II. Defining International Constitutional Law and Global Constitutionalism

International Constitutional Law and Global Constitutionalism have no settled definitions. The consequence of this is a ‘cacophony in ... discourse’<sup>8</sup> where definitions are contextual to the intention of the author or the project. Our intention is not to add further noise to this cacophony but to understand both concepts to exist on a continuum in which International Constitutional Law focuses more on internationalising domestic constitutional law and constitutionalising international law, and Global Constitutionalism on whether the supra-state context might have or need a constitution or constitutional order.

The scholars who speak of or engage in International Constitutional Law tend to be looking to legal frameworks. On the other hand, Global Constitutionalism is mainly about process and norms. International Constitutional Law assumes that international legal frameworks exist around constitutional mechanisms and that international legal rules have a constitutional function.<sup>9</sup> In a sense, International Constitutional Law is most concerned with rules – rules that transcend international and constitutional law. International Constitutional Law in our taxonomy is vertical – it is the ‘bringing up’ of human rights law from the domestic into the international, and the transportation of international law ‘back down’ into the domestic constitution, whereas Global Constitutionalism is concerned with political and legal global

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<sup>8</sup> Cormac Mac Amhlaigh, ‘Harmonizing Global Constitutionalism’ (2016) 5 *GC* 173, 179.

<sup>9</sup> Jean d’Aspermont, ‘International Legal Constitutionalism, Legal Forms, and the Need for Villains’ in Anthony F. Lang Jr. and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017), 155-169, 159.

structures, institutions, and processes. In other words, the horizontal interactions at the global level are the primary concern of Global Constitutionalism scholarship.<sup>10</sup>

Perhaps what most distinguishes International Constitutional Law from Global Constitutionalism is the significance given to the state and state borders. International Constitutional Law maintains the relevance of national boundaries,<sup>11</sup> while Global Constitutionalism begins to identify and anticipate greater links between the individual and the global that transcend the state. International Constitutional Law captures the interactions that are happening between the international and the state, that is, the vertical relationship between international law and constitutional law. This interaction moves in both directions so that international law may influence domestic constitutional law, just as domestic constitutional law may guide international law. Global Constitutionalism is, put simply, replication at the global level of the constitutional structures and processes of constitutionalisation that have a long history within the state. International (and regional) institutions are central to the process of constitutionalisation. Those who see evidence of, or advocate for, the emergence of a global constitutional order point to the European Union as the quintessential example; however, some will also point to the World Trade Organization and the United Nations as demonstrating ‘constitutional qualities.’

We explore the possibility that International Constitutional Law and Global Constitutionalism rely on distinctive assumptions about gender in the internationalisation/globalisation of constitutional norms. Moreover, these assumptions are opaque. For decades scholars have sought transparency by applying a feminist lens first to national constitutions,<sup>12</sup> then to International Constitutional Law,<sup>13</sup> and most recently to Global Constitutionalism.<sup>14</sup> This article also pursues transparency albeit from a novel approach. We focus on International Constitutional Law and Global Constitutionalism scholars whom we identify as feminist to analyse how they include gender in their work. Our exploration suggests they conceptualise gender differently depending on whether their work falls within International Constitutional Law or Global Constitutionalism.

We do not advocate for one concept over the other but suggest that discursive exchanges between exemplaries of each field of study are necessary to open a space of resistance for the promotion of gender equality, inclusion, and agency. We select these three concepts as ideals to open space to feminists for exchange, which sets the theme for this article. They are also part of the discourse that all the scholars use and shape, and which are concepts applicable to feminism, but also constitutionalism and

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<sup>10</sup> See Anthony F. Lang Jr. and Antje Wiener, ‘Introduction’ in Anthony F. Lang Jr. and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017), 1-20.

<sup>11</sup> E.g. Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2009).

<sup>12</sup> E.g. Donna Greschner, ‘Can Constitutions Be for Women Too?’ in Dawn Currie and Brian MacLean (eds), *The Administration of Justice* (Social Research Unit 1986), 20.

<sup>13</sup> E.g. Dianne Otto, ‘Introduction’ in Dianne Otto (ed), *Gender Issues and Human Rights* (Edward Elgar 2013).

<sup>14</sup> Ruth Houghton and Aoife O’Donoghue, ‘Can Global Constitutionalism be Feminist?’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019).

constitutional law. If such an exchange were to transpire, it could move feminist inquiry beyond transparency to transformation of the scholarly assumptions about including gender in the re-internationalisation/globalisation of constitutional norms. We cannot, however, predict reconciliation or compatibility, rather we advocate for a space of engagement, in line with Otto's invitation to build a space of feminist resistance.

### III. Feminist Curiosity

The theory of feminist curiosity frames our approach. Cynthia Enloe developed this theory to inform her international research about women in contexts of war, conflict, and militarization.<sup>15</sup> According to Enloe, 'the idea of feminist curiosity is empowering because it suggests that what makes you a feminist are the questions you might ask, not just the answers you offer.'<sup>16</sup> Feminist curiosity led her to pose two questions: 'Where are the women?'<sup>17</sup> and 'What do these people do there, wherever this "there" is?'<sup>18</sup> She asked these questions of a wide range of elites and non-elites in many research contexts although she did not advert to women scholars. However, we invoke her first question to identify women as International Constitutional Law and Global Constitutionalism scholars. We maintain that this approach is consistent with her contention that researchers should 'pay attention to all sorts of women in all sorts of circumstances because they are *analytically interesting*.'<sup>19</sup>

Moreover, our research suggests that the constitutional imaginaries<sup>20</sup> that distinguish Global Constitutionalism and International Constitutional Law scholarship also differentiate *where* the Global Constitutionalism and International Constitutional Law women are. This distinction contributes to the centrality of the few women who are Global Constitutionalism scholars relative to the many women International Constitutional Law scholars who are siloed. We suggest that questioning who centred and siloed them, and 'who benefits from them being there but not somewhere else'<sup>21</sup> could form the basis for women who are Global Constitutionalism and International Constitutional Law scholars to initiate a conversation irrespective of whether it leads to a reconciliation, compatibility or even an alliance.<sup>22</sup>

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<sup>15</sup> Cynthia Enloe, Anita Lacey, and Thomas Gregory, 'Twenty-five Years of *Bananas, Beaches and Bases*: A Conversation with Cynthia Enloe' (2016) 52 *JSoc* 537, 540.

