

Protesting the Preamble: Normative Pronouncements and Feminist Jurisprudence in the Security Council

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I. Introduction

When Alaa Saleh took to the streets of Dafur, to sing as part of the street protests that began after the arrest of Sudanese President Omar Al-Bashir in 2019,¹ her image, dressed in white and leading the chants, travelled the world. Saleh's demands were simple: freedom, peace and justice. Subsequently, Saleh was one of three Sudanese women who addressed the United Nations Security Council (SC) at the annual meeting in October 2019 on women, peace and security (WPS). Saleh spoke on behalf of Sudanese youth and spoke of Sudanese women's participation in the protests for peace alongside co-founder of the Women for Peace Initiative, Samah Jamous and, member of the women's rights coalition MANSAM, Huda Ali.² I am interested in the flow of knowledge from transnational feminist praxis on the ground to the transformation of that knowledge through international institutions. Within those knowledge flows lie spaces of legal argumentation from voices raised in protest to the legal text. Of specific interest is the function of the preambles within international legal texts and their capacity to filter out some knowledge and to transform the perspectives of one community to align with dominant forms. I examine two aspects of the preamble to Security Council resolutions in this chapter. First, the filtering out of wider transnational feminist demands that continue to reside in the space of protest. Second, the filtering in of the dominant normative commitments of international institutions and, in both instances, the role of the preamble in shaping the normative frame for legal argument. I examine how SC preambles become an articulation of feminist approaches that emphasise women as victims (of conflict-related sexual violence) and as participants within decision-making structures while the preamble downplays the structural changes, such as commitments to anti-militarism, peace, wide justice agendas and disarmament, framed by transnational feminist actors.

¹ For details, see: Wouter, this volume.

² 'From Sudan to the Security Council: Sudanese women lead drive for change' UN Women, November 7th 2019 <https://www.unwomen.org/en/news/stories/2019/11/feature-sudanese-women-lead-drive-for-change>

Through the examination of SC preambles, I argue for feminist protest as a form of legal argumentation. I explore how feminist protests might be understood as the overlooked preamble to WPS that makes impenitent demands on international legal responses to militarism and insecurity. My approach is drawn from an understanding of the legal and the normative as iterative of each other, given meaning through legal interpretation.³ As such, the legal effect of WPS resolutions is not only understood through the text of operative paragraphs, but also through the normative universe they stem from. That normative universe, I argue, includes the content within the preamble as well as the histories of feminist organising that come to be only partially included in the resolutions. In order to analyse the forms of legal argumentation deployed in the SC, in feminist legal spaces and in the resolutions, I centre the preamble to evidence the silencing of dissident feminist approaches and the elision between normative and legal arguments within international law. It is easy to dismiss the preamble as just that, preambular, non-legal and thus insignificant to the development of law.⁴ However, the changing practice of the Council not only in terms of the length of preambles but, perhaps more importantly, the content of the preamble from strictly legal to a combination of legal and normative justifications benefits from closer scrutiny.

This chapter provides an entry point for asking what sort of work the preamble of SC resolutions do. Wood argues that ‘given the way that SC resolutions are drafted, less reliance can be placed upon the preambular language of resolutions as a tool for the interpretation of the operative part’.⁵ However, the changing nature of contemporary preambles - and thus the efforts and input invested into the preamble – suggests interactions between the normative and legal in SC resolutions, including what preambles add and, perhaps, what they distract from. If the normative encompasses the larger patterns of beliefs and assumptions that circulate across a community, the legal is a specific expression of the normative. At the same time the legal remains distinct from the normative due to its prescriptive content. Many lawyers understand law, and the legal, as the

³ Robert Cover, ‘Nomos and Narrative,’ *Harvard Law Review* 97 (1983): 4

⁴ Also see, Sheeran, this volume, on the complex social interactions and political dimensions of Security Council practice.

⁵ Michael Wood, ‘The Interpretation of Security Council Resolutions: Revisited,’ *Max Planck Yearbook of United Nations Online* 20 (1917): 1, at 34

precise rules within a system, and yet, as this book attests, lawyers also understand the legal as produced within a specific normative universe.⁶ In this chapter I examine the different normative universes that combine to shape SC resolutions on WPS and the role of the preamble in refining the wider normative agenda of transnational feminisms into a shape amenable to the SC.

Thematic resolutions, including WPS, from the SC are understood as normative, in the sense of holding something other than binding legal obligations through the incorporation of beliefs and assumptions. Yet this does not preclude elements of a thematic resolution acquiring specific legal force.

I use the ten WPS resolutions as an example of the changing normative content, the travelling of content between thematic and situation-specific resolutions and the potential legal consequences of often repeated preamble framings and phrasings. I consider how the resolutions on WPS are an important example of the risks of the continued development of normative agendas via the SC and its ever growing preambular material. I examine these risks in terms of the spaces of forgetting, that is, where preambular material may be discarded for its (assumed) lack of legal meaning, and as spaces of legal argumentation with the potential to crystallise into future customary international law, while also developing interpretations of existing treaty law. Contemporary feminist writing has begun to make claim to this crystallisation of legal content in the preambles of WPS resolutions,⁷ that has implications for international lawyers as a form of legal argument in and of itself. At the same time the risks of feminist engagement with the SC are identified, where a partial, potentially damaging, form of gender law reform emerges as a consequence.

The paper proceeds in the following manner. Section two provides a short introduction to the expanding preambles of SC resolutions. I track the content and expansion of resolutions to examine the normative work performed by preambles and the development of the WPS resolutions. In section three, I look at contemporary feminist accounts of the SC's WPS

⁶ See further, Claussen, Hakimi, and Johnstone, in particular.

