The Law on the Use of Force

A Feminist Analysis

Gina Heathcote

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Preface

I am walking home with a friend and our children. We have just collected the children from a party. The babies recline, momentarily peaceful, in their buggies. My oldest child picks up a stick. My friend's child follows suit but selects a larger stick and waves it around.

I ask my child to put the stick down. My friend turns to me, rolls her eyes and smiles as she says 'boys will be boys'. My son places his stick on the ground while expressing his disapproval at my request. His friend throws his stick carelessly over his head. The stick hits one of the babies on the arm; the little one begins to cry. My friend's son experiences the full wrath of parental rage and is humiliated and castigated in front of his friend, my son. The baby is, fortunately, unharmed. I am left contemplating the mixed messages we give our children, especially boys.

I raise my children under the motto that no matter how bad, how upsetting, how dangerous, how humiliating or how threatening the act of another may seem their own violence is an inadequate means to solve a problem. I am proud of my three children who from a young age have, mostly, been able to use creative thinking or the presence of an authoritative power (parents, teachers) to resolve conflict with other children. I have no idea whether this makes them good boys. I hope it will help them become wonderful people.

Important to my reflections on and engagements with my children is my understanding of international law on the use of force. Like our household, the international law on the use of force rests on a simple prohibition against force.[1] Unlike our household, international law allows for authorised force when a 'threat to the peace, breach of the peace or an act of aggression' is deemed to have occurred.[2] Furthermore, international customary international law demonstrates that, in addition to authorised force, justifications for force – especially self-defence – are an integral

1 UN Charter, Article 2(4).

2 UN Charter, Articles 39–42; indeed to continue the analogy, if authorised force were permitted within my family this would entail the use of force by my partner or me to halt violations of the prohibition on violence. As a mother I find little merit in challenging children's violence with greater violence and have experienced the frustrating long term consequences of such an approach in families around me; for a discussion of parental rights to use force to control their children, see: Durrant, *A Generation Without Smacking: The Impact of Sweden's Ban on Physical Punishment* (Save the Children (UK), 2000).

component of the law on the use of force or *jus ad bellum*.[3] In this book, I present an analysis of the international law that permits the authorisation of force by the collective security structure and the arguments of states that seek to justify unilateral force.

Some – many – would argue that the international law on the use of force has nothing to do with the private, everyday, domestic interactions I have with my children. Yet, much that I wish to question is contained in my friend's phrase, 'boys will be boys', a phrase uttered routinely by those around me in my domestic relationships. How will boys be boys unless we tell them? Why does 'boys being boys' usually entail the justification of violent, dangerous or aggressive play? How do these childish interactions shape men's – and women's – perceptions of normal behaviour later in life? In this book I challenge the law on the use of force as both sexed and gendered through the repetition within those laws of sexed and gendered understandings of justified violence. To challenge the law on the use of force, I use feminist understandings of the role of law in the production of sex and gender. I also develop two specific methods that emerge from these broader reflections on the impact of sexed and gendered constructions on personhood.

First, I use a domestic analogy: that is, an analogy between accounts of interpersonal violence and international justifications for violence to demonstrate the patriarchal underpinnings of the international laws on the use of force.[4] Second, I regard law as a narrative, one telling among many with multiple potential meanings rather than as a source of objective and neutral 'truth'. Consequently, in the process of looking at law's narrative I look at many non-legal narratives to understand the impact of law. This is something Davies refers to as 'Flat Law Theory'.[5] To introduce the use of both the domestic analogy and law as narrative approaches, I wish to draw on a further personal example.

I often commute via train into London. On my return journey, I arrive at the local train station in the evening and must make a 15-min walk in the dark. It is a pleasant walk that passes a large park, playing fields, tennis courts, a secondary school, a local pre-school and a row of houses (of which my house is at the end). It should be an enjoyable walk. I know my partner makes that walk with headphones on, largely unaware of any person who might be walking nearby. In contrast, I turn off any music I might be listening to, place my mobile phone on automatic dial with my finger near the call button and grasp my keys in the other hand. I note who is walking ahead of

3 See Bowett, *Self-defence in International Law* (Manchester: Manchester University Press, 1958). International law distinguishes *jus ad bellum* (the law on the use of force) from *jus in bello* (the international humanitarian law of armed conflict), for a discussion of the origins of the terms, see Kolb, 'Origin of the Twin Terms *Jus ad Bellum* and *Jus in Bello*', 320, *International Review of the Red Cross* (1997) 553.