<sup>16</sup> *Ibid*, 541 continuing: 'It also allows us to be more candid about what we don't know.'

<sup>17</sup> *Ibid*, 542.

<sup>18</sup> *Ibid*.

<sup>19</sup> Cynthia Enloe, 'Resisting Lazy Political Analysis: Crafting a Feminist Curiosity to Make Sense of International Politics' (2017) 9 *Alternatif Politika* 317, 319 (emphasis in original).

<sup>20</sup> Oliviero Angeli, 'Global Constitutionalism and Constitutional Imagination' (2017) 6 *GC* 359, 375.

<sup>21</sup> Enloe, 'Twenty-five Years' (n 15), 542.

<sup>22</sup> Her findings led Enloe ('Twenty-five Years' (n 15), 549) to encourage women to take seriously the strategy of creating alliances because 'patriarchy is constantly being updated in order to perpetuate the privilege of certain forms of masculinity.' Enloe would encourage us to seek more than transparency. Given her warning that 'patriarchy really is sustainable,' we worry that distinctive feminist approaches to gender, especially if they are mutually exclusive, could preclude impactful feminist resistance. Thus, Enloe's call for women's alliances merits serious consideration

Enloe's second major question, 'What do these people do there, wherever this "there" is?',<sup>23</sup> invites us to consider three criteria – 'people,' 'do,' and 'there'. In our research, the 'people' are women scholars because they palliate Enloe's concern that: 'Rarely are women seen as the explainers or the reshapers of the world.'<sup>24</sup> What they 'do,' whether implicitly or explicitly, is gender analysis; and 'there' is wherever patriarchy is in International Constitutional Law and Global Constitutionalism scholarship.<sup>25</sup> Elaborating these criteria makes it apposite to re-frame Enloe's question to ask: What is the work that gender does in International Constitutional Law and Global Constitutionalism scholarship? We address this question by exploring how gender inclusivity and gender specificity inform the writings of four women whom we identify as International Constitutional Law scholars – Hilary Charlesworth and Christine Chinkin on women's equality and security,<sup>26</sup> Catharine A. MacKinnon on freedom from sexual violence,<sup>27</sup> Ruth Rubio-Marín on gender parity<sup>28</sup> – and three writings by their Global Constitutionalism counterparts – Antje Wiener on contestation,<sup>29</sup> Anne Peters on proportionality,<sup>30</sup> and Seyla Benhabib on democratic iterations.<sup>31</sup> We chose these writings for their subject matter – equality, inclusion, and agency – rather than their authors.

We maintain that the subject matter of each paper is central to the illumination of gender in the internationalisation/globalisation of constitutional norms. Moreover, despite the differences in their conceptualisations of gender, the authors share the same perspective about which norms – namely, equality, inclusion and agency – are fundamental to any form of constitution-making, whether domestic, international, or global. What they share provides a platform for opening an exchange about their differences. We make no claim, however, that they are the only papers by these authors that we could have selected.

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by the feminist scholars whose work we approach in this article. We do not advocate for alliances here (although likewise, would not reject them). Rather, we seek to open spaces of engagement, not to suggest what these scholars (or any others working in these fields) should think. To do so would detract from their agency, which they hold as respected scholars.

<sup>23</sup> Enloe, 'Twenty-five Years' (n 15), 542.

<sup>24</sup> Cynthia Enloe, *Bananas, Beaches and Bases: Making Feminist Sense of International Politics* (2<sup>nd</sup> ed., University of California Press 2014), 34.

<sup>25</sup> *Ibid.*, xvi expressing her long held 'hunch ... [that] patriarchy is ingeniously adaptable.'

<sup>26</sup> Hilary Charlesworth and Christine Chinkin, 'An Alien's Review of Women and Armed Conflict' in Dale Stephens and Paul Babie (eds), *Imagining Law: Essays in Conversation with Judith Gardam* (University of Adelaide Press 2016), 171-194.

<sup>27</sup> Catharine A MacKinnon, 'Creating International Law: Gender as Leading Edge' (2013) 36 *HJL&G* 105.

<sup>28</sup> Ruth Rubio-Marín, 'Women in Europe and in the World: The State of the Union' (2016) 14 *IJCL* 545.

<sup>29</sup> Antje Wiener, *A Theory of Contestation* (Springer 2014).

<sup>30</sup> Anne Peters, 'Proportionality as a Global Constitutional Principle' (2016) MPIL Research Paper No. 2016-10, available at SSRN: <https://ssrn.com/abstract=2773733>, last accessed 16 July 2019.

<sup>31</sup> Seyla Benhabib, 'The New Sovereignism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism' (2016) 5 *GC* 109.

The authors of the papers we chose are European, Australian or American experienced senior scholars. There were many other women International Constitutional Law scholars we could have chosen, although the pool of women Global Constitutionalism scholars is significantly smaller. Self-identification as feminist was not a criterion for selection. Nevertheless, none would question that feminism permeates the work of Charlesworth, Chinkin, MacKinnon, Rubio-Marín, and Benhabib, as well as being transparent in the early scholarship by Wiener<sup>32</sup> and Peters.<sup>33</sup> In other words, we attribute to all of them a past or present engagement with feminism, which we define broadly. We do not make any claim as to the strength of their scholarship or feminist approach over other feminist scholarly approaches. We selected these seven scholars to indulge our ‘feminist curiosity,’ not to assume that they share a uniform feminist approach or even shared experience and definition of gender other than that it can refer to women.