⁷ Christine Chinkin and Madeleine Rees, 'Commentary on Security Council resolution 2467: Continued State Obligation and Civil Society Obligation on Sexual Violence in Conflict', *LSE WPS Working Paper Series*, July 2019, <http://www.lse.ac.uk/women-peace-security/assets/documents/2019/reports/WPS-Commentary-Report-online.pdf>

framework, where arguments with regard to the legal, as opposed to normative, value of the ten resolutions as a co-joined body of law have begun to appear. This is distinct from analysis of the legal impact of operative paragraphs.⁸ In section four, I draw in the substantial feminist critiques of the WPS resolutions to understand the risks for feminist projects of pursuing either a normative or legal agenda within the SC. These are legal developments that, I argue, often ignore and actively ‘forget’ feminist histories and feminist knowledge production - both past and present - that is deeply rooted in anti-militarist struggles and, through feminist protest, challenges the SC and its five permanent members’ propensity to rely on the use of force and the circulation of arms as a means to peace.⁹ To conclude the chapter, I argue for feminist protest – historical and contemporary - as the forgotten preamble to WPS that makes unrepentant demands on a global system that uses law to underscore war and which has consistently mis-used feminist messages as a normative weapon.

II. On Expanding Preambles of the UN Security Council

SC resolutions are structured through a preamble and a series of operative paragraphs. The preamble of resolutions situates them in relation to prior resolutions and relevant treaty material and, when the resolution is issued under Chapter VII of the UN Charter, offers evidence of the binding quality of the operative paragraphs. Although not often regarded as creating legal obligations on states, the preamble is not only an important part of the resolution it is also a form of legal argumentation. That is, the preamble gives evidence of, and articulates, the legal and factual situation which the operative paragraphs emerge from. Following the *Namibia* case, it is clear the Council’s decisions must be ‘adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25’.¹⁰ That is, Articles 24 and 25 of the UN Charter give legal meaning to decisions within any given resolution, which might also contain recommendations. The ten resolutions on WPS are generally regarded as thematic, recommendatory, and non-binding. However, Chinkin and Rees argue that the continued

⁸ Gina Heathcote, ‘Feminist Politics and the Use of Force: Theorising Feminist Action and SC Resolution 1325’ *Socio-Legal Review*, 7 (2011): 23

⁹ See further: Anna Stavrianakis, ‘Towards a Postcolonial, Anti-Racist, Anti-Militarist Feminist Mode of Weapons Control’ in *New Directions in Women Peace and Security* edited by Soumita Basu, Paul Kirby and Laura Shepherd (Bristol: Polity Press, 2020)

¹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Reports, para. 115

production of WPS resolutions indicates a crystallization of some provisions into customary international law, while noting the use of references to additional, existing laws in the preambles of these resolutions.¹¹ Here I examine, first, the changing nature of SC resolutions over the life of the institution and, second, the placement of the WPS resolutions within that history.

i. Security Council preambles over time

A simple quantitative check gives a sense of how the use of preambles has evolved. In 2000, in the first WPS resolution, Resolution 1325, the preamble consists of eleven paragraphs that take up just over one page of the resolution. In contrast, the preamble of the ninth resolution on WPS, 2467 of 23rd April 2019, consists of 25 paragraphs, just over three pages in length. Before 1990 (and prior to the development of thematic resolutions) the preambles to resolutions were around one or two paragraphs in length and sometimes non-existent. For example, Resolution 678 from 30th November 1990, authorising military force in the event of Iraq's non-compliance with the Council's demand to withdraw its troops from Kuwait, has a preamble of three short paragraphs (sentences). In contrast, Resolution 2490, 20th September 2019, renewing the mandate of UNITAD in Iraq, consists of a preamble just over a page in length - including six long paragraphs - and a mere four operative paragraphs. It is now not unusual for a resolution preamble to far exceed the length of the operative paragraphs - a reverse of pre-1990 practice.

At the commencement of the SC's work, in Resolution 0001, 25th January 1946, the preamble begins with a reference to the UN Charter's authorisation of the Council to establish a military staff committee under Article 47. This is the substance of the preamble of the first Council resolution: an underpinning of the legal authority given to the institution to act under Chapter VII. In the subsequent half century, the role of any SC commentary prior to the operative elements of resolutions (i.e., the preamble) remains largely explanatory - explaining the situation before the SC or establishing the legal authority with which the SC acts. For example, Resolution 83, 27th June 1950, authorising the use of force (or assistance 'as may be necessary') against North Korea, contains a five sentence preamble that identifies an Article 39 breach of the peace, the prior call by the Council for North Korea to cease hostilities and withdraw their forces, and the statements from the UN Commission on Korea before asserting the request from

¹¹ Chinkin and Rees, *Commentary*, p.7-9

the Republic of Korea for assistance. That is, the preamble in Resolution 83 establishes the legal grounds on which the Council has chosen to act. Compared to contemporary preambular material, not only is this a relatively brief text, but it is also qualitatively different. Resolution 678, 30th November 1990, authorising the use of force to protect Kuwait in the event of Iraqi non-compliance with the resolution, provides similar preambular content - affirming the capacity of the Council to act through the referencing of former resolutions on the situation before it, noting, in particular, Iraq's non-compliance with resolution 660 and invoking its own authority under the Charter - essentially recording the legal authority to act.

By the mid-1990s preambular length had changed significantly, as had the content of preambles to increasingly invoke the wider situation and normative force behind the resolution. For example, Resolution 866, 22nd September 1993, establishing the creation of UNOMIL in Liberia, includes a preamble of over a page in length, consisting of thirteen paragraphs. At this point the content of the preamble roughly aligns with earlier resolutions: establishing the antecedents to the resolution, including previous relevant resolutions, Secretary-General reports, the actions and recommendations of relevant regional bodies (ECOWAS, African Union) and legal documents, such as the peace agreements. However, by the end of the 1990s the shift from direct legal references in the preamble toward the inclusion of broader normative claims had commenced, reflecting the changing political dimensions that saw the SC actively and deeply engaged with an increased number of situations after the end of the Cold War. In Resolution 1214, 8th December 1998, on the situation in Afghanistan,¹² the preamble continues well into the second page of the resolution and includes general statements on human suffering, the ethnic and religious nature of the conflict and, for the first time in a resolution, 'its deep concern at the continuing discrimination against girls and women'.¹³ The latter is explicitly linked to both international human rights and humanitarian law. What is new is the shift from a legal assertion to an expression of 'concern'.¹⁴ Resolution 1214 thus marks the commencement of the transition from the use of the preamble to underpin the legal authority through which the SC acts towards a combination of legal and normative claims.

