

# FEMINIST REFLECTIONS ON THE 'END' OF THE WAR ON TERROR

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*This article examines the range of arguments articulated to justify the use of force under the 'War on Terror'. The three key justifications for unilateral force directed against terrorist actors, pre-emptive force, implied authorisation and the use of force to prevent terrorist actors operating from failed states, are demonstrated as analogous to domestic provocation excuses. As such, the article argues the 'end' of the 'War on Terror' has been in name only as the Obama Administration in the United States continues to develop practice in line with that of its predecessor. The analogy with domestic provocation excuses demonstrates weaknesses of contemporary US practice and of the pre-emptive force justification. Using a feminist understanding of the limitations of provocation defences and of the relationship between social, cultural, political and legal norms, the legacy of the 'War on Terror' is demonstrated as an assertion of a limited model of security that ignores the role militaries play in women's insecurity and which limits women's participation through the use of sexual stereotypes. The article concludes with a discussion of the range of feminist strategies that might be invoked to challenge the legacy of the 'War on Terror'.*

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## I INTRODUCTION

In March 2009, the United States Obama Administration replaced the language of the 'War on Terror' with the terminology 'Overseas Contingency Operation'.<sup>1</sup> In May 2010, the Obama Administration's first National Security Strategy was published and the Bush Doctrine of pre-emptive force appeared to be replaced by the language of cooperation and compliance with international

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<sup>1</sup> After the change of administration in the US in 2009, the new Obama government initially announced the end of the 'War on Terror': see Oliver Burkeman, 'Obama Administration says Goodbye to "War on Terror"', *The Guardian* (London), 25 March 2009. However the use of force by the US against terrorist actors abroad has continued under the name of 'Overseas Contingency Operation' and, after the arrest of Umar Farouk Abdulmutallab on 25 December 2009, the Obama Administration increasingly referred to the global action against international terrorism. By March 2010, the Obama Administration acknowledged that 'the United States is waging a global campaign against al-Qaida and its terrorist affiliates': National Security Council, *The National Security Strategy of the United States of America* (May 2010) 19 <[http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf)> ('2010 National Security Strategy').

law on the use of force. President Obama emphasised, '[w]e are clear-eyed about the challenge of mobilizing collective action, and the shortfalls of our international system. But America has not succeeded by stepping outside the currents of international cooperation'.<sup>2</sup> It is apparent that the era of semantics elaborating the Bush-style 'War on Terror' has ended. However, US action against terrorist actors continues, globally, in a fashion similar to the previous US Administration.<sup>3</sup> So while the articulation of a doctrine of pre-emptive force, central to Bush's 'War on Terror', is notably absent from the Obama approach, the use of force against international terrorist networks continues in a pre-emptive fashion. In this article I use the term 'global war against terrorism' rather than the 'War on Terror' to accommodate the changing terminology utilised by the US government while acknowledging that the legacy of the 'War on Terror' continues to infiltrate US justifications for the use of force. However, I argue that the legacy of the 'War on Terror' is more than the continuation of pre-emptive force now labelled the 'Overseas Contingency Operation'. An important legacy of the 'War on Terror' is the affirmation of a gendered international law and a continuation of a model of international relations ignorant of its gendered underpinnings.

This article specifically reflects on the legacy of the Bush era's 'War on Terror' for international law on the use of force. I argue that the pre-emptive force justification (the Bush Doctrine) is indicative of fundamental gendered fault lines in the international law on the use of force. I highlight a domestic analogy between the regulation of provocation defences under common law defences for violence and the pre-emptive force argument to demonstrate the gendered core of the law on the use of force. As international legal narratives shift away from the language of the 'War on Terror', we would do well to reflect on the legacy of the Bush Doctrine through the use of the 'War on Terror' as a strut to explore new strategies for challenging widespread assumptions about the role of military security as a route to human security.