Our exploration is limited to a singular piece of work by each scholar (or in one case pair of scholars). We explain how it leads us to suggest that gender specificity informs the scholarship of International Constitutional Law feminists and gender inclusivity, that of their Global Constitutionalism counterparts. Effectively, their scholarship makes transparent different concepts of gender. Feminist analysis in International Constitutional Law is sexualised in that it siloes the women who challenge its gendered nature. The International Constitutional Law women we identify in this article are powerful and vocal feminist critics; all have well-deserved reputations as eminent scholars doing outstanding work. However, what is siloed is the feminist perspective that they adopt, the consequence of their gender specificity. Even as they are taken seriously, the position they work from is still very much pushed to the sidelines of the discipline. The feminists working on Global Constitutionalism whose scholarship we engage within this article, similarly acclaimed scholars, write within gendered and patriarchal structures, albeit, from the centre of the academic discipline. That their analysis is also sexualised is not transparent because they take a gender inclusive approach. Further, we note that International Constitutional Law scholars give greater attention to rights, while Global Constitutionalism scholars focus more on processes, which, as we have already suggested, may be a consequence of their training in law or politics, or a reflection of their assumptions on the globalisation of the international space. In sum, the six papers we explore represent a small-scale qualitative research project that yields the hypothesis that International Constitutional Law and Global Constitutionalism feminist scholars adopt different concepts of gender – gender specificity and gender inclusivity respectively – on which they rely to confront patriarchal scholarship.

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<sup>32</sup> Antje Wiener, ‘Identity-Power-Politics or Social Movements Inside Out: A Critical Feminist Perspective on Social Movements’ (2004) Latin American Studies Association, Pittsburgh, March 10-12, 1994, available at SSRN: <https://ssrn.com/abstract=2097699>, last accessed 16 July 2019.

<sup>33</sup> Anne Peters, *Women, Quotas and Constitutions: A Comparative Study of Affirmative Action for Women under American, German, EC and International Law* (Kluwer Law International 1999).

The following table illuminates our categorisation, even as we acknowledge that in practice there can be no such conceptual rigidity.

	INTERNATIONAL CONSTITUTIONAL LAW	GLOBAL CONSTITUTIONALISM
	<i>specificity/ rights</i>	<i>inclusivity/ process</i>
EQUALITY	equality and security (Charlesworth and Chinkin)	contestation (Wiener)
INCLUSION	freedom from violence (MacKinnon)	proportionality (Peters)
AGENCY	parity (Rubio-Marín)	democratic iterations (Benhabib)

In general, the benefits of dialogues are significant and recognised by other scholars. Thomas Muller maintained that dialogue could refine ‘conceptual and analytical tools’<sup>34</sup> which, applied to our project, might reduce any instability introduced by different concepts of gender. Enloe contended that avoiding dialogue could be ‘one of the reasons why patriarchy persists.’<sup>35</sup> Cogently, Barbara Havelkova argued that any approach that is not one-sided could be transformational,<sup>36</sup> portending the ‘gender-progressive’ empowerment of women.<sup>37</sup> In sum, these discursive exchanges have the (as yet unrealised) potential to transform how feminist scholars conceptualise gender in the internationalisation/globalisation of constitutional norms.

Any exchanges between these feminist scholars must benefit both sides if they are to be productive. For example, a dialogue might lead International Constitutional Law scholars to question whether being siloed in a fragmented constitutional imaginary is more likely to re-inscribe patriarchy than the experience of Global Constitutionalism scholars whose work has centrality to a holistic constitutional imaginary. On the other hand, a conversation might encourage Global Constitutionalism scholars to question whether gender inclusivity is more likely to instantiate patriarchy than to overcome it as the gender specific regime International

<sup>34</sup> Thomas Müller, ‘Global Constitutionalism in Historical Perspective: Towards Refined Tools for International Constitutional Histories’ (2014) 3 *GC* 71, 73.

<sup>35</sup> Enloe, ‘Twenty-five Years’ (n 15), 548.

<sup>36</sup> Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart 2017), 2.

<sup>37</sup> *Ibid*, 15-16 relying on the Beijing Platform for Action which ‘strives to empower women through “removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making ... and the eradication of all forms of discrimination on the grounds of sex”.’

Constitutional Law scholars intend. Of course, dialogues may move beyond either/or choices to yield both/and configurations. But they must happen before we can know the outcomes.

#### IV. Feminists Do Gender

This section re-frames Enloe's second question to ask of feminist scholars: What is the work that gender does in your scholarship on International Constitutional Law and Global Constitutionalism? Gender is a contested concept. In 1995 the Beijing World Conference on Women adopted the goal of gender equality.<sup>38</sup> Scholars construe gender as a social category that connotes the possibilities of change, unlike sex, which if construed as a biological category, is a barrier to change. However, gender remains synonymous with women in much international discourse and as such is subject to criticism.<sup>39</sup> One response to this criticism is to treat gender as performative, viewing women's international participation as different from men's not for inherent biological reasons but rather because it is socially constructed.<sup>40</sup> Another response, and the one we adopt, is to understand gender as an interdependent or relational concept 'which means that changing ideas about women necessarily involves changing ideas about men.'<sup>41</sup> Expressed relationally, the concept prods International Constitutional Law and Global Constitutionalism scholars to justify the gender regimes they influence and structure.

Typically, gender works to promote relations of specificity or inclusivity. In constitutional law, gender specificity seeks to remediate legally constructed barriers that perpetuate women's vulnerabilities and hence inequalities. Examples of employment legislation that could be subject to gender specific constitutional challenge are laws that require women to retire at a younger age than men or that do not provide for pregnancy leave and benefits. On the other hand, gender inclusivity creates legal arrangements that enable women's agency through processes that are advertently and genuinely equal. Examples of family dissolution laws that might not be subject to gender inclusive constitutional challenge are custody laws that give primacy to the best interests of children and division of matrimonial property laws that assess non-monetary contributions. Our research findings suggest vulnerability and agency are precisely the assumptions that underlie the concepts of gender specificity and gender inclusivity that feminist International Constitutional Law and Global Constitutionalism scholars would respectively justify given the opportunity for dialogue. We base this hypothesis on the following exploration of International Constitutional Law and Global Constitutionalism scholarship.

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<sup>38</sup> Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

<sup>39</sup> Brenda Cossman, 'Gender Performance, Sexual Subjects, and International Law' (2002) 15 *CJLJ* 281, 282.

<sup>40</sup> Catherine Powell, 'How Women Could Save the World, If Only We Would Let Them: From Gender Essentialism to Inclusive Security' (2017) 28 *YJLF* 271, 276.