¹² Resolution 1214 (8th December 1998) UN Doc. S/RES/1214

¹³ Ibid., preamble

¹⁴ See further, [chapter XX, this volume \(Wouter's\)](#)

ii. *Thematic resolutions*

The development of thematic rather than situation-specific resolutions also begins to appear during the final decade of the twentieth century. In Resolution 868, 29th September 1993, on peacekeeping the Council endorses the Secretary-General's *An Agenda for Peace*. It is a relatively short resolution acknowledging the report and endorsing the protections for peacekeepers and peacekeeping operations recommended in the report.¹⁵ The second thematic resolution from the Council is Resolution 984 (11th April 1995) on the non-proliferation of nuclear weapons.¹⁶ With the exception of Resolution 1121, 22 July 1997 (on the creation of the Dag Hammarskjöld Medal), the next thematic resolutions were not adopted until 1999 -- Resolution 1261 (25th August 1999), on the protection of children in armed conflict, and Resolution 1265 (17th September 1999), on the protection of civilians in armed conflict.¹⁷ Various resolutions - on refugees and on illicit arms flow in Africa, on international terrorism and international peace and security - while focused on a region do address wider concerns of the SC over the same period.¹⁸ In the year 2000, the Council issued five thematic resolutions, including Resolution 1325, on WPS. By 2019, the Council issued seven thematic resolutions in a single calendar year, although the average annually between 2010 and 2019 has been five.

This emergence of thematic resolutions has in turn resulted in a shift toward a form of normative pronouncement within the preamble of situation-specific resolutions, even when they are relatively short. For example, resolutions 2516 and 2517 of 30th March 2020, in which the Council renews the existing mandate for missions in Somalia (2516) and Sudan (2517), both include references to 'sovereignty, territorial integrity, political independence and unity'.¹⁹ This language is neither uniform or consistent in all mandate renewals but mimics the language of Article 2 of the UN Charter giving it a distinctly legal resonance. This older, consistent legal framing thus remains but as the thematic resolutions multiply so do does the normative framing

¹⁵ Resolution 868, (29th September 1993) UN Doc. S/Res/868; *An Agenda for Peace*

¹⁶ The Treaty on the Non-Proliferation of Nuclear Weapons (729 U.N.T.S.) 1968

¹⁷ Resolution 1121, (22 July 1997) UN Doc. S/RES/1121; Resolution 1261, (25th August 1999) UN Doc. S/RES/1261; Resolution 1265, (17th September 1999) UN Doc. S/RES/1265

¹⁸ Resolution 1172, (6th June 1998) UN Doc. S/RES/1172; Resolution 1189 (13th August 1998) UN Doc. S/RES/1189; Resolution 1208, (19th November 1998) UN Doc. S/RES/1208; Resolution 1209, (19th November 1998) UN Doc. S/RES/1209

¹⁹ Resolution 2516 (30th March 2020) UN Doc. S/RES/2516; Resolution 2517 (30th March 2020) UN Doc. S/RES/2517

within some situation specific resolutions, In the preamble of resolution 2489, the Council refers to the need for a ‘comprehensive and inclusive Afghan-led’ peace process, while resolution 2488 refers to ‘peace, security, justice, reconciliation, inclusivity and development’ in the preamble.²⁰ If the established approach of the SC has always centred the signaling of legal authority in the preamble, the emergence of additional language that is not legal, evidencing wider normative considerations and a subtle expansion of the content of preambles, is of interest. Given the rise of thematic resolutions over the same period, the normative assertions of these general resolutions flow into situation specific resolutions via the preamble.

iii. Women, Peace and Security

Within this shift from legal statements to normative claims in the preambles, the ten WPS resolutions have seen the SC deploy feminist-derived messages as a normative weapon. That is, the Council has used the WPS resolutions to underscore its own legitimacy after a period, at the beginning of the millennium, when questions were raised as to the SC’s continued effectiveness.²¹ In addition, the WPS agenda has been refined by the Council to slowly become a process of forgetting the transnational feminist origins behind the law. While the first WPS resolution, 1325, was informed by the work of civil society actors, subsequent resolutions have developed their own repertoire of language and terminologies. Consequently, the WPS resolutions demonstrate the changing ways in which the SC perceives and performs its role, as well as the interplay between legal and normative forms. When considered in terms of legal argumentation, developments *within* the resolutions -- the expansion of normative statements -- and developments *around* the resolutions, -- understandings of their legal meaning and effect -- both help track how the WPS framework has been used by feminist actors to assert a feminist agenda and by the Council’s members to assert a separate SC agenda, sometimes aligned with the former and yet always partial.