4 That is, I look at Western criminal codes, particularly common law defences to homicide, as providing a model for international justifications for violence. While I acknowledge the distinctions between the two systems and the impact of other legal systems on the international, key to my argument is the influence Western national criminal defences has on Western scholars' understandings of international justifications for the use of force. One of the clearest examples of the use of Western common law justifications as a model for establishing the normative credibility of the international can be found in Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2002), chapter 10.

5 Davies, "Feminism and the Flat Law Theory" 16 *Feminist Legal Studies* (2008)281.

me and at what speed. I listen for footsteps behind me. I double check the shadows in front of me. I am conscious of the gender, dress, and actions of any of my fellow walkers. I have never been attacked or approached while walking home at night but I am acutely aware that if I was attacked there would be some question as to why I was walking alone at night. Most of my girlfriends would not make this same walk late at night, yet we live in a relatively safe, affluent and friendly London suburb.[6] My point is that women live with the fear of potential violence and internalise a degree of responsibility for external threats (e.g. I shouldn't walk out after dark). The threat is always gendered, that is, of men attacking, raping, harming or harassing, and, quite possibly, is largely unrealistic; women face a much greater threat from the men they choose to live with or grow up among. Every time I take this walk, in the dark, I am forced to recognise the relationship between gender and violence. I believe the relationship between constructions of justified violence and gender begins with the choices that we make as we raise our children. As a society we generally accept that women live with the threat and fear of the potential violence of men.

As a legal scholar, I am well aware of the disparity between women's response to the threat and existence of violence and what law regards as provocation defences. Provocation defences justify or mitigate actions that are in response to low level but persistent fears or threats. Put simply, men who are provoked to kill their nagging wives find their behaviour will usually be mitigated by law.[7] Similarly, men who fear their partner's sexual agency away from them and kill their partner as a result, or her assumed lover, often find their behaviour mitigated by law.[8] I wonder why women walk every night in fear of an attack from an unknown man with little more than a can of pepper spray (or a key) to protect them while some men find it reasonable to attack and kill a woman they have loved. Why does law provide excuses and justifications for some behaviour and not promote the use of justified violence in others? I wonder about the role law plays in the social dialogues and norms that are co-opted into gendered realities. In fact, from a feminist perspective, much is written about the role of law in perpetuating and excusing (justifying) gender violence against women by men. I draw on this scholarship extensively throughout this book. However, my primary concern is not the gendering or sexing of justifications for individual violence but rather to ask whether this same biased structure flows onto Western constructions of justifications for violence at the international level.

I use feminist understandings of the limitations of national laws that prohibit and justify violence to interrogate international justifications for inter-state violence. This is the domestic analogy. I also use non-legal sources to challenge the self-appointed role of law at the apex of social and cultural discourse. By using non-legal dialogues, I demonstrate the particularity of legal accounts, highlighting law as a narrative rather than as a series of objective truths and in a horizontal rather than vertical

6 For a similar discussion, see Morgan, *The Demon Lover: The Roots of Terrorism* (Piaktus, 2001, 2nd edition) at 15.

7 For a discussion of disparities in gender justice for intimate partner killings, see www.jfw.org.uk (last accessed February 2011).

8 Ibid.

relationship with other normative structures.[9] In the example above, my personal narrative would be meaningless in a formal legal analysis, which is not interested in the cultural phenomenon of gender fear and violence but in the regulative impact of, for example, anti-stalking legislation. The focus on law often overlooks the role of gender in stalking or in other forms of sexual harassment or violence. To understand the role of gender in legal relationships, it is necessary to appreciate law's role as a social and cultural narrative. This is to see law as a narrative.[10]

In this book, I interrogate international law on force from a feminist perspective: focusing on the power of the Security Council to authorise the use of force and state justifications for the use of force on the territory of other states. My starting point is the question: how do justifications for individual violence and force – challenged by feminist scholarship as sexed and gendered – re-emerge in international justifications for the use of force? To answer this question, I take the law on the use of force and consider the narratives produced under the auspices of international law, exposing their sexed and gendered assumptions. My motivation is the justification that I make to my children when expressing my desire for an absence of force and violence in their lives.