<sup>41</sup> Otto (n 13).

## A. On Equality

This section re-narrates Hilary Charlesworth and Christine Chinkin's analysis of how two international instruments address women's insecurities and inequalities. Next, we describe Antje Wiener's theory of contestation as exemplified in the context of international security governance. The section concludes with some questions relevant to equality that these scholars might raise in a fictional conversation.

### i. Equality and Security

Hilary Charlesworth and Christine Chinkin contrasted the 'flurry of international activity' expressed through normative development and rhetoric over two decades with its 'little effect' on violence against women in and after armed conflict situations.<sup>42</sup> First, they reported how all-encompassing this violence is. It includes sexual violence, rape, abductions, forced domestic work, forced marriage, forced nudity designed to sexually humiliate, forced pregnancy, abuse in refugee camps, unequal access to training and economic opportunities, little or poor reproductive health care, difficulty dealing with menstruation when living in tents and lacking adequate sanitary facilities, diminished access to housing, land and property, aggravated poverty, harsh burdens of caring for children, family and others, and so on.<sup>43</sup> Then they explained how two recent international instruments adopted on the same day in October 2013 – UN Security Resolution 2122<sup>44</sup> and UN Convention on the Elimination of Discrimination against Women ('CEDAW') Committee General Recommendation No. 30<sup>45</sup> – manifest different approaches to addressing women's insecurity and inequality in and after armed conflict.<sup>46</sup>

Security Council Resolution 2122 reiterated earlier resolutions calling for women's participation and perspectives in international peace and security efforts. It also made a modest effort to consolidate 'more fleeting references to women's equality in earlier resolutions.'<sup>47</sup> However, Charlesworth and Chinkin criticised it for failing to challenge the 'priority given to coercive action through military power' and the 'deeply gendered nature of security discourse and practice.'<sup>48</sup> Their critique highlights the priority the Security Council gives to state interests. In effect, non-intervention trumps humanitarian relief.

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<sup>42</sup> Charlesworth and Chinkin (n 26), 176.

<sup>43</sup> *Ibid.*, 172-176.

<sup>44</sup> UN Security Resolution 2122, S/RES/2122 (2013), 18 October 2013, available at <http://unscr.com/en/resolutions/doc/2122>, last accessed 16 July 2019.

<sup>45</sup> UN Committee on the Elimination of Discrimination against Women, General recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations, 18 October 2013, available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf> last accessed 16 July 2019.

<sup>46</sup> Charlesworth and Chinkin (n 26), 176.

<sup>47</sup> *Ibid.*, 182.

<sup>48</sup> *Ibid.*, 184.

Unlike Resolution 2122 wherein the Security Council focused primarily on security, General Recommendation No. 30 originated from a non-governmental body, the expert committee set up under CEDAW. The Committee deployed it to require that State and non-State actors address ‘the root causes of armed conflict’ and recognise that ‘reparation measures must seek to rectify structural inequalities.’<sup>49</sup> In other words, Recommendation No. 30 focused on violence as a form of discrimination. The emphasis on inequality is not surprising given its CEDAW antecedents. Indeed, Charlesworth and Chinkin credited the Recommendation with not only seeking changes for women but also attempting to influence the Security Council to ‘broaden, strengthen and operationalize gender equality.’<sup>50</sup> Nevertheless, its subscription to gender equality also posed several potential problems.

For instance, it illuminated a fragmentation between the two instruments, the one subsumed under the norm of international security and the other gender equality. This fragmentation led Charlesworth and Chinkin to ask: ‘How has the generation of principles and norms on women and gender in different parts of the UN affected the possibilities for feminist transformations at the international level?’<sup>51</sup> Another criticism they voiced was that Recommendation No. 30 fails women because it assumes structural disadvantage and economic hardship render them vulnerable, imaging them as victims, not agents. Thus Recommendation No. 30 was also problematic, albeit differently so from Resolution 2122.

However, Charlesworth and Chinkin did not use their failures to condemn either instrument. They understood that despite their limitations these instruments represented the affirmation of women’s rights to security and equality, rights that might be invoked to assist women trapped in the dangerous consequences of armed conflict. Regrettably, their research also underlined how little difference Resolution 2122 and Recommendation No. 30 make to the security and equality of women in these conflict situations. As Charlesworth and Chinkin realistically concluded, a puzzling dissonance remains ‘between the[ir] bold aims and prescriptions ... and their impact on States.’<sup>52</sup>

## ii. Contestation

Antje Wiener’s monograph on the theory of contestation addressed the dissonance between international norms and their impact. She exemplified her theory in the context of security governance, its norms and implementation at the global level. Wiener explored contestation not as a norm but rather as a social activity or practice that is usually expressed through discourse and never through violent acts.<sup>53</sup> Discursively, it typically involves expressing disapproval of fundamental norms. The norm-constituting stage precedes and gives rise to it, while the rule implementing stage follows it. In other words, the innovative thrust of Wiener’s theory of contestation was

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<sup>49</sup> *Ibid*, 187, 188.

<sup>50</sup> General Recommendation No. 30 (n 45) quoted in Charlesworth and Chinkin (n 26), 193.

<sup>51</sup> Charlesworth and Chinkin (n 26), 193.

<sup>52</sup> *Ibid*, 191.

