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Force, Feminism and the Security Council

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1. Introduction

Since 2000, the United Nations Security Council has adopted four resolutions on women, peace and security. This article considers Security Council Resolutions 1325 (31st October 2000), 1820 (18th June 2008), 1888 (30th September 2009) and 1889 (5th October 2009) from the perspective of feminist legal methodologies.¹ Of specific concern in the article is, firstly, the recurrent imagery of women as ‘vulnerable’ members of the international community and, secondly, the consequence for women in conflict regions and for feminist theories to have the ‘pragmatic’ (and undemocratic) forum of the Security Council incorporating a women’s rights and/or Western feminist agenda into international responses to threats to international peace and security. I argue that although the resolutions are *potentially* groundbreaking, Security Council resolutions 1325, 1820, 1888 and

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¹ H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (2000), at 1-37.

1889 are circumscribed narratives that represent only a partial feminist politics. I contend that the four Security Council resolutions on women, peace and security collectively demonstrate a shift in international peace and security dialogues however unresolved tensions in the discipline of feminist legal theory and core structural international legal limitations fundamentally shape and limit the parameters of institutional responses to women, peace and security.

On October 31st 2000 the Security Council unanimously adopted Resolution 1325 recognising for the first time the nexus between women, peace and security. Despite the wealth of feminist and women's rights literature acknowledging and identifying the link between women's rights and peace and security matters,² the Security Council mandate to address threats to international peace and security under Article 39 of the UN Charter had not previously incorporated threats to women's security.

Security Council Resolution 1325 engages international law with a range of issues identified by feminist scholars and activists as important in conflict and post-conflict situations, including women's participation in all stages of peace building and in decision making processes (Operative Paragraph 1, 2, 3, 4, 8),³ recognising the impact of violence against women and sexual abuse during conflict (OP 10), the need for gender sensitive training within military and peacekeeping organisations, including for civilian personnel, and recognition of the need for provision for the financing and logistics of such training (OP 6 & 7), the need for 'gender perspectives' to be taken into account in disarmament, demobilization and reintegration planning (OP 13), recognition of developments in international criminal law (OP 11), acknowledgement of the needs of women and girls in refugee communities (OP 12), consideration of the impact of Article 41 sanctions on women and the need for gender mainstreaming, gender research and reportage to challenge practices in international institutions and initiatives (OP 15, 16, 17). Security Council Resolution 1325 also notes the requirement for Security Council missions to include consultation with international and local women's groups. Cohn describes Security Council Resolution 1325 as a 'landmark resolution' because 'it represents the first time the Security Council directly addressed the subject of women and armed conflict, beyond a few passing references to women as victims, or women as a "vulnerable group"'.⁴

² See, for example, Chinkin, 'A Gendered Perspective to the International Use of Force' 12 *Australian Yearbook of International Law* (1992) at 279; Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' 46 *International Comparative Law Quarterly*, (1997); Otto, 'Integrating Questions of Gender into Discussion of "the Use of Force" in the International Law Curriculum' 6 *Legal Education Review* (1995), 219.

³ Operative Paragraph, henceforth noted as 'OP'.

⁴ Cohn, 'Mainstreaming Gender in UN Security Policy: A Path to Political Transformation?' in S. M. Rai and G. Waylen (eds), *Global Governance: Feminist Perspectives* (2008), at 185.

Almost eight years after Security Council Resolution 1325, the Bush administration in the US instigated and convened a day long Security Council debate on women peace and security that resulted in the unanimous adoption of Security Council Resolution 1820 (18th June 2008). Security Council Resolution 1820 narrows the focus of the Security Council's approach to women, peace and security, providing an elaboration of one aspect of Security Council Resolution 1325, that of sexual violence in conflict and post-conflict environments. This includes a refinement of terminology, so that while Security Council Resolution 1325 (in OP 10) challenges 'gender-based violence, particularly rape and other forms of sexual abuse' in contrast Security Council Resolution 1820 is limited to condemnation of '*sexual* and other forms of violence committed against civilians' (Preamble) and 'demands the immediate and complete cessation by all parties to armed conflict of all acts of *sexual* violence against civilians' (OP2).⁵ Furthermore, Resolution 1820 in focusing on sexual violence distances sexual exploitation and abuse perpetrated by UN personnel from the Security Council agenda on women, peace and security as this is now targeted through the UN Conduct and Discipline Unit.⁶

In 2009, perhaps in response to the increased access of women's lobby groups after the election of President Obama in the United States and in advance of the ten year anniversary of the adoption of Security Council Resolution 1325, two further resolutions were issued by the Security Council. Security Council Resolutions 1888 and 1889 on women, peace and security considerably expand the international toolbox on women, peace and security. Security Council Resolution 1888, on the protection of women and girls from sexual violence in armed conflict (30th September 2009), picks up on the themes and responses to sexual violence during armed conflict established under Security Council Resolution 1820 and largely replicates 1820 in terms of focus and language. The fourth resolution, 1889 (5th October 2009) is broader in focus, returning the Security Council to many of the issues addressed in Resolution 1325, particularly through the urging of States to develop renewed measures to improve women's participation in peace processes and through a reaffirmation of the importance of women's roles in post-conflict communities. Security Council Resolution 1889 focuses on post-conflict measures and identifies women's participation as linked to education opportunities (OP 11), social and cultural norms (Preamble) and the capacity for increased female representation in national, regional and international forums (OP 1, 4, 10).