For citizens in Western communities, and undoubtedly many others, the date 11 September 2001 is latent with meaning, history and, most likely, memories of where and how we heard, saw and reeled at the images of the terrorist attacks on New York, Washington and Pennsylvania. We now speak of '9/11' in knowing tones as if some sense and understanding has been wrought from this violence. My own personal narrative of 'September 11' is filled with knowledge of births and deaths in an unfortunate collision of personal and public events.<sup>4</sup>

Having been born on 11 September thirty years earlier meant that I began 11 September 2001 with anticipation and excitement at the prospect of personal celebrations at a family gathering that evening. My sister had travelled across the

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<sup>2</sup> National Security Council, *2010 National Security Strategy*, above n 1, ii.

<sup>3</sup> For a thorough discussion of the policy changes under Obama, see Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009' (Legal Studies Research Paper No 09-43, Notre Dame Law School, July 2009) <<http://ssrn.com/abstract=1501144>>.

<sup>4</sup> Charlotte Bunch, reflecting on Western introspection, acknowledges 'that 9/11 is not seen as a defining moment for the rest of the world — at least not in terms of what happened that day' emphasising instead that 'it has become a defining moment because of how it has been used. But the issues highlighted by 9/11 are not new and have been raised by many events both before and after it.': Charlotte Bunch, 'Whose Security?', *The Nation* (New York) 23 September 2002.

world to London to mark the occasion with me, which was generous of her and greatly welcomed by me. At my 29<sup>th</sup> birthday we had decided, across telephone exchanges, to celebrate my thirtieth birthday in New York. However, the birth of my second son stalled our more adventurous departure and we settled on a rendezvous in London. So, still reeling from the effects of new motherhood, I missed New York and planned to celebrate with my family in London. My son's recent birth and my birthday were foremost in my mind as 11 September 2001 dawned. A crying baby and a sleepless night were not about to inhibit an evening in a child-free restaurant, enjoying the luxury of a babysitter and someone else's cooking. Instead the dinner became, for me, symbolic of the decadence of our culture as each of us wondered whether 'total war'<sup>5</sup> would be thrust upon us by morning. The streets of London were eerily deserted on the evening of 11 September 2001, adding to the sense of *fin de siècle*. The day closed with the knowledge that my birthday now stood as 'an exemplary day of male violence'.<sup>6</sup>

When I reflect on that day, as equally as I remember the unspeakable scenes watched on a television screen in London, my memories are fused with the also unspeakable but vastly different trials I encountered as a mother fighting for the preservation of a public self. The world seemed to collude in definitions thrust upon me that I did not want or could not live out. I was tired, I was lonely, I was busy, I was sore, I was exhausted and I was, am, a mother. Like violence, childbirth and postnatal experiences often remain unspeakable aspects of our collective experience.<sup>7</sup> Just as we do not launch into our understandings of the slow deaths inflicted upon Iraqi civilians through the destruction of civic infrastructure,<sup>8</sup> nor do we discuss the painful, bloody, heroic labour of birthing. The connection between the two — violence and birth — are explored by Cohn as she describes the language used by scientists involved in the testing and development of the atomic bomb:

There is one set of domestic images that demands separate attention — images that suggest men's desire to appropriate from women the power of giving life and that conflate creation and destruction. The bomb project is rife with images of male birth ...

The entire history of the bomb project, in fact, seems permeated with imagery that confounds man's overwhelming technological power to destroy nature with the power to create — imagery that inverts men's destruction and asserts in its place the power to create new life and a new world. It converts men's destruction into their rebirth.<sup>9</sup>

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<sup>5</sup> Colin McInnes, *Spectator-Sport War: The West and Contemporary Conflict* (Lynne Rienner, 2002) ch 4.

<sup>6</sup> Catharine A MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press, 2006) 260. See also Martin Amis, *The Second Plane: September 11 — 2001–2007* (Jonathan Cape, 2008) 19, 49, connecting the masculine violence of the 9/11 terrorists with negation of female citizenship common to religious fundamentalism.

<sup>7</sup> Robin Morgan, *The Demon Lover: The Roots of Terrorism* (Piatkus, 2<sup>nd</sup> ed, 2001) 68.

<sup>8</sup> See Nuha Al-Radi, *Baghdad Diaries: A Woman's Chronicle of War and Exile* (Vintage, 2003).