<sup>53</sup> Wiener (n 29), 1.

the espousal of an ‘imagined intermediary level’<sup>54</sup> that she characterised as the ‘referring’ stage.<sup>55</sup> It is at this level or stage that she called for establishing ‘organizing principles,’ especially ‘the principle of contestedness as a meta-organizing principle of governance in the global realm.’<sup>56</sup> This principle reflects democratic constitutionalism’s assumption of the citizen’s right to contestation vis-à-vis the state, then shifts it from the domestic realm to that of global governance.<sup>57</sup> Wiener theorised contestation as putting organising principles, including the principle of contestedness, on the agenda of global governance.<sup>58</sup> Organising principles are important; they might be ‘a potential stabilising force of global governance.’<sup>59</sup>

The objective of Wiener’s theory of contestation is to fill the ‘gap between generally agreed and well-justified norms on the one hand, and relatively specific and often highly disputed rules and regulations.’<sup>60</sup> Traditionally, this agreement takes place at the norm constituting stage and the disputation at the rule implementation stage. However, Wiener moved the disputation to an intermediary or referral stage and repurposed it as contestation. In effect, she created a space for ‘stakeholders’ who practice contestation.<sup>61</sup> The category of stakeholders is broader than the individual norm-users or designated norm-followers who might have disputed the norms at the implementation stage. Rather the concept of stakeholders has a social connotation, extending as it does to ‘those who claim a legitimate interest in a policy.’<sup>62</sup>

Moreover, Wiener conceptualised these stakeholders ‘as proactive rather than reactive’, maintaining they should have ‘access to regular contestation.’<sup>63</sup> Thus, she pre-empted conflict at the implementation stage by designing a space for routine contestation earlier.<sup>64</sup> If contestation were not routine, that is if it were *ad hoc*, it would not suffice to fill the gap between fundamental principles and standardised procedures because the gap is not about legality, it is a legitimacy gap.<sup>65</sup>

To illuminate this legitimacy gap between generally accepted fundamental norms and contested compliance at the implementation stage, Wiener explored three sectors, one of which was security governance. In this sector, the meta-norms are non-intervention, sovereignty, and civilian inviolability.<sup>66</sup> The contested micro-norms found at the implementation stage consist of UN Charter articles and regulations, *etc.*<sup>67</sup> Despite the broad appreciation of the macro-norms, the contestation of the micro-

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<sup>54</sup> *Ibid*, 3.

<sup>55</sup> *Ibid*, 34.

<sup>56</sup> *Ibid*, 3.

<sup>57</sup> *Ibid*, 4.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*, 3.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*, 53.

<sup>65</sup> *Ibid*, 3.

<sup>66</sup> *Ibid*, 65.

<sup>67</sup> *Ibid*.

norms – involving, for example, the decision about military intervention in Iraq – ‘has become the rule rather than the exception.’<sup>68</sup> Wiener argued against considering that this outcome means that the meta-norms are weak.<sup>69</sup> She proposed instead negotiated normativity at the intermediary or referring stage. Accordingly, her theory of contestation would fill this gap by adopting, as an organising principle, the Responsibility to Protect. While the Responsibility to Protect doctrine had not yet emerged as a legal norm, it nevertheless appears to lend legitimacy to international actors that engage its standards. As Wiener put it, ‘even the most powerful United Nations member states – go to quite some length in order to legitimate their action, whether in accordance with international law or not.’<sup>70</sup>

iii. Fictional Exchange on Equality between Charlesworth and Chinkin and Wiener

Between Charlesworth and Chinkin and Wiener, we imagine two meta-level conversations about substantive norms and global processes. Effectively questions might arise from Wiener about Charlesworth and Chinkin’s ascription of normativity to women’s rights. On the other hand, Charlesworth and Chinkin might wonder about Wiener’s query about who has access to contestation. Wiener might be puzzled about Charlesworth and Chinkin’s treatment of women’s security and equality rights as fundamental norms rather than implementation rules. Although these rights derive from instruments created by international bodies, Charlesworth and Chinkin attribute them to women, not to states.

In contrast, the fundamental norms addressed by Wiener (i.e., sovereignty and non-intervention) are states’ rights. There is a disjunction between whether these norms protect women or states. Charlesworth and Chinkin might ask Wiener if she attributes agency to women and, if so, how women might avail themselves of contestation given their victimhood. When Charlesworth and Chinkin expose the failures of Resolution 2122 and General Recommendation No. 30 and Wiener finds it necessary to theorise contestation, are these feminist scholars seeking to improve the rule of law or to identify rule by law at the international and global levels respectively?

*B. On Inclusion*

This section sets out an abbreviated version of Catharine A. MacKinnon’s analysis of gender crime jurisprudence at the international level, followed by a synopsis of Anne Peters’ theory of proportionality as a principle of international law. It concludes with a fictional exchange of questions about inclusion that MacKinnon and Peters might ask of each other.

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<sup>68</sup> *Ibid*, 66.

<sup>69</sup> *Ibid*, 67.

<sup>70</sup> *Ibid*, 68.

## i. Freedom from Violence

Catharine A. MacKinnon analysed the evolution of gender crime from its genesis in domestic law to its current state in international law.<sup>71</sup> Essentially gender crimes ‘happen because of gendered and sexualized roles, meanings, stereotypes, and scripts socially assigned to groups on the basis of their sex.’<sup>72</sup> MacKinnon conceptualised sex crimes as ‘gender-based.’<sup>73</sup> She contended they must be understood as ‘criminal forms of sex discrimination: crimes of sex inequality.’<sup>74</sup>

Moving specifically to the international level, MacKinnon reported a series of cases demonstrating that regional systems in Europe, Latin America, and Africa had begun to develop the insight that gender inequality is central to crimes of sexual violence.<sup>75</sup> Her review of decisions by *ad hoc* tribunals set up under the international criminal justice system revealed an implicit or tacit acceptance of the concept of gender crime.<sup>76</sup> The real breakthrough came, however, with the provisions articulated in the Rome Statute of the International Criminal Court.<sup>77</sup> The Rome Statute defined crimes against humanity as including: ‘rape, slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity’ and ‘persecution against any identifiable group or collectively on ... gender ... grounds.’<sup>78</sup> It also listed forms of sexual violence as war crimes.<sup>79</sup> These provisions changed gender crime ‘from tears in the eyes of women’ to ‘an international crime.’<sup>80</sup>

In the first few years from its inauguration, the Office of the Prosecutor gave effect to the Rome Statute’s gender crime provisions when he convicted three men: Thomas Lubanga Dyilo (DRC), Germain Katanga (DRC), and Jean-Pierre Bemba (Central African Republic).<sup>81</sup> He also issued arrest warrants for gender crimes against two men who are fugitives: Omar al Bashir (Sudan) and Joseph Kony (Uganda).<sup>82</sup> MacKinnon characterised the International Criminal Court prosecutions for gender crimes as ‘remarkable,’<sup>83</sup> given ‘laws against gender crime are largely not obeyed, domestically *or* internationally.’<sup>84</sup> Moreover, convictions become even more extraordinary.