In the past I have argued that the narrowing of Security Council Resolution 1325 in the text of Resolution 1820 produces a model of participation premised on

⁵ Emphasis added.

⁶ See <http://cdu.unlb.org/> (last accessed June 2010).

women's sexual vulnerability.⁷ Women's participation in decision-making structures is necessary for a representative international legal structure and for the rights of women to be fully realised. This argument is not developed through focusing on the potential for different decisions to be made when women have access to powerful structures. Instead I have argued for the necessity that international organisations and institutions be representative of all humans to better respond to and reflect the spectrum of human experiences. This argument recognises the political reality of many women's lives as distinctly different to the life experiences of men. By definition, this strategy also incorporates the plethora of differences amongst women. Building laws to secure women's participation is thus a strategy developed from a politics of agency. In contrast, addressing only sexual violence, as Resolutions 1820 and 1888 do, (mis)represents a form of victim feminism that has the potential for limited gains while risking a perpetuation rather than diminishing of harm. Security Council Resolution 1820, now enhanced by Security Council Resolution 1888, limits the Security Council to the referencing of women as a vulnerable group who suffer harms as a sexually vulnerable group that then require protection via the military-backed power of the Security Council.⁸

This paper will focus on the shifting approaches to participation, evident in Security Council Resolutions 1325 and 1889, and the framing of Security Council Resolutions 1820 and 1889 as responses to sexual violence during conflict. In considering the potential and the limitations of the Security Council resolutions on sexual violence during conflict, the paper addresses three aspects of the resolutions. First, I analyse the relationship between the Security Council sexual violence agenda and the development of the international law on the use of force. Second, I consider all four Security Council resolutions on women, peace and security in terms of the representations of victims and agents across the resolutions. Third, the discussion describes the resolutions as a negotiation of the categories of hard and soft law under international law.⁹ I conclude by finding the Security Council resolutions on sexual violence during armed conflict (1820 and 1888) dangerously propose the use of force to protect women's rights despite an obvious absence of feminist scholarship and debate on the nature of 'feminist friendly force'.

⁷ Heathcote, 'From Security Council Resolution 1325 to 1820', Seminar Presentation at Institute for International Law and the Humanities, University of Melbourne, 28th July, 2009.

⁸ Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' 10 *Melbourne Journal of International Law* (2009) 11, at 25.

⁹ This paper focuses primarily on the implications of Security Council Resolution on feminist approaches to international law and on the international law on the use of force with only a limited discussion of the international humanitarian law of armed conflict, additional study of the impact of Security Resolution 1820 on international criminal law and international humanitarian law are important complementary studies. As a starting point see Gardam's analysis of the relationship between Security Council Resolution 1325 and international humanitarian law: Gardam, 'Women and Armed Conflict: the Response of International Humanitarian Law' in H. Durham and T. Gurd (eds), *Listening to the Silences: Women and War*, (2005).

2. Security Council Resolutions 1820/ 1888 and the International Law on the Use of Force

Charleworth and Chinkin highlight the role boundaries play in international law, as markers of exclusion but also as sites of potential expansion:

The institutional and substantive compartmentalisation of international law reinforces the resistance of international law to structural change. Indeed, those areas that have been most receptive to the needs of women such as human rights and international criminal law, are themselves marginalised areas of international law which are generally given scant coverage in general international law courses and texts . . . Standard dichotomies such as war/peace, order/disorder or security/insecurity have operated in international law to filter out the experiences of women. . . a radical shift in perspective and boundary drawing will only occur through a ‘commitment and ability to develop, explore, rethink and revalue those ways of thinking that get silenced and devalued’. We must ask the questions that will force us to rethink the boundaries . . .¹⁰

Boundaries are an important aspect of feminist approaches to international law, as boundaries function as sites that require analysis and as sites that hold the potential for feminist reforms. Advances with respect to women’s rights under international law often occur on the margins, are marginalized in mainstream accounts of international law and, importantly for feminist activists, are not necessarily linear, uniform and are not always legal in form. Security Council Resolution 1325 provides an example of how feminist developments remain on the boundaries of international action, as Security Council Resolution 1325 receives little attention in mainstream accounts of the law on the use of force or under international humanitarian law or even in accounts of the Security Council powers.¹¹ Furthermore, the legal impact of Security Council Resolution 1325 is limited through the non-mandatory language used while the actual impact – in terms of the construction of subsequent Security Council Resolutions – has largely been restricted to the insertion of ‘gender’ paragraphs in the Council’s resolutions that have little operational impact.¹²

¹⁰ Charlesworth and Chinkin. *Supra* note 1, at 336; quoting Cohn, ‘War, Wimps and Women: Talking Gender and Thinking War’ in C. Cook and A. Woolcott (eds), *Gendering War Talk* (1993) at 239.

¹¹ On the use of force, see: C. Gray, *International Law on the Use of Force, 3rd Edition*, (2008). On international humanitarian law, see: I. Detter, *The Law of War*, (2000). On the powers of the Security Council see: V. Lowe, A. Roberts, J Walsh and D Zaum (eds), *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (2008).

¹² For example, SC Res 1865, 27th January 2009; SC Res 1867, 26th February, 2009.