<sup>9</sup> Carol Cohn, 'Sex and Death in the Rational World of Defense Intellectuals' (1987) 12 *Signs* 687, 699–701.

Violence has something that birthing inherently lacks. While all humans have the capacity for violence, men are born but they cannot give birth.<sup>10</sup> Male experiences of birth are, therefore, forgotten, second-hand or downplayed. It is this that Cohn seems to suggest the building of weapons, at some level, may compensate for.<sup>11</sup> This is what Scarry refers to as the 'unmaking of the world'.<sup>12</sup> Yet even this is a culturally constructed narrative, since men do experience birth, as children, partners, fathers, medical professionals, as brothers, uncles and as significant others. Even more so than female experiences of birth, men's experiences of birth are hidden in Western communities.

What does birth, creation, have to do with the international law on the use of force? It is through an unhappy coincidence that my birth-day is now shared with the most visually confronting act of terrorism known to humankind. The very public preoccupation of humankind with violence over birthing is not an unhappy coincidence. It is instead something we all play a role in developing and maintaining across our lifetimes. This article is about violence, force and justifying violence but it is also about creativity and birth — the creation of alternative narratives, alternative strategies and an alternative international law than the one we see as predominant from our positions in Western communities. Arendt defines the creation of new narratives, philosophies and political action as 'natality', arguing that it is the capacity for natality that makes us human. In natality:

the new 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 of natality, is inherent in all human activities. Moreover, since action is the political activity par excellence, natality, and not morality, may be the central category of political ... thought.<sup>13</sup>

Arendt's use of the natal experience as a means of understanding the world of political action is instrumental to developing an alternative conception of justice.<sup>14</sup> If each of us is fortunate enough to hold a newborn baby in our arms then we are given the possibility of understanding that all of us are born with full rights and no rights. Full rights because the newborn human exemplifies our equal origins as crying, thirsty children. No rights because no child survives simply through an allocation of rights, but rather through the input of, and dependence on, the will of other humans for the provision of basic rights, food, shelter, communication and warmth. To have the capacity for individuality and

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<sup>10</sup> Apologies for stating the obvious.

<sup>11</sup> See also Klaus Theweleit, 'The Bomb's Womb and the Genders of War: War Goes on Preventing Women from Becoming the Mothers of Invention' in Miriam Cooke and Angela Woollacott (eds), *Gendering War Talk* (Princeton University Press, 1993) 283.

<sup>12</sup> Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1985) 22.

<sup>13</sup> Hannah Arendt, *The Human Condition* (University of Chicago Press, 2<sup>nd</sup> ed, 1998) 9.

<sup>14</sup> It strikes me, further, that elevation of the role of natality, to more than the giving birth to new humans to encompass the giving birth to ideas and action in the political realm, has the potential to challenge cultural norms regarding motherhood and birthing as definitive female experiences. By shifting natality away from mothering, action and agency are offered to individuals in a radical and challenging manner because Arendt's conception of natality is not an inherently gendered sphere.

to be dependent is thus to be born. For international law to move forward it must see the dependency *and* the isolation of individuals rather than continue to construct the state in an image of separateness and autonomy. Obama's 2010 security strategy moves toward this model when it acknowledges that 'we must recognize that no one nation — no matter how powerful — can meet global challenges alone. As we did after World War II, America must prepare for the future, while forging cooperative approaches among nations that can yield results'<sup>15</sup> However, the underwriting of this policy with an affirmed unilateralism when cooperation is perceived as unproductive<sup>16</sup> and an emphasis on the achievement of security through military means<sup>17</sup> heralds a continuation of a view of international subjectivity that asserts the state as the central international legal actor and decision-maker, and in a manner that mimics the individual as the sovereign actor within domestic legal systems, thus reaffirming legal liberalism's ideology of individualism over the collective. Furthermore, while the language of the 'War on Terror' has changed under Obama, it is important — perhaps fundamental — to recognise that US practice has not.