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<sup>71</sup> MacKinnon (n 27), 105.

<sup>72</sup> *Ibid*, 105-106.

<sup>73</sup> *Ibid*, 105.

<sup>74</sup> *Ibid*, 106.

<sup>75</sup> *Ibid*, 106-107.

<sup>76</sup> *Ibid*, 108.

<sup>77</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

<sup>78</sup> MacKinnon (n 27), 108, fn 16 citing Rome Statute arts. 7(1)(g), 7(1)(h).

<sup>79</sup> *Ibid*, citing Rome Statute art. 8(2)(e)(vi).

<sup>80</sup> *Ibid*, 109.

<sup>81</sup> *Ibid*, 111.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*, 113.

<sup>84</sup> *Ibid*, 114 (emphasis in original).

Asking why the International Criminal Court took ‘such an exceptional path,’<sup>85</sup> MacKinnon contended that distance attenuates the male bond.<sup>86</sup> By male bond, she meant what all men know about gender crimes: men with power can commit them and will allow certain other men to commit them; gender crimes are not the real rules.<sup>87</sup> Distance matters because: ‘When the men observing do not identify so closely with the doers of the acts, they are more likely to see what they are actually doing to women.’<sup>88</sup> More specifically, distance is what the International Criminal Court represents; it opens the ‘opportunity ... to act on what women know.’<sup>89</sup>

MacKinnon’s analysis about the impact of distance applied both to the design of the Rome Statute wherein international political actors included very detailed enumerations of what constitutes gender crime, and to the prosecutions and convictions by the International Criminal Court. Her affirmation of the value of the Rome Statute and the International Criminal Court prosecutions elides political and judicial actors, theorising them as working in tandem. The political actors created the international statute; the International Criminal Court acted as its guardian. There was no contest. Or if there was a contest, it was not between the various United Nations member states who requested the men be charged with the gender crimes and the women who were the victims. They were to all intents and purposes on the same side.

## ii. Proportionality

In contrast, proportionality is all about constituting sides. Or as Anne Peters put it, proportionality is about forging relationships between different things.<sup>90</sup> The size, number, and types of things may differ, but proportionality requires their relationship be ‘appropriate.’<sup>91</sup> ‘Disproportionality,’ she explained, ‘is thus a “wrong” relationship.’<sup>92</sup> Like MacKinnon, Peters identified the historical origins of the legal concept of proportionality. In 1794, almost two centuries before the creation of the concept of gender crime, a Prussian jurist ‘invented’ proportionality.<sup>93</sup> Currently, it is found in the language or jurisprudence of many national and some regional constitutions.<sup>94</sup> Peters also reported its appearance in various areas of international law, including armed conflict, human rights and trade.<sup>95</sup>

Peters characterised proportionality as a principle of international law that is without ‘a substantive standard of conduct.’<sup>96</sup> Instead, it is ‘a technique or method to

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<sup>85</sup> *Ibid*, 115.

<sup>86</sup> *Ibid*, 120.

<sup>87</sup> *Ibid*, 116.

<sup>88</sup> *Ibid*, 120.

<sup>89</sup> *Ibid*, 121.

<sup>90</sup> Peters (n 30), 1.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid*, 2.

<sup>95</sup> *Ibid*, 3.

<sup>96</sup> *Ibid*, 6.

determine such a measure of conduct in the light of the specific circumstances.’<sup>97</sup> Moreover, as an international principle, proportionality comes in three versions distinguishable by the relationships implicated by the circumstances. The horizontal version refers to the relationship between states, typified by the law of countermeasures; the diagonal version, to the relationship between a national public interest and the interest of individuals in, for example, human rights protection or international humanitarian law; and the vertical version, to the relationship between a global public interest in, for example, free trade and particular interests of states.<sup>98</sup>

The rationale for the principle of proportionality in the horizontal version is ‘to prevent escalations.’<sup>99</sup> It could weigh in on the side of either state. However, the rationale for proportionality in the diagonal version is one-sided because it invokes ‘international law ... and an international legal regime ... to guarantee that the interests of the individuals ... are safeguarded.’<sup>100</sup> When international human rights law is invoked to guarantee individual interests, it is ‘seen as being in the global public interest.’<sup>101</sup> In other words, the rationale for proportionality in the diagonal version is very significant. It changes the nature of the contest from being one between a national public interest and individual interests to one between a national public interest and the ‘global public interest.’<sup>102</sup> Finally, the rationale for proportionality in the vertical version promotes the global public interest in free trade, for example, by applying international law to limit exceptions to World Trade Organization obligations.<sup>103</sup> In all three versions, therefore, the proportionality principle is a technique for intervening in the reconciliation of disputes specifically by requiring ‘verification and criticism’ at the international level.<sup>104</sup>

To support her main argument, which was for classifying proportionality as a global constitutional norm, Peters offered four reasons the most important of which was that it ‘reduces fragmentation and thus plays the constitutional role of creating unity.’<sup>105</sup> As an example, she referred to the law of armed conflict which allows ‘collateral damage’ to civilians only if it is not ‘disproportionate’ to anticipated concrete and direct military advantage.<sup>106</sup> In theory, the balance is tilted slightly to the protection of civilians if the principle of proportionality is performing its functions of coordinating and harmonising the differences between international humanitarian law and human rights.<sup>107</sup> However, the reality is that the balancing ‘is often to the

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*, 7.

<sup>100</sup> *Ibid.*, 9.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*, 10.

<sup>104</sup> *Ibid.*, 12.

<sup>105</sup> *Ibid.*, 14.

<sup>106</sup> *Ibid.*, 16, fn 61 citing International Criminal Court for the former Yugoslavia, Appeals Chamber, *Prosecutor v Galić*, Judgement, IT-98-29-A, 30 November 2006, para. 190.