Connected to the limited institutional response is the conflation of the terms ‘gender perspectives’, ‘gender mainstreaming’ and ‘gender balance’ in the Security Council resolutions in a manner that neither defines or delineates these different institutional strategies. Other writers challenge the structure of Security Council Resolution 1325, recognizing its role as part of the UN collective security regime and thus circumscribed by the limitations of the regime. Consequently, Cohn concludes ‘letting (some) women into decision-making positions seems a small price to pay for leaving the war system essentially undisturbed’.¹³ Despite this, the use of Security Council Resolution 1325 by women’s NGOs has been productive. For example, the UNIFEM web portal womenwarpeace.org describes Security Council Resolution 1325 as a ‘toolbox’ and provides an annotated version of 1325, develops reports in response to the resolution, funds activism around the key concerns of Security Council Resolution 1325, has translated Security Council Resolution 1325 into 100 different languages and provides a contact point and information exchange for NGOs. In this sense, 1325 has produced developments on the ‘boundaries’ of law, developing Security Council Resolution 1325 as an advocacy tool and as a strategy setting device for women’s NGOs. The contrast between mainstream international legal neglect of 1325 with the thriving feminist and women’s activism around 1325 – at both national and international levels – provides a practical example of Charlesworth and Chinkin’s boundary argument. These are productive sites where both feminist and women’s human rights activism are able to articulate and act. Yet because the resolution is positioned between the boundary between the law on the use of force, international humanitarian law, international criminal law and collective security, Resolution 1325 and the additional Security Council resolutions on women, peace and security are marginalized – or absent – in mainstream legal accounts of each discipline.

The focus of this paper is how Security Council Resolutions on sexual violence, 1820 and 1888, straddle these conceptual boundaries to allow a certain malleability for future feminist and women’s human rights activism but ultimately circumscribe the possibility for productive legal answers. As Charlesworth and Chinkin indicate, boundaries are often sites open to renegotiation yet, by definition, boundaries are the margins of traditional forms of action. I will discuss the Security Council resolutions on sexual violence through the boundaries they mark. The first boundary examined is the legal distinction between *jus in bello* (law in war) and *jus ad bellum* (law of war). This is the distinction between the international humanitarian international laws of armed conflict and the international law on the use of force. The second boundary is the recurrent tension in feminist legal theories between victims and agents and the third boundary is the distinction between hard and soft laws on the international plane. I will conclude with a reflection on whether the Security Council can be a site for productive feminist legal reform.

¹³ Cohn *supra* note 4, at 203.

While my key concern is the framing of sexual violence in resolutions 1820 and 1888, the discussion places these within the wider focus of resolutions 1325 and 1889 to understand whether the four resolutions work as a broader mandate to states and international institutions or whether the two sexual violence resolutions reduce the potential of 1325 and 1889.

A. *Jus ad bellum and Jus in bello*

The international law on the use of force, also labelled *jus ad bellum*, encompasses the prohibition on the use of force (Article 2(4) of the UN Charter), the use of authorised force (Article 42 of the UN Charter) and justifications for the use of force (including UN Charter Article 51 and customary international law self-defence). This is distinct from the international humanitarian law of armed conflict (IHL), known as *jus in bello*, that governs the conduct of armed conflict. International humanitarian law is found in the Hague and Geneva Conventions, as well as customary international law, all of which direct the methods and means of armed conflict, as well as the norms governing the treatment of individuals not participating directly in hostilities.¹⁴

Security Council Resolutions 1820 and 1888, in Operative Paragraph One, takes us to the junction of *jus in bello* and *jus ad bellum*. For the most part, the resolutions address sexual violence during conflict as a violation of international humanitarian law. However, during the 1990s, gross violations of human rights within states saw the development of *jus ad bellum* force on humanitarian grounds. This was a development that saw the ‘humanitarianism’ of *jus in bello* impact on the justifications for the use of force under *jus ad bellum*. The form of OP 1 of Security Council Resolutions 1820 is replicated in OP1 of 1888, in which the Security Council:

Reaffirms that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security; *affirms* in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security; and *expresses its readiness*, when considering situations on the agenda of the Council, to take, where necessary, appropriate steps to address widespread or systematic sexual violence in situations of armed conflict [*italics in original*].

Although ultimately ambiguous, this paragraph infers that sexual violence (if widespread or systematic) may initiate Chapter VII acts of the Security Council.

¹⁴ See Detter *supra* note 12 for a full description; also see: J. Gardam, and M. Jarvis, *Women, Armed Conflict and International Law*, (2001).

This is certainly the manner in which some feminists have read OP1. If systematic and widespread sexual violence can be regarded as an Article 39¹⁵ type breach by the Security Council then this Resolution indicates the willingness of the Security Council to use force (under Article 42 of the UN Charter) or sanctions (under Article 41 of the UN Charter) to combat widespread or systematic sexual violence.¹⁶ In this sense, it is important to think through Security Council Resolution 1820 from the perspective of the international law on the use of force. The remainder of the text in resolutions 1820 and 1888 addresses sexual violence in conflict and post-conflict environments as a violation of the international humanitarian law of armed conflict or as a potential international criminal law violation. Operative Paragraph 1 of 1820 and 1888, in contrast, envisages the possibility of the Security Council mobilising authorised force to halt widespread or systematic sexual violence within an armed conflict. This shadows developments in the Security Council during the 1990s where gross human rights violations shifted from *jus in bello* violations to become a recognised threat to international peace and security that the Security Council was, at times, willing to authorise the use of force to halt.