The first WPS resolution had a preamble aligned with SC practice at the time - about a page in length and largely (although not only) making links between the work of the Council and adjunct

²⁰ Resolution 2488 (12th September 2019) UN Doc. S/RES/ 2488

²¹ Dianne Otto, ‘The Security Council’s Alliance of Gender Legitimacy: The Symbolic Capital of Resolution 1325’ in *Fault Lines of International Legitimacy* edited by Hilary Charlesworth and Jean-Marc Coicaud, (Cambridge University Press 2010)

legal structures and obligations.²² By 2019, in Resolution 2467, the preamble extends over the first three pages of the resolution and links to other legal documents, recalls and repeats earlier resolutions and makes normative statements about gendered violence within armed conflict and post-conflict. The legal significance of these developments has received some attention in feminist writing on WPS. Attempts to assert the legal value, and thus potential, of the various resolutions on WPS, including through the language of the preambles, emerges as a form of legal argumentation.²³

III. Normative Content and Legal Argumentation

Otto notes the enthusiasm of some feminist actors to hold the WPS resolutions as having binding legal force.²⁴ That is, early in the development of the WPS agenda, a misunderstanding as to the legal quality of Council resolutions decided under Chapter VI was apparent within wider feminist networks. This misperception within feminist spaces had advantages, in that feminist actors lobbied states (and continue to do so) via the language of the WPS agenda with conviction that the origins of the resolutions in the SC gave them binding legal force. In 2020 this continued to a degree, with an influential scholarly text announcing ‘1325 bound the international community . . . (a)s such, it was a ground-breaking commitment by the SC’.²⁵ The language of being bound and a commitment from the Council gives the impression of a binding legal obligation, despite the soft law nature of 1325 as thematic resolution. Otto reflects that her anxiety about the failure of feminist actors to appreciate the distinction between Chapter VI and Chapter VII resolutions might be ‘unduly legalistic’ given the work of feminist actors, in civil society and NGOs, to use the resolutions in transformative and innovative ways to build legal change.²⁶ This transnational feminist ‘misreading’ of the WPS resolutions is reminiscent of other sites of feminist praxis that use the ambiguous space of legal language and soft law to inform practice and legal change.²⁷

²² Resolution 1325 (30th October 2000) UN Doc. S/RES/1325

²³ Chinkin and Rees, *Commentary*, p. 12-14

²⁴ Dianne Otto, ‘Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade of the Twentieth Century’ *Melbourne Journal of International Law* 10 ((2009): 11

²⁵ Soumita Basu, Paul Kirby and Laura Shepherd, ‘WPS: a Critical Cartography’ in *New Directions in Women, Peace and Security* edited by Soumita Basu, Paul Kirby and Laura Shepherd (Bristol: Polity Press, 2020) p. 1

²⁶ Otto, *Exile of Inclusion*, p 12

²⁷ Gina Heathcote, *Feminist Dialogues on International Law: successes, tensions, futures*, (Oxford: Oxford University Press, 2019) 156-157

O'Rourke argues that feminist engagements with international law need to be understood as driven by normative and political motivations beyond the 'pursuit of legal obligations and state compliance'.²⁸ O'Rourke questions the motivations for academic critique of the UN system that ignores 'what these international law norms for gender equality mean to the feminist activists who engage them,' advocating for increased attention to the 'insights from local feminist advocacy, transnational feminist organizations and feminists within the institutions of international law'.²⁹ While the overlap between feminist activist, academic, and international lawyer is a difficult one to untangle, the continued choice to engage with international law and to pursue the development of normative agendas, such as is seen in the production of preambles, has potentially far reaching consequences for all feminist actors. In addition, understandings from feminist scholars and actors that the legal quality of the resolutions is less important than the change undertaken in their name suggests a two-tier life for the resolutions: their work in legitimating the SC's activities and their function within transnational feminist spaces. These distinct interpretative communities 'meet' in the world of WPS.

i. Finding Legal Meaning in SC preambles

The agitation (protest) from civil society that pursued legal change, although outside of the legal institutional structures, constructs a form of legal argument that helps explain the limitations of gender law reforms through the WPS framework. Drawing again on Cover, feminist praxis – from academic to activist spaces – constructs a normative universe. The preamble to SC resolutions then draws in some elements of that universe to the exclusion of other elements. In particular, the embedding of women's rights within larger social justice/peace projects, feminist anti-militarism and commitments to disarmament - while prominent in transnational feminist work - are absent in the normative universe framed through the preamble. Following Cover, the dissent and the difference in these normative worlds, or differing narratives on gendered insecurity, remain an important space of legal meaning and interpretation.³⁰

²⁸ Catherine O'Rourke, 'Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions' *European Journal of International Law* 28. 4, (2018): 1019, at 1021

²⁹ *Ibid.*, p. 1021

³⁰ Robert Cover, 'Violence and the Word' *The Yale Law Journal* 95 (1986): 1601, p. 1616-18

In quite a different vein, Chinkin and Rees argue in their commentary on Resolution 2467 that the consolidation of legal language across multiple WPS resolutions, as well as local level or domestic legal implementation, ultimately creates new international law, as custom.³¹ Chinkin and Rees describe the preamble of SC resolutions in the following way: ‘it essentially states its purpose, aims, and justification and locates it within existing legal and political structures’.³² Chinkin and Rees note that the preamble of Resolution 2467, ‘opens the door for interpretation of the Operative Paragraphs in ways that civil society can make good use of them to further State and institutional implementation’.³³ Chinkin and Rees further argue that the reference to existing (treaty-based) legal obligations within the text of resolutions helps embed the legal effect of Council outputs.³⁴ With regard to specific legal obligations that Chinkin and Rees draw out of Resolution 2467 -- CEDAW (including the Optional Protocol) and the Geneva Conventions – these references are found in the preamble.