9 For example, I compare personal narratives of those experiencing the impact of force with those using force (chapters two, three, five). I use the narratives of women in nationalist movements in chapter four and I draw on feminist scholarship outside of the legal academy to explore the narrowness of legal narratives. See chapter six for a discussion of the limitations of this approach.

10 See Thornton, 'Introduction' in *Romancing the Tomes: Popular Culture, Law and Feminism* (London: Cavendish, 2002); also see Buss, 'Keeping Its Promise: Use of Force and the New Man of International Law' in Bartholomew, *Empire's Law* (London: Pluto, 2006).

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have all given me, I continue to learn as I teach and, of course, thank you Chenaara for scaring the life out of me the day before my first lecture at SOAS. Your influence on this book is more subtle yet just as important. The text remains up to date to February 2011.

All errors remain my own.

Abbreviations

AJIL	American Journal of International Law
BYIL	British Journal of International Law
CEDAW	Convention on the Elimination of Discrimination against Women
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
EULEX	European Union Rule of Law Mission in Kosovo
EWCA	England and Wales Court of Appeal
FAO	Food and Agriculture Organisation
FARDC	Congolese Armed Forces
GA	General Assembly
HCA	High Court of Australia
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law commission
ILM	International Legal Materials
ILR	International Law Reports
INTERFET	UN International Force in East Timor
JSMP	East Timor Judicial System Monitoring Programme
KFOR	Kosovo Force (NATO)
NATO	North Atlantic Treaty
MINUSTAH	United Nations Stabilisation Mission in Haiti
MMORPG	Massive Multiplayer Online Role Playing Game
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental organisation
NLDA	Netherlands Defence Academy
NPT	Non-Proliferation Treaty
PKK	Kurdish Democratic Party (Patriotic Union of Kurdistan)
Res	Resolution
ROK	Republic of Korea

SADR	Saharawi Arab Democratic Republic
SC	Security Council
TWAIL	Third World Approaches to International Law
UN	United Nations
UNTAET	UN Transitional Administration in East Timor
UNIFEM	United Nations Fund for Women
UNMS	Union Nacional de Mujeres Saharau
UNYB	United Nations Yearbook
UK	United Kingdom
US	United States
USSR	United Soviet Socialist Republic
WFP	World Food Programme
WHO	World Health Organisation

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 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.

Simone Weil, 'The Iliad, or the Poem of Force',
in Simone Weil *et al.*, *War and the Iliad*,
(New York Review Books, 2005, first published 1945) 11

[n]atality; the beginning inherent in birth can make itself felt in the world only because the newcomer possesses the capacity of beginning something anew, that is, of acting. In this sense of initiative, an element of action and therefore natality, is inherent in all human actions. Moreover, since action is the political activity par excellence, natality, and not morality, may be the central category of political [thought].

Hannah Arendt, *The Human Condition* (Chicago, 1998, 2nd Edition) 9

Contents

1 Feminist legal approaches and international law on the use of force

International rules on the use of force are contained in the UN Charter and customary international law. The central provision on the use of force contained in the UN Charter is Article 2(4) which prohibits the threat or use of force by states. The prohibition is supplemented by a collective security structure that envisages the pacific settlement of disputes by states and regional organisations, detailed in chapters VI and VIII of the Charter, and the use of non-forcible and forcible measures authorised by the Security Council, under chapter VII of the Charter.[1] The UN Charter also retains the right of states to use force in self-defence under Article 51. All these provisions function and develop in tandem with customary international law on the use of force.[2] This book uses feminist methods to assess customary international law and UN Charter provisions on the use of force.

Since the year 2000 the United Nations has initiated a host of reforms to protect women during conflict,[3] as well as inserting standard form paragraphs in many conflict specific resolutions alerting states and UN personnel to the existence of sexual violence during armed conflict[4] while instituting a policy of zero-tolerance for sexual misconduct by peacekeepers.[5] The UN Secretary-General has had a Special Advisor on Gender Issues and the Advancement of Women since 1997 and in 2010 the UN General Assembly created 'UN Women' an umbrella institution to co-ordinate the increasing number of gender-based initiatives and departments within the United Nations.[6]

1 Regional organizations may be authorized by the Security Council to undertake enforcement operations under Article 53 of the UN Charter.