It is my contention that Security Council Resolution 1820 places sexual violence at the wrong juncture between these two areas of international law. The operative text is thus able to straddle the *jus in bello* and *jus ad bellum* with ambiguous results. OP1, specifically, evokes this sense of ambiguity between the two aspects of international law. On the one hand, OP1 appears to be governing the conduct of armed conflict and thus recognises the human rights, and humanitarian, origins of the international humanitarian laws of armed conflict. However, the phrasing of OP1 also suggests sexual violence *may* trigger the use of authorised Security Council force. Such a reading is, perhaps, controversial as other components of OP1 identify widespread or systematic sexual violence as an impediment to ‘the restoration of international peace’ and the prevention of sexual violence as a potential contributor to the ‘maintenance of international peace and security’. Both of these phrases thus fall short of identifying widespread or systematic sexual violence as a threat to international peace and security in a manner that would parallel the language of Article 39 of the UN Charter. Instead it is in the phrase ‘*expresses its readiness*, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps’ that indicates a shift toward Security Council willingness to authorise force in response to (widespread or systematic) sexual violence. The Security Council has used the phrase ‘all

¹⁵ UN Charter Article 39 states: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.

¹⁶ Also see OP5 of Security Council Resolution 1820 and OP14 Security Council Resolution 1325

means necessary' to authorise the use of force in the past and the UN Charter in Article 42 gives the Security Council its mandate to use measures 'as may be necessary' to secure international peace and security. The terminology of OP1, in this sense, is a purposeful engagement of *jus ad bellum*, although not an Article 42 resolution itself.

Operative Paragraph One of resolutions 1820 and 1888 therefore perform a strategic role for both feminist advocates behind the drafting of the resolution and for non-feminist actors retaining power in the Security Council. For non-feminist actors the resolutions give nothing away and, in fact, support and underpin the existing approach to authorised military force under *jus ad bellum* requirements that have seen a continually pushing out of the categories of threat the Security Council have been willing to respond to with military force. Despite the text of OP1, the political nature of the Security Council, alongside past (and present) inaction of the international community to respond to widespread and systematic sexual violence in any community, in peace times or conflict, suggests it would be unlikely that OP1 would be used to authorise the use of force. This is not to say the semantics of OP1 do not leave this as a possibility, rather that political will is lacking.

For feminist actors, the ambiguity of OP1 appears to put sexual violence on the peace and security agenda in a concrete form, as Security Council Resolution 1820 can be instrumentally developed to promote future military action. Yet, the turn to force to halt sexual violence ignores the role that military actors and military mindsets play in enhancing gender differences and in perpetrating sexual violence. Regardless of whether militaries are peacekeepers, peace enforcers, coalitions of the willing, representing national interests or regional or international interests, the sexual violence that Security Council Resolutions 1820 and 1888 address is perpetrated by militaries and therefore to incorporate the possibility of the use of force to halt sexual violence is to ignore the discrepancy between sexual violence as an acknowledged and widespread violation of international humanitarian law. Furthermore, the possibility of Security Council authorised force in response to any threat to international peace and security is under-discussed in feminist literature.¹⁷ The use of Security Council authorised force to halt sexual violence in conflict has also received scant attention from feminist legal writers.¹⁸ The assumption in resolutions 1820 and 1888 that Security Council authorised force offers an adequate or possible solution to sexual violence is in line with the

¹⁷ However, see C. MacKinnon, *Are Women Human? And Other international Dialogues*, (2006) chapter 25.

¹⁸ See further the discussion in: Engle ' "Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights and Humanitarian Intervention' 20 *Harvard Human rights Journal* (2007), 189.

purposes of the Security Council but is questionable as a specifically feminist strategy.¹⁹

An alternative approach would have been for Security Council Resolution 1820 and 1888 to emphasise the necessity of states and international institutions to include sexual violence in proportionality equations when using military force. The general international legal principle of proportionality applies in *jus ad bellum* and *jus in bello* decisions.²⁰ Under *jus ad bellum* the principle of proportionality requires states to apply force that is proportionate (for example, justified under Article 51 of the UN Charter as self-defence) to the initial breach. While this is not a test of equivalence, the principle considers the temporal, geographic, environmental impact and extent of aggression on the community targeted. In 1999, when NATO justified the use of force in the (then) Serbian province of Kosovo on the grounds of a humanitarian crisis, commentators and state actors emphasised the role of proportionality tests in all forms of force. In contrast, the principle of proportionality under IHL provides a guideline for decision-making with respect to the use of specific weaponry/tactics or the methods and means of armed conflict. While these are distinct tests the two clearly overlap.

To recognise the sexual violence of militaries as within the test of proportionality under the law on the use of force (*jus ad bellum*) would require powerful states, and the UN, in decisions to authorise or justify force to acknowledge the impact of force on the sexual health and integrity of communities, to acknowledge that all militaries have sex and use local women to manage domestic spaces and chores, including sexual labour, and that as a consequence the proportionality of the use of force, in the lives of women, must be measured in terms of the long term impact of military prostitution, trafficking industries and the sexual violence and exploitation that parallels the arrival of militaries.²¹ To focus on sexual violence during armed conflict, as Security Council Resolution 1820 does, as a potential trigger for the use of (authorised or justified) force is to overlook the role of militaries in gender violence, in sexual exploitation and abuse and in sexual violence in conflict regions.

Sexual violence that is perpetrated by militia, paramilitaries, rebel groups or other non-state actors during times of conflict would not be addressed by a turn to proportionality. The focus on the impact of intervening militaries is nevertheless crucial for setting standards and changing the foundational relationship between

¹⁹ Cohn, 'Sex and Death in the Rational World of Defense Intellectuals' 12 *Signs* (1987) 687-718; Enloe, *Does Khaki Become You? The Militarization of Women's Lives* (1988); C. Cockburn, and D. Zarkov, (eds) *The Postwar Moment: Militaries, Masculinities and International Peacekeeping* (2006).