In this article, I argue that an analogy exists between pre-emptive force as a justification for violence and domestic provocation defences. I argue that the analogy is illustrative of contemporary discourse on the use of force functioning to reinforce the sexed and gendered model of force found in Western national systems. In Part II I review the argument for pre-emptive force, arguments for implied authorisation from the United Nations Security Council and arguments for a responsibility to protect, as well as recent US practice, so as to highlight an analogy that can be made with interpersonal justifications for provocation in Western legal structures. I demonstrate how key flaws of the pre-emptive force justification are understood through an analogy with provocation laws, particularly the incapacity of provocation to be limited by principles of proportionality and necessity. I follow this with a review of feminist responses to the global war against terrorism. The third section of the article considers how feminist methods can challenge contemporary understandings of when the use of force may be justified. I reflect on how to rethink the law on the use of force in a manner that incorporates understandings of the sex and gender of violence. I argue this approach allows us to re-imagine the international and thus re-imagine human potential toward a politics of natality.

## II THE GLOBAL WAR AGAINST TERRORISM

I begin this section with a brief discussion of the global war against terrorism and how it was articulated through a range of excuses for the use of force by a state. This is primarily evidenced through the US National Security Strategies of

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<sup>15</sup> National Security Council, *2010 National Security Strategy*, above n 1, 1.

<sup>16</sup> Ibid 22, stating: 'Military force, at times, may be necessary to defend our country and allies or to preserve broader peace and security, including by protecting civilians facing a grave humanitarian crisis ... [t]he United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will seek to adhere to standards that govern the use of force.'

<sup>17</sup> Ibid 18, stating: 'our military continues to underpin our national security and global leadership, and when we use it appropriately, our security and leadership is reinforced'.

2002 and 2006,<sup>18</sup> as well as analysis offered by key (Western) scholars.<sup>19</sup> The global war against terrorism and/or the ‘War on Terror’ phrase also emerge in numerous non-legal discourses, including as a political term used to describe or justify US acts of foreign policy:<sup>20</sup> as a socio-legal discourse in Western communities justifying the curtailment of civil liberties:<sup>21</sup> as media shorthand for a range of international events initiated after the terrorist attacks against the US in 2001: and as a justification for the use of force in specific conflicts, including Afghanistan and Pakistan,<sup>22</sup> Iraq,<sup>23</sup> Somalia<sup>24</sup> and Yemen.<sup>25</sup> The global war against terrorism was never a legal term, and specific legal narratives — pre-emptive force, implied authorisation and the responsibility to protect — were invoked to justify the use of force under the global war against terrorism.<sup>26</sup> In this sense, the global war against terrorism offers an excellent example of how legal norms rely on and engage with other normative structures, particularly cultural, political and social discourse. The entwining of social, cultural, legal and political normative orders also contributes to the regulation of

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<sup>18</sup> National Security Council, *The National Security Strategy of the United States of America* (September 2002) 15–16 <<http://www.comw.org/qdr/fulltext/nss2002.pdf>>; National Security Council, *The National Security Strategy of the United States of America* (March 2006) 23 <<http://www.comw.org/qdr/fulltext/nss2006.pdf>>.

<sup>19</sup> See David M Ackerman, ‘International Law and the Preemptive Use of Force against Iraq’, (Congressional Research Service Report, Library of Congress, United States Congress, 2003) <<http://www.au.af.mil/au/awc/awcgate/crs/rs21314.pdf>>; Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’ (2002) 51 *International and Comparative Law Quarterly* 401; Michael Glennon, ‘The Fog of Law: Self-Defence, Inherence and Incoherence in Article 51 of the United Nations Charter’ (2002) 25 *Harvard Journal of Law and Public Policy* 539; Christopher Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (2003) 4 *San Diego International Law Journal* 7; Mary Ellen O’Connell, ‘The Myth of Preemptive Self-Defence’ (American Society of International Law Task Force on Terrorism Paper Series, American Society of International Law, August 2002); Michael Reisman and Andrea Armstrong, ‘The Past and Future of the Claim of Pre-Emptive Self-Defense’ (2006) 100 *American Journal of International Law* 525; William H Taft IV and Todd F Buchwald, ‘Preemption, Iraq, and International Law’ (2003) 97 *American Journal of International Law* 557; Ruth Wedgwood, ‘The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense’ (2003) 97 *American Journal of International Law* 576.