Although writing is sparse on the legal status of the preamble to SC resolutions, Chinkin and Rees’ approach considers the potential legality of preambles. Perhaps the iteration of ten resolutions on WPS gives them a greater propensity to signal binding legal commitments. Wood’s account of SC practice, in contrast, argues that the political reality of the Council’s membership leads ‘to the ambiguities inherent in political compromise and consensus, not to clarity’.³⁵ A history of unanimous endorsement from states on WPS texts seemed to negate this argument, at least in relation to the perceptions of states as to which issues ought to be addressed via the WPS resolutions. The consensus on WPS ended, however, during the drafting of Resolution 2467, when objections from China, Russia and the United States led to an adapted draft being concluded and, ultimately, abstentions from China and Russia in the final vote. US objections rested on the broad approach to the provision of reproductive and sexual health services that potentially included abortion services, while China and Russia expressed concern at the increasing expansion of the WPS agenda including the creation of the Informal Expert Group

³¹ Chinkin and Rees, *Commentary*, p. 7

³² *Ibid.*, p. 12

³³ *Ibid.*, p. 14

³⁵ Wood, ‘Interpretation’, p. 12

on Women, Peace and Security (IEG) related to sexual violence in conflict.³⁶ These different normative communities, obviously, also incorporate their own tensions and disagreements. Likewise, transnational feminist spaces are not uniform in their approaches to what constitutes gender law reform. Accounts of the meaning and effect of the preamble and of WPS thus emerge as varied and present an additional range of legal argument with no settled or agreed positions.

ii. Situation-specific resolutions, WPS and the preamble.

The ambiguity of legal function within SC preambles is further complicated via analysis of situation specific resolutions where the normative framings found in thematic resolutions is adapted and refined. For example, the SC resolutions on the situation in Libya attracted analysis of the text of the preamble in relation to the potential crystallisation of the Responsibility to Protect doctrine into customary international law.³⁷ Importantly, although often characterised as an instance of the Council ‘authorising’ military force via the responsibility to protect doctrine, scholars are quick to highlight that the phrase ‘responsibility to protect’ is not used in the operative paragraphs of Resolution 1973 authorising military force but rather in the preamble.³⁸ In fact, legal arguments on the existence of responsibility to protect under international law are more likely to turn to the General Assembly’s Summit Outcome Document, in which states make clear that the powers of the SC to authorise military force include the capacity to respond to a range of security threats such as occurred in Libya in 2011.³⁹ Similarly, Resolution 1368, agreed after the terrorist attacks in the United States in 2001, flags Article 51 of the UN Charter in the preamble but is generally not regarded as offering more than recognition of the existing right of states to act in self-defence, as opposed to legal authority on this point.⁴⁰

Legal argumentation, as traditionally understood, is the process of establishing that a law or legal obligation exists, the way that obligation should be interpreted and the legal authority the obligation stems from. In the condemnation of terrorist attacks (1368) and the authorisation of

³⁶ See further: ‘In Hindsight: Negotiations on Resolution 2467 on Sexual Violence in Conflict, *What’s in Blue*, May 2nd, 2019 <https://www.whatsinblue.org/2019/05/in-hindsight-negotiations-on-resolution-2467-on-sexual-violence-in-conflict.php>

³⁷ Resolution 1970 (26th February 2011) UN Doc. S/RES/1970; Resolution 1973 (17th March 2011) UN Doc.1973

³⁸ Marie-Eve Loiselle, ‘The Normative Status of the Responsibility to Protect after Libya’ *Global Responsibility to Protect* 5.3, (2013): 317-34

³⁹ World Summit Outcome Document, 2005, UN Doc. A/RES/60/1

⁴⁰ Resolution 1368 (12th September 2001) UN. Doc.S/RES/1368

military force against Libya (1973) the changing security environment is reflected in the invocation, through the preamble, of new legal developments rather than consolidation of new legal obligations via preambular material. In 2001 this happens in a short, legally focused preamble that parallels the post-9/11 use of force against terrorist actors. In 2011, the responsibility to protect is invoked in a lengthy preamble that signals a larger agenda around responding to the ongoing violence in Libya. Both preambles constitute a legal argument for what comes next – the operative paragraphs – placing the resolution in a normative universe that propels toward a specific interpretation and the construction of *nomos*. I am interested in both the traditional legal approach to SC resolutions, which refuses significant legal value to the preamble and the expansion of the content of preambles suggesting a wider purpose for the preamble than was previously understood.

Resolutions 1368 and 1970 do not invoke the WPS framework, although in both cases gendered experiences of violence are significant in the conflict, highlighting, then, a further aspect of the preamble as a space of forgetting, or overlooking, as much as it is a space invoking a normative universe. While the resolutions on WPS might be replete with commitments to their application in situation specific resolutions, these are filtered out of preambles of many situation specific resolutions including the two above on Afghanistan and Libya. In sum, the arguments for the WPS as embedding legal obligations, crystallizing as customary international law via the preamble, demonstrates the collision of different normative agendas rather than a satisfying legal argument for the transformation of peace and security laws through WPS frames.

IV. The Security Council as site of Gender Law Reform

Otto analyses the ‘footholds for feminist change’ that emerge from engagement within international institutions, in particular, the SC, to conclude that ‘un-crisis’ or, feminist, thinking . . . requires supporting the activism of women outside the mainstream institutions of law and politics as well as carving out spaces on the inside. The institutionalisation of feminist ideas will always extract a price of compromise and dilution, even more so in a crisis; but the damage to long term feminist goals

can be mitigated by outside movements of women, in coalition with others, demanding that emergencies be remapped through a feminist lens.⁴¹

The emergence of feminist gains inside institutional spaces has attracted feminist questions about the legitimacy and value of the SC as a place for gender law reform.⁴² Chinkin and Rees' argument that the preamble to SC resolutions might also signal potential law, *lex ferenda*, through the capacity to crystallise into custom must be understood then as having implications for SC resolutions generally and in terms of the narrowing of gender law reform. Both international lawyers and feminist actors might consider the structural constraints of any institutional practice before any *ad hoc* agenda for consolidated legal obligations is pursued.