²⁰ J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2005).

²¹ For an excellent account of the long term impact of militaries on the health and well being of women within a community and the role governments play in the regulation of sex industries adjacent to military bases, see J. Moon, *Sex Among Allies: Military Prostitution in US - Korea Relations* (1997).

militaries and sexual labour. In contrast, Security Council Resolutions 1820 and 1888 develop a mechanism for challenging widespread and systematic sexual violence in ‘other’ (non-Western) places and the ‘zero tolerance’ policy of the UN is perceived as the appropriate form of regulation for the force deployed under the power of the Security Council.²² Consequently, the prioritisation of sexual violence as a potential trigger for authorised action allows for a strategic turning away from the sexual exploitation and abuse that is prevalent in UN authorised force and peacekeeping missions.

Thus the use of Security Council Resolutions 1820 and 1888 to shift from the regulation of gender based crimes during armed conflict (as was the approach of 1325 and 1889) toward an exclusive focus on sexual violence represents, on the one hand, a strategic invocation of the international law on the use of force. On the other hand, OP1 remains in a no-mans land of not quite an Article 39 trigger for Security Council authorised force. The exclusive focus on sexual violence within Security Council Resolution 1820 represents a narrowing of Security Council Resolution 1325, which addressed sexual exploitation and abuse, gender-based crimes and violence against women in the context of armed conflict as well as sexual violence. This shift has occurred through a interventions by feminist activists to shift Security Council Resolutions on women, peace and security into the realm of the law on the use of force, however, the larger consequences of such a move – the reduction of a focus on gender-based crimes to an exclusive focus on sexual violence and the consequences of force as a strategy to halt widespread and systematic sexual violence – remain unacknowledged.

B. Victim or Agent?

The second boundary demonstrated by a study of the Security Council Resolutions on women, peace and security is the tension between agency and victimhood within legal liberalism. Drawing on the substantial feminist debate on this ‘tension’, I argue that Resolutions 1820 and 1888 have incorporated a boundary when the limitations of a boundary (or dichotomy) between victimhood and agency might have been exposed. This claim builds on criticisms such as Cohn’s above that Security Council Resolution 1325 and, by implication the subsequent three resolutions, fail to challenge the structure of the international legal system. That is, Security Council Resolutions 1820 and 1888 extend and develop a weakness of Security Council Resolution 1325 in the acceptance of the status quo of international arrangements with respect to international peace and security and with respect to the nature and possibilities of international law more generally.

²² Otto, ‘Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies’ in V. Munro and C. Stychin (eds) *Sexuality and the Law: Feminist Engagements* (2007) at 259-282.

Much has been written and spoken with respect to victim and agency in feminist theorising, particularly in relation to feminist legal theories.²³ Security Council Resolutions 1325, 1820, 1888 and 1889 present an example of the range of tensions and issues raised in feminist legal theories around victim and agency. While 1325 and 1889 focus on the participation of women in decision-making structures relevant to conflict and post-conflict situations, Resolutions 1820 and 1888 connect women's participation in decision-making structures to their status as sexually vulnerable or sexually harmed actors, for example, in operative paragraph 3.²⁴

The only provision in Resolution 1820 that does not address women's participation without reference to women as survivors of sexual violence is Operative Paragraph 12, which refers to women's participation generally. Operative Paragraph 12, however, falls short of recognizing women's right to participate in the building and governing of communities, and instead directs the Secretary-General to invite women to 'participate in discussions pertinent to the prevention and resolution of conflict'. In contrast, the deployment of women's agency as a feature of international peace and security in Security Council Resolution 1325 has been described as disrupting 'the dominant script of women as victims of armed conflict by acknowledging a diversity of women's experience and giving prominence to the importance of women's contributions to conflict resolution and sustainable peace'.²⁵ The references to women's participation in Security Council Resolution 1820 are brief, undeveloped, linked to sexual violence and, as Cohn writes of Resolution 1325, fail to challenge 'the war system' or the legal/political structures that endorse force as a legal tool and the military as a solution to violence.²⁶ The final Security Council resolution, 1889, returns the focus to women's participation, although reducing the range of situations addressed to post-conflict communities. This resolution marks a positive return to the broader approach of resolution 1325.

The balance of the substantive reach across the four resolutions is perhaps, then, a negotiation of the feminist tension (or dialogue) around victimhood and agency. Resolutions 1325 and 1889 address women's participation, socio-cultural norms and the role of access to education while identifying women as a positive

²³ See for example, MacKinnon, *Women's Lives, Men's Lives*, (2005); also see W. Brown, *States of Injury: Power and Freedom in Late Modernity*, (Princeton: Princeton University Press, 1995); R Kapur, *Erotic Justice: Postcolonial Law Feminism Sexuality*, (2005) chapter 4.

²⁴ Operative paragraph 3 '... requests the Secretary-General, where appropriate, to encourage dialogue to address in the context of broader discussions of conflict resolution between this issue appropriate UN officials and the parties to the conflict, taking into account, *inter alia*, the views expressed by women of affected local communities.'

²⁵ Otto *supra* note 8, at 17

²⁶ Cohn, *supra* note 4 at 203.

force in the pursuit of peace.²⁷ Resolutions 1820 and 1888, in contrast, address women as victims of conflict and specifically victims of sexual violence during armed conflict. It is possible to argue that the split between resolutions 1325/1889 and 1820/1888 also marks a number of fissures in Western and global feminisms.