2 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA), ICJ Reports (27 June 1986) 14, at paragraph 172–176.

3 SC Res 1325 (30 October 2000), SC Res 1820 (19 June 2008), SC Res 1888 (30 September 2009), SC Res 1889 (5 October 2009), SC Res 1960 (16 December 2010).

4 For example, SC Res 1962 (20 December 2010) on the situation in the Ivory Coast in operative paragraph nine: '*calls upon* all parties to take appropriate measures to refrain from, prevent and protect civilians from all forms of sexual violence'.

5 For example, SC Res 1944 (14 October 2010) on the situation in Haiti in operative paragraph 15: 'Requests the Secretary-General to continue to take the necessary measures to ensure full compliance of all MINUSTAH personnel with the United Nations zero-tolerance policy on sexual exploitation and abuse, and to keep the Council informed, and urges troop- and police-contributing countries to ensure that acts involving their personnel are properly investigated and punished'.

6 See: www.unwomen.org (last accessed February 2011).

The 1990s focus on gender mainstreaming in international institutions has consequently developed into a plethora of projects across the UN, over a host of issues, to challenge gender-based violence and discrimination, including in situations of armed conflict.

Within the Security Council, initiatives include the following: gender training for UN forces and peacekeeping operations,[7] clear disciplinary procedures for UN personnel found to violate the Code of Practice on sexual behaviour of personnel, Gender Affairs Units in many post-conflict communities, the condemnation of systematic and widespread sexual violence during conflict, the call for sanctions against perpetrators of sexual exploitation and abuse and the call for increased participation of women in post-conflict re-construction and decision-making. Despite clear limitations within this aspect of the UN Security Council's work, notably the interchange of the word 'women' with 'gender', the failure to challenge the links between the construction of masculinity as a social norm that implicitly condones violence and the continuance of the 'war system' within this model, these developments, on paper, appear to demonstrate what can be regarded as feminist inspired developments within the institutional setting of the United Nations.

Even with these impressive developments, and while a host of academic journals, university departments and NGOs prepared to mark 'ten years of Security Council Resolution 1325 on women, peace and security,'[8] mid-2010 saw reports of systematic sexual violence in the village of Luvungi, in the Democratic Republic of Congo (DRC). The reports were a chilling reminder of the gap between words and action. The UN Assistant Secretary-General for Peacekeeping, Mr Atul Khare, reported to the Security Council that 242 cases of civilians requiring treatment for rape had been recorded in Luvungi by medical personnel with an additional 260 cases reported from neighbouring towns. The sexual violence was believed to be the consequence of attacks by armed rebels between 30 July 2010 and 2 August 2010. UN Peacekeepers stationed nearby were recorded as unaware of the violence, having withdrawn patrols of the villages prior to the attacks taking place. Ostensibly, under Security Council Resolutions 1820 and 1888, the Security Council had announced its readiness to act and 'to address widespread or systematic sexual violence'.[9] Not until a month after the attacks did UN peacekeepers in the region demonstrate a commitment to increased patrols and visibility. In October 2010, UN peacekeepers had arrested the commander of the Mai Mai Cheka rebel group involved in the attacks, and the UN Special Representative on Sexual Violence in Conflict urged the Security Council to support processes to ensure the end of impunity for perpetrators of sexual violence during armed conflict.[10] By February 2011, and despite a new Security Council resolution on women, peace and security in December 2010, no Security Council response to this specific series of systematic sexual attacks had taken place.

7 See: http://cdu.unlb.org/UNStrategy/Prevention.aspx (last accessed February 2011).

8 See: http://www.unifem.org/campaigns/1325plus10/ (last accessed February 2011).

9 SC Res 1820 (19th June 2008); SC Res 1888 (30 September 2009). Also see SC Res 1960 (16 December 2010).

10 SC/10055, 14 October 2010, Recent Arrests in Mass Rape Cases in Democratic Republic of the Congo.

There is a chilling dissonance between the rape of 500 people in a systematic attack by armed groups in a region patrolled by a UN force, authorised to use force to protect civilians, and ten years of Security Council resolutions inclusive of paragraphs stating:

> 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, where necessary, adopt appropriate steps to address widespread or systematic sexual violence.[emphasis added][11]

Both the failure of UN words and the magnitude of harm are haunting. Consequently, every reference to the 'feminist' success found in contemporary international institutions, including the UN Security Council, seems to mark the pain of every individual harmed during the ongoing conflict in the DRC. Can words change actions? Can words stop wars, stop violence, stop conflict or rape? These questions underlie the thinking behind this book.