Beyond the question of whether a preamble could provide evidence of a crystallising norm, there is need for feminist interrogation of what it means to pursue and assert the legal potential of SC preambles. That is, if the preamble of WPS resolutions can, over time, acquire legal significance, then feminist international lawyers need to reflect on how this form of legal argument lends itself to application to other areas of the SC's work. For example, the resolutions on countering terrorism and violent extremism also deploy preambles of increasing length, with reference to an array of established legal obligations and normative assertions. While WPS resolutions are thematic, most resolutions on the threat of terrorism are situation specific. Since 2015, the WPS resolutions have cross-referenced the counter-terrorism resolutions, drawing aspects of the two agendas into alignment.⁴³ Both the WPS and the counter-terrorism work in the SC draw from very specific world-views, or normative visions, of international peace and security and raise questions about what gets left out and which states influence the text. The crossing over between the two agendas through the cross-referencing of resolutions in the preambles demonstrates how the non-legally binding preamble does more legal 'work' than an assertion of a wider normative framework. The coordinated approach to WPS and counterterrorism also constructs the legal

⁴¹ Dianne Otto, 'Remapping Crisis through Feminist Lens' *University of Melbourne Law School Research Series* (2011) 5

⁴² Also see: Dianne Otto, 'Power and Danger: Feminist Engagement with International Law through the UN SC' *Australian Feminist Law Journal* 32 (2010): 97; Dianne Otto, 'Beyond Stories of Victory and Danger: Resisting Feminism's Amenability to Serving Security Council Politics' in *Rethinking Peacekeeping, Gender Equality and Collective Security*, edited by Gina Heathcote and Dianne Otto (London: Palgrave MacMillan, 2012)

⁴³ Gina Heathcote, 'SC Resolution 2242 on WPS: Progressive Gains or Dangerous Development?' Special Issue on Gender and Security *Global Society* 34.4, (2018): 374

frame that future arguments might be articulated through, where future WPS resolutions move further from their origins within transnational feminist praxis and closer to counterterrorism approach and/or the agendas of specific global powers.

Ultimately, the development of extensive preambles to SC resolutions remains a curious thing, as it is not clear what legal consequences flow. In some ways, contemporary preambles are an attempt to draw attention to Council action as a force for ‘good’, justifiable and based on larger principles and legal obligations within international law: a form of legal argumentation. Not only is this not required, the shifting between the legal and the normative within preambles remains unsettling, precisely because of the potential of the preamble to become evidence of *opinio juris* or state practice through repetition. In thematic, Chapter VI resolutions, such as WPS where the open debate formula collates the views of many states, this adds transnational feminist tensions to existing political tensions within the SC. The preamble becomes an iteration of a very specific feminist politics that traces women as victims (of conflict-related sexual violence) and as potential participants (of decision-making structures) while ignoring the widescale structural changes needed to mobilise solutions, including a commitment to anti-militarism and disarmament. At one level this is no different from the pursuit of consensus in international law generally and in the SC specifically, however the diversity of feminist positions outside of the Council become co-opted as the reason behind the WPS agenda, at the same time as the actual demands of those same actors, are left outside of the institution.

Furthermore, for feminist or any other civil society actors to assume that the turning of the SC toward their interests is guaranteed to continue is an erroneous assumption illustrated through the drafting of resolution 2467. Unlike earlier resolutions on WPS, this resolution was drafted by Germany as penholder.⁴⁴ As noted above, the US expressed objections to the draft and threatened to veto it if it was put to a vote. Previously both the UK and the US had taken the lead on resolutions and debates on conflict-related sexual violence (the focus of resolution 2467) and resolutions consistently received the full support of Council members. Resolution 2467 marked the end of unanimous support from member states for WPS resolutions. The position taken by

⁴⁴ ‘The Penholder’, *Security Council Report: Research Report #3*, December 21st 2018 <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Penholders.pdf> (accessed August 2020)

the US is an important reminder of the political restraints that sit behind the legal outputs of the Council. A feminist agenda that seeks to affirm the legal potential of a non-binding text must tread carefully in a global environment of increasingly repressive and nationalist states with very narrow perceptions of women's rights and of gender.

There is a need to hold the 'outside' and 'inside' of institutional spaces as interconnected rather than distinct. A failure to do so limits the capacity to voice a challenge to contemporary legal and political institutions as always outside of those structures and the incremental 'footholds' for change as within institutions. In addition, any critique of the SC must address at least two different levels of its work. First, the persistent structural bias within the institutions of international law and, second, the larger outputs the institutions produces. The study of SC preambles illustrates not only the dangers of unqualified acceptance of the structures and methods of international institutions but also the potential flow of feminist arguments into other areas of the Council's work that might be actively anti-feminist, such as the counterterrorism resolutions. Structural bias feminisms require an 'excavation' to look under the surface of laws and legal structures to expose the deep-set gender norms that inform and construct the work of international institutions and international law. Thinking about the legal value of SC preambles requires a composite analysis of the structural restraints on any legal outputs from the Council -- not only interrogation of what work its outputs on WPS 'do' in terms of producing gender law reform, but also how this work underpins the larger work and methods of the Council. The pursuit then of enhanced legal value for WPS resolutions, including the preambles to these resolutions, requires attention to the weak capacity of the Council to articulate gender beyond narrow versions of feminism and the potential impact such developments hold for the SC itself.

At the same time, feminist analysis of SC outputs over twenty years has focused on resolutions concerning women, peace, and security, to the exclusion of resolutions on specific situations. Analysis of situation-specific resolutions suggests WPS resolutions do more 'work' than simply produce a set of normative statements on women and gender. The 2018 and 2019 resolutions on Sudan and South Sudan present a good example. Here I add to the discussion of the Libyan and Afghanistan resolutions, above, through a focus on the preambles of recent situation specific resolutions.