In 2005 Engle asked what is feminist in women's human rights strategies and raised questions posed by women's cultural diversity and the multiplicity of feminisms describing these as the elephants in the room of women's human rights reforms in the global context.²⁸ The more recent turn by feminist and women's networks to the Security Council as a mechanism for securing the protection and promotion women's rights during armed conflict appears to ignore similar – and long debated – feminist issues.²⁹ In the construction of strategies that pivot around victim and agency the resolutions on women, peace and security avoid confrontation with feminist questions around women's diversity and the multiplicity of feminist approaches. The consequence is embedded assumptions about North and South women and about the nature of feminisms manifest in the Security Council resolutions on women, peace and security with a seemingly regressive focus. For example, the creation of a structure demanding the increased presence of gender experts in post-conflict decision-making forums (in resolutions 1325 and 1889) allows Western feminist 'experts' to be accommodated into the UN framework. In contrast, the image of the non-Western woman (who may or may not be feminist) in 1820 and 1888 remains one of the vulnerable female in need of protection provided by the international legal structure, Western gender experts and, it seems, the Security Council. This approach ignores the expertise of non-Western women and ignores the very real threat and reality of widespread sexual violence in the lives of Western women despite the absence of armed conflicts on Western territories.

Consequently, Security Council Resolution 1820 and 1888 can be described as marking women as victims, so as to gain agency, in a seemingly paradoxical move that indicates a broader tension present in liberal legalism. Kapur writes on the relationship of victim feminism to core issues around essentialism, questioning the need to characterise third world women as sexually vulnerable or as 'agents without sexual narratives' rather than through the lens of sexual agency.³⁰ Brown identified the need for those outside of law's gaze to construct themselves as

²⁷ However, see Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' 16 *Feminist Legal Studies* (2008) 347 and Otto, 'A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325' 13 *Michigan Journal of Gender and Law* (2006) 113 on the limitations of approaches that link women with peace.

²⁸ Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in D. Buss and A. Manji (eds), *International Law: Modern Feminist Approaches* (2005), at 55-60.

²⁹ *ibid*; Engle, 'International Human Rights and Feminism: Where Discourses Meet' 13 *Michigan Journal of International Law* (1992) 517.

³⁰ *Supra* note 24; also see Otto *supra* note 23 at 22.

victims to gain a voice under legal liberalism.³¹ The paradox of this move is that the status of victim denies the outsider full legal subjectivity. Once full legal subjectivity is gained it is assumed the discrimination marking the subject as a victim has been removed. Otto considers a similar feature within the narratives of international human rights law. Women are permitted status as those requiring protection, as the formally equal woman or as a sexually vulnerable actor.³² The capacity for women to be concurrently agents (formally equally) and victims (requiring law's protection) sets a conundrum that legal liberalism is insufficiently answers.³³ The Security Council resolutions on women, peace and security are only able to accommodate this tension through a division in the resolutions that consequently entrenches third/first world, global South/North, developing/developed distinctions where agency and participation are granted to 'gender experts' from the second category in each pair and protections to women in the former *if* they are victims of sexual violence during conflict.

Underlying these distinctions between victim and agency is an intergenerational debate in feminist theories that can be traced back, at least, to the 'sex wars' in feminist theories in the 1980s.³⁴ Recent manifestations of the debate (or dialogue/conversation) have been described as a split between radical and difference feminist legal theories.³⁵ On the international plane, feminist scholarship has often straddled this divide by drawing strengths from each of the somewhat polarised positions in national/ Western feminist legal theories.³⁶

During the period of the Bush administration in the US, radical feminist theories appear to have influenced some areas of the international legal reform agenda, at least where issues of women's sexual agency/ vulnerability have garnered interest. Rather than seeing the prominence of one feminist approach as necessarily failing due to the well-founded and developed criticisms of that approach,³⁷ it is necessary for feminist scholarship to acknowledge the limitations of each approach (difference/ radical) as well as the potentials of each. That is,

³¹ Brown, *supra* note 24.

³² Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in D. Buss and A. Manji, *International Law: Modern Feminist Approaches* (2005) at 124.

³³ Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 20 *Yale Journal of Law and Feminism* (2008) 8.

³⁴ Although also present as a tension/ dialogue in much earlier works, e.g., S. Beauvoir, 1973. *The Second Sex*, (1973); M. Wollstonecraft, *A Vindication of the Rights of Women*, (1993, original edition 1792).

³⁵ See Lacey, 'Feminist Legal Theory and the Rights of Women' in K. Knop, *Gender and Human Rights* (2004), at 23-26.

³⁶ Charlesworth and Chinkin, *supra* note 1 at 48; Engle, 'Calling in the Troops' *supra* note 29.

³⁷ Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' 30 *Michigan Journal of International Law* (2008), 1.

radical feminism or governance feminism³⁸ or victim feminism³⁹ do seem to have found a place in the international institutional structure, albeit in areas that pertain to women and women's sexuality. The positive consequence of this in terms of the visibility of feminist issues on the global security terrain is important. This can be acknowledged as constituting what Otto describes as an 'inside' strategy.⁴⁰ Accepting developments such as Security Council Resolutions 1820 and 1888, however flawed, as part of a larger dialogue between inside/ outside strategies, between radical/ difference feminism, between victim/agency is thus important and does not mean accepting that international legal developments constitute closure of dialogue on feminist approaches to international law.