<sup>20</sup> George W Bush, ‘Address before a Joint Session of the Congress on the State of the Union’ (Speech delivered at the US House of Representatives, Washington DC, 28 January 2003): ‘We’ve got the terrorists on the run. We’re keeping them on the run. One by one the terrorists are learning the meaning of American justice.’

<sup>21</sup> Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart, 2007); Ben Golder and George Williams, ‘Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism’ (2006) 8 *Journal of Comparative Policy Analysis* 43.

<sup>22</sup> Greenwood, above n 19.

<sup>23</sup> Ibid.

<sup>24</sup> International Crisis Group, ‘Counter-Terrorism in Somalia: Losing Hearts and Minds?’, (Africa Report No 95, International Crisis Group, 11 July 2005); Eric Schmitt, ‘Qaeda Leader Reported Killed in Somalia’, *The New York Times* (New York), 2 May 2008; Xan Rice, ‘“Many Dead” in US Air Strikes on Somalia’, *The Guardian* (London), 9 January 2007.

<sup>25</sup> Thom Shanker and Mark Landler, ‘US Aids Yemeni Raids on Al Qaeda, Officials Say’, *The New York Times* (New York), 18 December 2009.

<sup>26</sup> On connecting the arguments of a responsibility to protect with arguments made in response to the war on terror, see Lee Feinstein and Anne-Marie Slaughter, ‘A Duty to Prevent’ (2004) 83 *Foreign Affairs* 136; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart, 2006).

women and is therefore of particular interest to feminist scholarship. Through looking at the legal implications of the global war against terrorism, and arguments made that persistent and low-level threats may justify the use of force by states, I argue that an analogy with the rationale of domestic provocation defences is apparent. This further illustrates the manner in which international law on the use of force can be described as gendered. On the one hand, through the assumption of a legal subject that mimics the masculine legal subject that legal liberalism utilises as the 'normal' legal actor and, on the other hand, instrumentalising a gendered understanding of the manner in which violence is to be justified, tolerated and regulated.

#### A *Justifying Violence under the Global War against Terrorism*

The global war against terrorism developed (at least) three types of narratives to project legality on to the political rhetoric. The first type of narrative centred on prior international legal debates over the possibility of anticipatory force and attempts to expand self-defence under the conditions of the global war against terrorism to encompass pre-emptive self-defence. That is, the use of force may be justified in response to low-level and persistent terrorist threats. The second type of narrative focused on past Security Council resolutions and contended that states may use force if force can be justified through implied authorisations found in prior Security Council resolutions. The third range of narratives argued that the use of force is justified in failed states, as well as in response to potential threats from rogue states with the perceived capacity to build weapons of mass destruction, due to a lack of stable or democratic government. More recent articulations of this justification have used the terminology of a 'material breach' of the Security Council resolutions by Iraq, and thus cast the US-led invasion as some form of counter-measure or enforcement tool.<sup>27</sup>

Under the first narrative, the controversial customary international law category of anticipatory self-defence came to include a narrative on the possibility of the use of pre-emptive force to track down, kill or capture the 'hard core of the terrorists'.<sup>28</sup> Reisman and Armstrong suggest this is more likely to involve 'strategic preemptive strikes against weapons of mass destruction or terrorist training camps' than '[l]arge-scale attacks on states'.<sup>29</sup> This description constructs terrorist camps and WMD production facilities as (strangely) outside of the territory of states, implicitly suggesting that these are something 'Other' to the political independence and territorial integrity encompassed by the prohibition on the use of force articulated in the *Charter of the United Nations*

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<sup>27</sup> Evidence to The Iraq Inquiry, London, 27 January 2010, 9 (Lord Goldsmith) <<http://www.iraqinquiry.org.uk/media/45317/20100127goldsmith-final.pdf>>.