Resolution 2445, 15th November 2018, on Sudan and South Sudan has a preamble that extends over two pages with dense background information on the conflict and includes mentions of resolutions 1325 and 2242:

Further recalling resolutions 1325 (2000) and subsequent resolutions on women, peace, and security and emphasizing that persistent barriers to full implementation of these resolutions will only be dismantled through dedicated commitment to women’s empowerment, participation, and human rights, and through concerted leadership, consistent information and action, and support, to build women’s engagement in all levels of decision-making, also recalling resolution 2242 and its aspiration to increase the number of women in military and police contingents of United Nations peacekeeping operations⁴⁵

This paragraph is fascinating for the normative content it picks up and develops beyond the direct reference to Resolution 1325 and the subsequent WPS resolutions. For example, terms such as ‘persistent barriers,’ ‘dedicated commitment,’ and ‘consistent information and action,’ as well as the language of ‘aspiration’, are a form of argument that is normative, in the sense of not relying on direct legal content for their articulation and, instead, drawing in perceptions and values. As such, it can be seen how the normative content of the thematic resolutions is carried, and adapted, in situation-specific resolutions via the preamble. At the same time the eight additional WPS resolutions, also with nuances of language and changing content, are not mentioned. Consequently, the study of preambles and WPS must include the preambles of situation-specific resolutions to understand which aspects ‘travel’, and are expanded, from the thematic resolutions. The preamble of Resolution 2445 shows an emphasis on women’s participation in decision-making and peacekeeping operations, an agenda reiterated in operative paragraph 18 of the resolution.⁴⁶ Other situation specific resolutions draw, via the preamble, attention to the provisions for responding to conflict-related sexual violence. Given that the various WPS resolutions address both conflict-related sexual violence and women’s participation, it is curious that some conflicts draw attention to one but not the other. In

⁴⁵ Resolution 2445 (15th November 2018) UN Doc. S/RES/2445

⁴⁶ Ibid.

resolution 2445, the focus is narrowed to an agenda on women's participation although reports of sexual violence from the region have been documented.⁴⁷ A study of gender law reform and the development of legal content in preambles thus requires analysis of when and where the Council further expands WPS content across its large oeuvre of work and what forms of selectivity occur in these expansions. This research might also parallel understandings of colonial histories of engagement in colonial territories under the guise of civilizing through gender law reform, as women's bodies have a long history of providing the justification for foreign interventions whether military or otherwise.⁴⁸

The study of additional institutional outputs for feminist actors, however, cannot be as selective as only drawing attention to the placement of WPS text in situation-specific resolutions. The absence of this content also matters. Resolution 2479, 27th June 2019, on Sudan and South Sudan has an extremely brief preamble and no reference to the WPS framework.⁴⁹ Resolution 2479 identifies the situation in Sudan and South Sudan as a threat to international peace and security and establishes the resolution as a Chapter VII resolution. The operative paragraphs, also brief, contain the decision to extend the mandate of the international force in Sudan and South Sudan. In contrast, resolution 2445 references Chapter VII within operative paragraph one only, extending the mandate for force; the remainder of the resolution is therefore clearly under Chapter VI. As I have discussed elsewhere, it is standard practice of the SC to leave off any incorporation of the WPS framework when authorising military force.⁵⁰ The distinction between the authorisation of military force and the construction of post-conflict peace is gendered, where work on WPS is expected to wait until the crisis moment has passed. Ultimately, an account of the legal and normative content of WPS resolutions cannot progress without an analysis of both where WPS content travels into other resolutions and where it does not. The continued distinction between the preambular content of Chapter VI and Chapter VII resolutions might, in

⁴⁷ Report from Nobel Women's Initiative, 'Survivor's Speak Out: Sexual Violence in Sudan', *Nobel Women's Initiative*, (2013) <https://nobelwomensinitiative.org/wp-content/uploads/2013/12/Survivors-Speak-Out-Sudan-web.pdf?ref=218>

⁴⁸ Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (London: Routledge 1995)

⁴⁹ Resolution 2479, (27th June 2019) UN Doc. S/RES/2479

⁵⁰ Gina Heathcote, 'Humanitarian Intervention and Gender Dynamics' in *Oxford Handbook on Gender and Conflict* edited by Naomi Cahn, Dina Haynes, Fionnuala Ni Aolain and Naha Valji, (Oxford: Oxford University Press, 2018)

particular, mark a significant emerging practice of separating the normative (i.e Chapter VI) from the legally binding (i.e Chapter VII) content of resolutions.

Feminist ‘footholds’ within the SC do not happen in isolation from the larger work of the Council. Resolutions on Sudan and South Sudan present women’s participation as an external value ‘brought’ to the region by the international community in utter ignorance of the persistence and forms of regional structures and organisations that are inclusive of spaces for gender balanced women’s leadership. The preamble of resolution 2445 does work in reinforcing gender and women’s rights as part of the civilising force of international law rather than as transnational, varied and active in challenging multiple spaces of oppression and power, actively forgetting Saleh’s presence at the Council only a few weeks prior. Cover’s understanding of the relationship between normative and legal orders assists here, as the space of legal interpretation and what Cover describes as the ‘problem of meaning in law’ functions such that, ‘legal hermeneutics or interpretation - is commonly associated with one rather narrow kind of problem that confronts officials and those who seek to predict, control, or profit from official behavior’.⁵¹ The WPS resolutions, in their operative paragraphs and in the preamble, as well as the feminist agendas that are never included in the legal text, form a *nomos* that questions the possibility of feminist law reform while also signaling important features of the relationship between the normative and the legal and, therefore how legal argumentation is framed. In particular, feminist protests reap understanding of a commitment to a quite different *nomos*, one that centres disarmament, one that attends to anti-militarism and one that configures feminist change through appeals to peace and justice that do not collapse back into a preoccupation with women’s lives in isolation from the communities in which gendered harms materialise.