Yet, what Otto describes as 'outside' strategies also remains relevant and necessary, as does the continuation of critical and theoretical feminist legal methodologies and dialogues. 'Outside' strategies can be described as strategies that seek to challenge and question the international (legal) system as a whole, as well as interrogating legal meanings, processes and knowledge. In this sense, feminist approaches geared toward recovering and acknowledging women's agency, including sexual agency and legal agency emerge as cross cultural and intra-cultural agendas and dialogues. Returning to Security Council Resolutions 1820 and 1888, the overt emphasis on the representation of women as victims, specifically sexually vulnerable/harmed victims, when viewed in isolation – from Resolutions 1325 and 1889, from wider feminist dialogues and knowledge – must be acknowledged as a limited and, of itself, harmful approach. If we return to Security Council Resolution 1325 and 1889 it is apparent that the life and potential of international norms can be shaped by 'outside' strategies and it is here that women's agency is both better theorised and realised.

C. International Law as Soft and Hard Law

The third boundary to be discussed is manifest in the structure of Security Council powers. Security Council acts are divided by Chapters VI and VII of the UN Charter which can be described as characterised by the distinction between hard and soft international law.

Chapter VI of the UN Charter details the Council's role in the pacific settlement of disputes and provides non-binding powers to the Security Council.⁴¹ In this sense, Chapter VI resolutions are often characterised as 'soft' international law. While soft law may crystallise into a norm over time or may represent a

³⁸ Halley, 'Rape in Berlin; Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' 9 *Melbourne Journal of International Law* (2008).

³⁹ Kapur, *supra* note 24.

⁴⁰ Otto *supra* note 28, at 172-173; also see Engle, 'When Discourses Meet', *supra* note 29.

⁴¹ Otto *supra* note 9.

material source of customary international law, soft law represents a non-binding form of law that states are not obliged to implement. In contrast, Chapter VII details the Council's powers with respect to the maintenance of international peace and security and under Article 25 of the UN Charter states have committed themselves to the implementation of binding Security Council resolutions.⁴² Within Chapter VII, Article 41 authorises the Security Council to instigate sanctions (or any other measure short of force) while Article 42 authorises the Security Council to authorise the use of force.

Resolutions 1325 and 1889 are Chapter VI resolutions as they provide recommendations rather than placing legal obligations on states. In contrast, Security Council Resolution 1820 and 1888 straddle Chapter VI and Chapter VII of the UN Charter. While the language of Resolution 1820 and 1888 remains recommendatory, and thus under Chapter VI, the terms of reference, particularly the invocation of the sanctions regime (OP5) and the use of the phrase 'where necessary' in OP1 suggests an agenda that may lend toward mandatory, or Chapter VII action, in the future. Although not precisely the same, the Security Council, when it has authorised the use of force under Chapter VII in the past, has used very similar language to OP1 to indicate the use of force authorised by Article 42 of the UN Charter. For example, when the Security Council authorised the use of force in self-defence by the US coalition in collective self-defence of Kuwait in 1999, the phrase 'all means necessary' was used in the operative text of Security Council Resolution 668. As stated above, the use of the phrase 'to where necessary adopt appropriate steps' in OP1 of 1820 and 1888, in this context is a purposeful extension of the Security Council approach to women, peace and security from the realm of soft law toward future binding resolutions under Chapter VII of the UN Charter.

As resolutions that straddles the soft and hard law potential of the Security Council, Resolution 1820 and 1888 may be indicative of the changing role of the Security Council, particularly the shift toward an increasingly legislative-type function. As an undemocratic international institution the increased prominence of law-making by the Security Council has been cautiously acknowledged by mainstream scholars and challenged by critical scholarship.⁴³ As actors that are often marginalised in democratic processes, the fair representation of women in a institution formed of powerful states is historically nonexistent and doubtful as a future possibility. While some have argued that the proclivity of the Security

⁴² Article 25 states 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter' and does not make a specific reference to Chapter VII. The comments above reflect state practice, although under a strict reading of the UN Charter Chapter VI acts can/ will also be mandatory.

⁴³ See: Szazs, 'The Security Council Starts Legislating,' 96 *AJIL*, (2002), 901; Talon, 'The Security Council as World Legislature' 99 *American Journal of International Law* (2005), 175.

Council to see itself as law-making institution on general issues pertinent to international peace and security exists as a ‘gap’ that feminist laws might emerge from,⁴⁴ the shift by the Security Council from authorising action in specific conflicts to general resolutions with binding effect is questionable as a feminist-friendly development. As a consequence the turn toward the possibility of future ‘hard’ or Chapter VII resolutions pre-figured in Security Council resolutions 1820 and 1888 must be analysed not only as a question of whether ‘feminist force’ is a desirable possibility but whether a Security Council as world legislature is a desirable development.