<sup>28</sup> National Security Council, *National Security Strategy of the United States* (March 2006), above n 18, 12; this can be compared to the earlier *National Security Strategy of the United States* (September 2002), above n 18, which suggested that the right of states to track down and prevent terrorists from acting was even larger in scope.

<sup>29</sup> Reisman and Armstrong, above n 19, 532.

(‘UN Charter’) under art 2(4).<sup>30</sup> Although the *2010 National Security Strategy* appears to dismiss the Bush Doctrine, the Obama strategy states:

The United States is waging a global campaign against al-Qa’ida and its terrorist affiliates. To disrupt, dismantle and defeat al-Qa’ida and its affiliates, we are pursuing a strategy that protects our homeland, secures the world’s most dangerous weapons and material, denies al-Qa’ida safe haven, and builds positive partnerships with Muslim communities around the world. Success requires a broad, sustained, and integrated campaign that judiciously applies every tool of American power — both military and civilian — as well as the concerted efforts of like-minded states and multilateral institutions.<sup>31</sup>

This somewhat oblique statement must be read alongside continued US military strikes in Pakistan and other states identified as harbouring the al-Qaeda threat, often through the controversial use of unmanned drones<sup>32</sup> that mimics rather than rejects the Bush policy of pre-emptive strikes. The Obama and Bush justification for these military acts remains that of homeland security. The *2010 National Security Strategy* further states: ‘we are working with partners abroad to confront threats that often begin beyond our borders’ while acknowledging that ‘[w]e must deny these groups the ability to conduct operational plotting from any locale, or to recruit, train, and position operatives’.<sup>33</sup> These statements avoid direct engagement with the international law on the use of force. US state practice since the Obama Administration came to power, however, indicates that the perceived terrorist threats abroad have been denied the capacity to materialise through pre-emptive strikes on civilian communities.<sup>34</sup>

My concern is that the narrative of pre-emptive strikes against terrorist actors both centralises the state as the key international actor, and functions through recognition of the terrorist actor as outside of the territory of the state — even while acting within a specific state — thus functioning to legitimise military strikes on the territory of another state. Furthermore, the use of force is not against a member state of the UN, but rather against the individual, permitting a threat rather than armed attack to function as the justification for unilateral violence. This mirrors the gap between interpersonal self-defence and provocation laws where self-defence assumes an attack or assault whereas provocation assumes a threat. An analogy can then be made with legal discourse that traditionally places women’s bodies outside of the remit of laws on assault and battery. Provocation laws are complicit in this legal ‘Othering’ through the location of female bodies

<sup>30</sup> Discourse has also emerged around ‘failed states’ as a site of terrorist activities that potentially permit the suspension of art 2(4) protections and the use of force by foreign states to target terrorist actors. The Security Council, in its response to terrorism, has also shown a willingness to override accepted international norms on non-intervention into the domestic jurisdiction of states. See the discussion in Iain Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’ (2003) 72 *Nordic Journal of International Law* 159.

<sup>31</sup> National Security Council, *2010 National Security Strategy*, above n 1, 19.

<sup>32</sup> See Mary Ellen O’Connell, ‘Lawful Use of Combat Drones’, Congress of the United States, House of Representatives, Subcommittee on National Security and Foreign Affairs, *Hearing: Rise of the Drones II — Examining the Illegality of Unmanned Targeting, Lawful Use of Combat Drones*, 28 April 2010 <[http://www.fas.org/irp/congress/2010\\_hr/042810oconnell.pdf](http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf)>.

<sup>33</sup> National Security Council, *2010 National Security Strategy*, above n 1, 20.