<sup>107</sup> *Ibid.*

disadvantage of the civilian population.’<sup>108</sup> For instance, courts may rely on the assessment of a ‘reasonable military commander’ who expects a massive military advantage and only an isolated loss of civilian life.<sup>109</sup> Nevertheless, Peters is convinced proportionality has the potential to work against the fragmentation of international law.<sup>110</sup>

Moreover, Peters cited studies that showed proportionality substantially contributed ‘to a strengthening of the judicial role’ both domestically and internationally.<sup>111</sup> From the perspective of the alternative of self-help, proportionality-infused judicialisation is an improvement. Balancing has its deficiencies, not least of which is the ‘considerable leeway’ it gives judges to evaluate and ‘weigh’ competing interests.<sup>112</sup> A lack of predictability and the potential for judicial authoritarianism should not be denied. These problems led Peters to suggest judicial restraint when reviewing domestic balancing decisions whilst leaving open the ‘prospect of possibility of being subjected to such review.’<sup>113</sup> Her reference to restraint and review supported the suggestion that she limited her argument for proportionality to the importation of the protections contained in non-criminal international law.

### iii. Fictional Exchange on Inclusion between MacKinnon and Peters

Since MacKinnon and Peters examined very different contexts – gender crimes and proportionality respectively – can they have a feminist conversation and if so to what end? What they share are reflections on international courts, criminal and non-criminal, and the values they ascribe to international law. That may be enough to start a conversation. MacKinnon might ask Peters whether the proportionality principle should play any role in the International Criminal Court gender crime prosecutions and, if so, what role? Might the gender crime provisions in the Rome Statute make proportionality redundant or, worse, dangerous for victims of sexual atrocities? For her part, Peters might ask MacKinnon whether the Rome Statute’s failure to advert to protecting gays and lesbians as such might become a context in which the victims of gender crimes could resort to non-criminal rules of litigation and avail themselves of proportionality’s protection. Finally, given that MacKinnon praised the International Criminal Court for applying the gender crimes provisions of the Rome Statute and Peters believes that the judiciary could be persuaded to apply proportionality to protect civilians from collateral damage in armed conflict, we should ask each scholar to explain how her approach is consistent with judicial independence and the separation of powers.

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, 17 citing works by Alec Stone Sweet & Jud Mathews (fn 65), Armin von Bogdandy & Ingo Venzke (fn 66), and Judith L. Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter (fn 67).

<sup>112</sup> *Ibid.*, 18.

<sup>113</sup> *Ibid.*, 19.

### C. On Agency

This section briefly reviews Ruth Rubio-Marín's assessment of the state of parity in Europe and Seyla Benhabib's development of the concept of democratic iterations. It concludes with questions that aspire to understand the concepts of agency that infuse both analyses.

#### i. Parity

When Ruth Rubio-Marín delivered the 2016 keynote address at the annual European University Institute State of the Union conference themed 'Women in Europe and the World', to those who might question the decision to devote the State of the Union to women, she responded: 'is it ever the right time to ask the Woman question?'<sup>114</sup> Her answer was an emphatical yes, because 'in spite of formal legal status, women in Europe, who make up more than half the population, remain an oppressed group.'<sup>115</sup>

Citing Iris Young's five faces of oppression – violence, exploitation, marginalisation, powerlessness, and cultural imperialism<sup>116</sup> – Rubio-Marín offered evidence that women in Europe experience violence from sex trafficking, rape, sexual harassment, cyberstalking, abuse including sexual abuse of migrant women, asylum seekers, refugees, and differently abled women, and intimate partner abuse.<sup>117</sup> Exploitation and marginalisation exist from low employment rates, the gender pay gap, lower or no pensions, occupational segregation in less lucrative sectors, part-time work, and the burden of most of the housework.<sup>118</sup> The low numbers of women on corporate boards, lack of parity in political representation, and the failure of many women to break through the glass ceiling evidence powerlessness.<sup>119</sup> The absolute failure of society to acknowledge the social value of care work illustrated cultural imperialism, that is, the 'androcentrism, which political theorist Nancy Fraser defines as an institutionalized pattern of cultural value that privileges traits associated with masculinity, while devaluing everything coded as feminine.'<sup>120</sup> Cultural imperialism also surfaces in the heteronormativity and religious and ethnic imperialism that lesbians and transgender women, adult Muslim women who wear headscarves, and Roma women all face.<sup>121</sup>

Rubio-Marín advocated a European response that would diverge from the neo-liberal model of capitalism and adopt a more inclusive model of development that integrates a gender perspective.<sup>122</sup> More specifically, she recommended adoption of the substantive norm of parity democracy, that is, the 'equal representation of women in

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<sup>114</sup> Rubio-Marín (n 28), 546.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, 547 citing Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011), 40.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, 548-549.

<sup>119</sup> *Ibid.*, 549.

<sup>120</sup> *Ibid.*, 549-550 citing Nancy Fraser, 'Feminist Politics in the Age of Recognition' in Nancy Fraser (ed) *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso 2013), 162.

<sup>121</sup> *Ibid.*, 550.

<sup>122</sup> *Ibid.*, 553.

every site of decision-making.<sup>123</sup> Parity challenges ‘male dominance, as men perceive gender-based hierarchy to be their last bastion of comfort and sense of self in a context of emasculation.’<sup>124</sup> Moreover, parity has relevance beyond Europe to all forms of international and global governance, as well as to scholarly endeavours such as national, international, and global publications, conferences, and classrooms.

ii. Democratic iterations

Seyla Benhabib argues against contemporary legislators, jurists, and scholars who would resist the force of transnational law including conceptions of global governance, labelling them the ‘new sovereigntists.’<sup>125</sup> They argue that transnational law and court decisions pose threats to democratic self-determination.<sup>126</sup> For Benhabib the contrary is true: ‘transnational human rights and constitutional rights do not stand in contradiction to one another’ even when they diverge.<sup>127</sup> Instead, transnational law can enhance popular sovereignty and strengthen democratic sovereignty.<sup>128</sup> However, political theorists will continue to be anxious about the loss of democratic control and self-determination if they continue to confuse popular with state sovereignty.<sup>129</sup>

Benhabib next addresses the question of how human rights norms or principles enshrined in transnational agreements relate to constitutional rights.<sup>130</sup> Her response is that transnational documents contain ‘core concepts of human rights which ought to form an aspect of any conception of valid constitutional rights.’<sup>131</sup> In other words, the norms ‘permit a variety of instantiations’ of the rights.<sup>132</sup> To illustrate, the norm of gender equality allows France and Germany to adopt versions of parity whereas the United States rejects parity in favour of non-discrimination legislation that does not apply to political parties.<sup>133</sup>

Over the past decade, Benhabib has developed the concept of ‘democratic iterations’ to address the contentious interaction political and legal scholars face between law and politics.<sup>134</sup> Like contestation and proportionality, democratic iterations are processes that encompass ‘argument, deliberation and exchange.’<sup>135</sup> They enable universal human rights claims to be ‘contested and contextualized,

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, 554.