In this book, I examine the words (laws) that attempt to regulate state-led violence that constitutes the international legal definition of armed conflict. The book uses feminist legal methods as a means to analyse the way that international law on the use of force is constructed and understood. The discussion of events in the DRC, above, refers to the violence perpetrated during armed conflict that is generally governed by the international humanitarian law of armed conflict. However, the shift towards recognising the use of sexual violence as a systematic and widespread 'weapon' during armed conflict moves the international legal system on the use of force, the *jus ad bellum*, towards recognising sexual violence as a justification for the use of increased force. In fact, the UN's response to the violence perpetrated in Luvungi and nearby villages was for increased UN military action, even if this was temporally dislocated from the acts themselves. Throughout this book, I argue that institutional and state justifications for the use of military force mirror the gendered model of interpersonal justifications for violence apparent in Western liberal democracies such as the United Kingdom, the United States, Canada and Australia. Consequently, force deployed to 'save women' does little to halt sexual violence and other forms of gender-based violence in armed conflict or to halt armed conflict.

I also explore the continuum of harm that women experience during armed conflict and argue that women's experiences of armed conflict provide strong justification for increased *restraint* in the use of force, including the use of force on humanitarian grounds.

The endemic sexual violence in the DRC is not the subject of this book, although I was mindful of the violence that continues to be perpetrated in the DRC and

11 SC Res 1820 (19 June 2008) operative paragraph 1.

elsewhere as I wrote the book. Those who cannot speak in the Security Council due to the conditions they live in, stand as a reminder that UN reform on women, peace and security has not stopped violence. To this end, a furtherance of feminist politics and debates that look at the ways international laws are constructed and justified is a programme of re-thinking the possibilities of laws, of words and of change: this is the approach of this book.

The book presents claims directed at feminist legal theories and at international law on the use of force. For feminist legal theories, I argue that a re-examination of the foundations of feminist approaches to international law is required. While feminist studies of international law contribute an important critique of the contemporary contours of international law,[12] there remains only limited analysis of the norms regulating force and the question of when force is justified. The book reveals that this absence is reflective of a larger silence from feminist legal theories on the relationship between law and violence. I argue that Arendt's model of natality as a political framework, which is a focus on creativity through a central focus on birth rather than mortality, is useful to feminist politics seeking to disrupt the law and violence relationship.[13] This larger claim emerges from recognition that the law and violence relationship is supplemented by social constructions of gender. In exposing the relationship between law, gender and violence, I advocate the necessity of restricting unilateral state justifications for the use of force and for limiting the authorisation of force by the Security Council because justifications for force and the authorisation of force are conceptually tarred by the use of military structures. Alternative means of peace enforcement are consequently devalued and under-utilised within the collective security regime. Feminist action within the security structure must develop a fundamental re-engagement with the very concept of security and potential solutions to security concerns so as to provide answers that do not revolve around the deployment of further force.

The arguments directed at international law recognise recent responses to curb the sexual violence and sexual exploitation and abuse of women during armed conflict.[14] However, I argue that, without recognition of the sexed and gendered bias of the international legal structure itself, recent collective security developments are unable to move beyond the force and counter-force paradigm that assumes that the use of force, when legal, can also be rational and controlled. Furthermore, viewing the use of force through the experiences and narratives of women illustrates how the use of force perpetuates and exacerbates insecurity in women's lives.

12 Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000); also see: Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Buss and Manji (eds), *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005), at 47, which offers a critical review of Charlesworth and Chinkin's body of work.

13 Arendt, *The Human Condition* (Chicago, 1998, 2nd edition), at 9; also see Jantzen, *Foundations of Violence* (London: Routledge, 2004) where she writes, '. . . in the west's obsession with death and mortality, our natality has been largely ignored. Yet it is in birth, in natality, that newness enters the world; and it is in the fact of new life that every other form of freedom and creativity is grounded', at 6.

14 See Report of the Secretary-General to the Security Council, 25 September 2008, S/2008/622.