V. Protest as Legal Argumentation

The travelling of feminist knowledge from protest to SC to resolutions on WPS provides an opportunity to understand which knowledge (narrative) travels from transnational feminist spaces to international law and what gets filtered out. The language of resolution 2467 on WPS, adopted after Alaa Saleh addressed the Council, repackages the voices of those who addressed the Council and offers no proscriptions for actual change. This understanding is further filtered

⁵¹ Cover, *Nomos and Narrative*, p. 6

when the Council returned its focus to Sudan, two weeks later, addressing the situation in Abyei in resolution 2497. This resolution was debated and drafted without the Sudan representatives who had previously been invited into the WPS debate and with only the standard reference to 1325 in the preamble and the inclusion of gender and sexual violence in the list of human rights abuses. Transnational feminist approaches to peace and security are filtered via WPS resolution preambles, narrowed into the format of the main text of the resolutions, and then diluted further in situation-specific resolutions. This practice demonstrates how the legal text dictates the future narratives of the nomos, leaving some framings as outside of the normative universe of the Council even at the moment where there is a performance of bringing diverse voices into law, such as the invitation to Sudanese activists to speak to the Council. The study of legal argumentation, thus, must look outside of the prescriptions held within the legal text to understand the plural normative worlds that emerge at the institution voicing strategies for inclusion. Alaa Saleh's voice, her protest, her song, were invited in and yet the words that the SC issued on WPS ignored the structural change Sudanese protests demanded and, in resolutions on Sudan, ignored the intertwined relationship between women, peace and security.

This study of preambles lead me to an account of feminist protest, such as Saleh's image in 2018, as an alternative preamble to WPS resolutions, that hold legal arguments derived from the history of feminist transnational organising and that speaks to power from outside of traditional legal forms. This study challenges the understanding that legal interpretation derives from a very specific, shared normative space, as it becomes clear that the political frames that inform SC resolutions are not the same as the origins of the texts within feminist histories of engaging through protest. While the SC calls for the increased participation of women in negotiations, peace agreements and post-conflict processes, what is silenced is the voices of women who act and speak throughout peacetimes and conflict to challenge the insecurity they experience in the everyday. Chinkin writes:

Again we are asking the wrong question. We should not ask how the participation of more women in peace-making processes and peacekeeping missions can be achieved but rather

participation in what? In the structures of patriarchy? And how can those structures be transformed to deliver a sustainable, feminist peace?⁵²

I have argued that the preamble functions as a filtering out of the diversity of feminist organising (protest) and the unrepentant demands for different approaches to international peace and security.

The WPS resolutions are simultaneously evidence of Cover's claim that '... law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse - to be supplied with history and destiny, beginning and end, explanation and purpose',⁵³ and evidence of the failures of international lawyers, feminist and otherwise, to understand the political domain as more than the dynamics of the Council itself. While Wood deems the preamble to be less reliable as a tool of interpretation, I have shown the interplay between the legal and the normative and the work that preamble does in shaping the normative, including in terms of what is excluded.⁵⁴ In particular, the forms of feminist agitation – protest – that portend the creation of gender law reform remain poorly understood and significantly undermined when viewed from the text of the resolutions themselves. The Council's shift toward the framing of a normative agenda via the expansive use of preambles is significant in this filtering.

Feminist protest is a space of engagement with law that often speaks and enacts the unspeakable. Tamale writes in her analysis of (naked) protest, '[t]he law is an important instrument in shaping and scripting our gendered bodies. Society "reads" women's bodies along the landmarks forged by the law'.⁵⁵ While Tamale's argument specifically engages the embodied meanings of naked protest in Uganda, her argument about the meaning and force of women's bodies as a challenge to the oppressive laws of the state have resonance across contexts (and protests). The striking image of Saleh, in Khartoum in 2018, returns: proceeded by feminist protest that centred on female clothing choices, the centering of women's bodies and self-representation was part of the

⁵² Christine Chinkin, 'Are We asking the Right Questions? Reframing Peace and Security', *LSE WPS Blog*, March 4th, 2019, <https://blogs.lse.ac.uk/wps/2019/03/04/1805/>

⁵³ Cover, *Nomos and Narrative*, p. 5

⁵⁴ Wood, *Interpretations*, p. 34

⁵⁵ Sylvia Tamale, 'Nudity, Protest and the Law in Uganda' *Feminist Africa* 22 (2017): 52, at 79

resistance and response to the repressive state. Similarly, the protests of Indian women in Manipur naked in public to protest the killing and rape of a young woman, while holding the banner 'Indian Army Rape Us', shows an engagement between state, law and women as a means of speaking that which law continues to fail to speak.⁵⁶ In fact, the spectrum of issues contained in the SC resolutions on WPS have histories in transnational feminist and women's protests, from the Campaign against Nuclear Disarmament to Greenham Common to Liberian feminist demands for inclusion in peace processes through the sitting-in spaces otherwise occupied by those formally gathered at the peace talks. Women's participation, the prevention of gender-based violence, protection from gender-based violence and the shaping of post-conflict recovery processes, the four pillars of WPS, all start in the mobilisation of women's and feminist networks, local, regional, transnational, that voice dissent with the status quo.⁵⁷

Articulating feminist protest as preamble creates an opportunity for transnational feminist approaches to law to develop two important methods. The first is a re-imagining of the persistence of calls for both inside and outside strategies within feminist legal writing, to see that which happens 'outside' of institutions, whether scholarly critique or space of protest, as inflecting and influencing the insider, institutional spaces of gender law reform - and vice versa. Second, in response to the larger impact of the changing practice of the Council and the non-feminist developments that might emerge from the expansion of normative content in the Council's output, the protest as preamble is a reminder that the normative and ethical commitments that inform WPS are on the streets, in the bodies and the everyday. They are legal arguments that challenge the status quo. Feminist protest continues to articulate a challenge to the global system which has been unable to look beyond military intervention as a solution and, in the example of the Security Council, misusing feminist messages as a normative weapon.

⁵⁶ Sumi Madhok, 'Coloniality, Political Subjectivation and Gendered Politics of Protest in a 'State of Exception'', *Feminist Review* 119, (2018): 56

⁵⁷ Felicity Ruby, 'SC Resolution 1325: A Tool for Conflict Prevention?' in *Rethinking Peacekeeping, Gender Equality and Collective Security* edited by Gina Heathcote and Dianne Otto, (London: Palgrave MacMillan, 2014)