<sup>125</sup> Benhabib (n 31), 111.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, 112.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, 113.

<sup>130</sup> *Ibid.*, 118.

<sup>131</sup> *Ibid.*, 119.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, fn 10 citing two anti-discrimination statutes that do not apply to political parties: Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) and Title IX, Education Amendments of 1972, 20 U.S.C.

<sup>134</sup> *Ibid.*, 122.

<sup>135</sup> *Ibid.*

invoked and revoked, posited and positioned.<sup>136</sup> These iterations may take place in 'legal and political institutions as well as in the associations of civil society.'<sup>137</sup>

Democratic iterations are important because they facilitate the reinterpretation of transnational norms to give them shape as constitutional rights.<sup>138</sup> In other words, they transform meaning, causing original meanings to lose their authority. While courts are primary sites of norm iteration, democratic iterations occur in legislative sites.<sup>139</sup> Ultimately, democratic iterations serve as a basis for deciding about the 'legitimacy of a range of variation in the interpretation of a rights claim.'<sup>140</sup> The dilemma is to figure out when 'democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination.'<sup>141</sup> The fact that democratic iterations can be national or international complicates this dilemma.<sup>142</sup>

Benhabib uses the example of the gender equality in the Tunisian constitution to warn this does not mean 'acceptance of dominant Western moral values.'<sup>143</sup> For instance, some Moroccan women's groups reject strict equality and seek 'complementarity,' claiming it is compatible with a provision for gender equality in their constitution.<sup>144</sup> They offer complementarity as a 'critique of Western feminism as acceding to the commodification of women's bodies through their lack of opposition to nudity and pornography.'<sup>145</sup> This contentious conversation illuminates 'value divergences about the meaning of female autonomy and the public manifestation of the female body.'<sup>146</sup> Similarly, feminists in Western countries debate issues such as pornography, surrogate motherhood, *etc.*<sup>147</sup> These controversies are not territorially limited and could lead to conversations in which women 'can agree to disagree through democratic iterations.'<sup>148</sup> Moreover, these and other examples illuminate the importance Benhabib attaches to the potential that transnational human rights hold to widen 'the circle of popular sovereignty by granting voice to the voiceless and rights to the rightless'.<sup>149</sup>

### iii. Fictional Exchange on Agency between Rubio-Marín and Benhabib

Rubio-Marín and Benhabib share the conviction that their work could make democracy better for women, the former through the adoption of the substantive norm of parity and the latter through valuing the process of democratic iterations. If they had a feminist conversation, Rubio-Marín might question Benhabib about the limits of her flexibility about constitutional rights. Benhabib subscribes to the transnational norm

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, 123.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*, 126.

<sup>143</sup> *Ibid.*, 128.

<sup>144</sup> *Ibid.*, citing Nouzha Guessous 'Women's Rights in Muslim Societies: Lessons from the Moroccan Experience' (2012) 38 *Philos. Soc. Crit.* 525-533.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, 129.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, 137.

of gender equality, but would she draw the line at one or more instantiations of it in a constitution? Would her answer depend on whether the constitutional instantiation was the result of democratic iterations? On the other hand, Benhabib might question Rubio-Marín's inflexibility about the value of the substantive norm of parity. For example, should feminists continue to value parity if they find that women who succeed to political office in a parity regime are anti-feminist? Could Rubio-Marín and Benhabib envision a coming together of their respective proposals to embrace both parity and democratic iterations? Would they together change women's constituent power and hence democracy nationally? Internationally? In global governance?

## V. Conclusion: A Way Forward

The language of international politics and law, be it in the area of security or diplomacy, is often consistent with the conventional stereotype of masculinity where strength and superiority are valued over cooperation and equality. Likewise, women are often not present internationally where men continue to dominate politically and professionally in law, governance, and scholarship. Women are not taken seriously as agents. Enloe implores feminist (and other) scholars to take women seriously. We argue that the opening of space between International Constitutional Law and Global Constitutionalism scholars could further their existing and distinctive projects to make women central to any discussion of constitutions, constitutional law, and constitutionalism.

As two scholars coming from two disciplines, constitutional law (Baines) and International Relations (Sapiano), and from opposite ends of our academic careers, we come to this project with differences in training, ways of thinking, and discourse. However, we are both inspired by the call for a more profound gender curiosity and have written this article aware that the danger of women's voices and agency being lost or silenced in this 'constitutional battle'<sup>150</sup> is a real possibility. The international/global constitutionalism project is fragmented, and the constitutionalisation of the separate global regimes adds to this fragmentation. The fragmented nature of the international sphere could limit, or it could open, the space for the substantive development of women's rights and the discussion of the political and legal agency of women. What may matter is to seize the moment.

The constitutionalisation of women's agency may, as Jan Klabbers warns, cause deeper fragmentation as competing constitutional regimes and organisations become 'locked firmly in constitutional place'.<sup>151</sup> On the other hand, the fragmented and incomplete nature of the global system may allow space for women to exist with voice and agency in a way that is absent in (many) domestic spaces. In other words, women may find more space in the realm of international/global constitutionalism/constitutional law, if their concerns find a platform or platforms. It is for the promotion of this second way that we suggest these spaces of resistance for exchanges between scholars of International Constitutional Law and Global Constitutionalism. Sharing dialogues about their differences could show us the way forward.

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<sup>150</sup> Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *Int. Org. L. R.* 31, 53.

<sup>151</sup> *Ibid.*