The distinction between hard and soft laws under international law also raises questions with respect to the enforceability of international legal tools. International law is often regarded as limited due to the central role of state voluntarism and the existence of soft law is thus an important aspect of the development, although not necessarily the enforcement, of international norms. In prefiguring the possibility of the use of authorised force to halt widespread and systematic sexual violence, Security Council Resolutions 1820 and 1888 raise questions with respect to what type of authorised force would be appropriate. Two specific concerns are of relevance to this discussion: the first operational and the second conceptual. At an operational level, what kind of enforcement action would be envisaged – military? peacekeeping? civilian? And would the gender of personnel be important or even relevant? It would be foolhardy to promote the authorised use of force without serious and reflective answers to such questions, answers built with the vast literature on the role of gender in the military and the role of the military in gender held at centre stage.⁴⁵ At a conceptual level, that is in terms of the development of the international law on the use of force, it is important to consider if it would be enough that force was authorised under Chapter VII of the UN Charter or would the use of force to challenge systematic or widespread sexual violence require accommodation into pre-existing understandings of when Security Council authorised force is possible? I raise these questions to illustrate the range of serious consequences a foray into the realm of ‘hard law’ or authorised Security Council action entails. My instinct is to feel deeply the serious and long term consequences of all types of force. As Simone Weil wrote in her eloquent analysis of the *Iliad*:

Force is as pitiless to the man who possesses it, or thinks he does, as it is to its victims; the second it crushes, the first it intoxicates. The truth is nobody really possesses it. The human race is not divided up, in the *Iliad*, into conquered persons, slaves, suppliants, on the one hand, and conquerors and

⁴⁴ Ndulo, ‘The UN Response to the Sexual Abuse of Women and Girls by Peacekeepers during Peacekeeping Missions’ 27 *Berkeley Journal of International Law* (2009) at 159-160.

⁴⁵ For example, J. Goldstein, *War and Gender*, (2003)

chiefs on the other. In this poem there is not a single man who does not at one time or another have to bow his neck to force.⁴⁶

The incongruence of a feminist-friendly Security Council military force under Chapter VII is found within Weil's analysis of the Iliad: the use of military force for 'good purposes' ignores the consequences of force both for the woman who thinks she possesses it and for the victims of the use of force.

3. Conclusion: Foundational Narratives in Feminist Legal Theories

This discussion leads us to ask why, as feminist activists, we ask for change from the Security Council and why under the banner of the law of the use of force. The strategy of feminist and women's human rights networks utilising the undemocratic political body that is the Security Council to secure women's autonomy and citizenship globally is questionable. Underlying this strategy is the issue of whether feminist activism supports the use of military violence to ostensibly protect women. The use of force as a solution to sexual violence or sexual exploitation and abuse fails to challenge militaries as the perpetrators of sexual violence as well as other gendered violence/crimes in conflict situations and in times of peace.

Consequently, feminist politics must address the foundations on which it comes to international law and institutions. Because international law offers force – military force – as its ultimate enforcement tool, feminist politics must have a theory of force as an answer – or perhaps to give multiple answers – to understand what feminism requires of international legal tools. There are no easy answers to such demands of feminist theory, and drawing on the discussion of victims and agents in this paper, it is clear that on some issues feminist politics is polarised. Victim politics in feminist theory co-opts itself into a system that already exists, as debates around governance feminism have illustrated, while the politics of agency work to re-imagine the system as a whole. In reality both need to occur – strategies that utilise current legal frameworks will only ever achieve results that are cognisant with the system but are necessary and urgent all the same. Strategies that re-imagine the system and demand prevention and participation, that shake at legal structures from a position outside are also necessary. At the base of both projects must be a commitment to coming to law with an understanding of what feminist politics asks and demands of law.

So, can Security Council Resolution 1820 and 1888 be regarded as an extension, negation, refinement or complementary tool to Resolution 1325 and

⁴⁶ Weil, 'The Iliad, or the Poem of Force' (1945) republished in S. Weil, et al., *War and the Iliad* (2005), at 11.

1889? In terms of feminist agendas, Security Council Resolutions 1820 and 1888 are instruments that represent women as victims before women can be recognised as agents with rights. This is a limited view of women's subject status and curtails women's agency, while also failing to see all of us as victims of war and all of us as potential agents for change. Understandings of the automatic status of women as rights bearers is also circumscribed by a specific definition of femaleness rather than an understanding of women's rights as human rights. In this sense, Security Council Resolutions 1820 and 1888 are a refinement of the balancing of agency and victim recognition found in Security Council Resolution 1325 and 1889. Resolutions 1820 and 1888, when analysed without reference to resolutions 1325 and 1889, negate the focus on participation found in the first and fourth resolutions. Underlying the victim-agent distinction are further global feminist issues that engage culture and empire; issues with a great deal of dialogue and with less easy legal answers. Moreover, as a hybrid moment between the Security Council powers with respect to soft and hard international laws Security Council Resolution 1820 and 1888 must also be read as a move by the Security Council toward an increased legislative role on general matters. This may be a far more important than any feminist content of all four Security Council resolutions on women, peace and security and is an aspect that requires increased feminist analysis. Ultimately, calls for a right to participation are somewhat negated when the institution itself is undemocratic.

Security Council Resolutions 1820 and 1888 are more than a shift between the politics of agency and victim in liberal discourse. They also represent carefully crafted legal tools that play with the boundaries of international law for a range of purposes, not all of them feminist. Crucially, Security Council Resolutions 1820 and 1888 indicate that the price of a 'gender perspective' in the Security Council may be the condoning and the support of the use of Security Council authorised force to challenge violence against women, specifically sexual violence against women. The Security Council remains an undemocratic forum traditionally focused on the security of sovereign states and there are inherent limitations to such a body guaranteeing women's agency. As an undemocratic forum traditionally focused on the security of sovereign states, the capacity of the Security Council to be implement, protect or define women's rights is consequently severely circumscribed.

As a consequence we can conclude that the words of institutions such as the Security Council are clearly important but our capacity to make them mean something positive in our collective futures will occur first and foremost outside of that institution.