<sup>34</sup> See O’Connell, ‘Unlawful Killing with Combat Drones’, above n 3.



as potentially provocative of male violence and therefore sites where violence may be excused or justified.<sup>35</sup> Feminist legal scholarship argues that the bounded bodies of men represent the normal body of the legal subject so that not only are women's bodies defined as penetrable through heterosexual images of the sexualised female body, but law has tolerated physical assaults on women's bodies in private space that would be unthinkable with respect to the bounded male body in motion in public space.<sup>36</sup>

The construction of terrorist acts in a space outside of the territorial integrity defended by the global community of states uses a similar regulative model to the provocation defence. Once cast as outside of the 'normal' construction of (male) legal actors, that is as acting outside the control of any state, it appears that terrorist actors can be justifiably attacked for less than an armed attack. At the same time, the notion of an armed attack under art 51 of the *UN Charter* has been re-articulated to include attacks from non-state actors, whereas prior to September 11 there was an assumption that armed attacks required a link to a state to fall within art 51. For example, in the aftermath of the September 11 attacks, Gardam found that international law was such that

it is not clear that the terrorists' activities against the United States can be attributed to any particular State, in which case there is no State-based responsibility ... [and] there is no right thereby conferred on the injured State to use force in self-defence ...<sup>37</sup>

Article 2(4) defines the parameters of the international legal subject through the requirement that force must not compromise a state's territorial integrity and political independence. The use of the imagery of terrorist actors outside of the regular (accepted) boundaries of the state thus facilitates the production of a justification for violence directed at terrorists, despite the fact that the use of force also compromises the territorial integrity of the state in which the terrorists are situated.

Moreover, the threshold for violence directed at the 'Other' is lower than the threshold triggering justified violence against other legal subjects. That is, the pre-emptive force argument projects low-level persistent threats as sufficient to justify state force, in contrast to the armed attack requirement required to initiate the use of force in self-defence against a state. While the pre-emptive force argument is in some ways different to national provocation laws, there remains a conceptual analogy in that the two arguments both measure the acceptable violence perpetrated by legal subjects and are constructed by perceptions of the actors against whom the violence is directed. In national legal structures, provocation defences have consistently been developed to justify fatal violence against women who pose no immediate threat of violence, but represent a

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<sup>35</sup> See Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 149.

<sup>36</sup> Ngaire Naffine, 'The Body Bag' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 79.

<sup>37</sup> Judith Gardam, 'International Law and the Terrorist Attacks on the USA' in Susan Hawthorne and Bronwyn Winter (eds), *September 11, 2001: Feminist Perspectives* (Spinifex Press, 2002) 156, 156. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Judgment)* [1986] ICJ Rep 14, 103 [195]. However, see the discussion of Greenwood, above n 19, 16–17.

low-level threat to the honour (and often sexual integrity) of the defendant. Under international law, the global war against terrorism, scripted as pre-emptive force, utilises an analogous model of violence justified against actors within the private domain of a state as a means of responding to low-level threats, including challenges to the honour and legitimacy of Western hegemony.<sup>38</sup>

If the global war against terrorism can be narrated as similar to common law conceptions of provocation, questions can be raised about the recent shift in many jurisdictions to eradicate and limit provocation defences.<sup>39</sup> The changing nature of provocation laws in national systems, in addition to the diversity of provocation defences across systems, illustrates a clear limitation of the domestic analogy that takes a snapshot of either domestic or international laws. In viewing the snapshot, temporal and geographical variations are difficult to accommodate. For example, while provocation laws have been abolished in some Western states, some states have continued to perceive provocation as a mitigating defence to homicide, while other states construct honour crimes in a similar form to provocation narratives.<sup>40</sup> However, this criticism overlooks the purpose of the domestic analogy, which is to consider the limitations of the international legal system, specifically as they emerge in analogy with national legal structures. In this sense, the approach is not constructed to demonstrate the necessity of maintaining an analogy between national and international legal structures. Furthermore, the use of the domestic analogy as a conceptual tool does not preclude other domestic legal structures also being used as tools for measuring the strengths or limitations of international narratives.

With respect to domestic laws on the provocation defence in common law states, feminist criticisms have centred on the leniency with which the excuse is applied to mitigate domestic partner homicides perpetrated by men against women. For this reason Western feminist scholarship has advocated abolishing the provocation defence in national legal systems.<sup>41</sup> Yet, even when feminist challenges to provocation laws have impacted on the structure of law, underlying structural biases within Western legal systems have often led to harmful results for women and/or non-heterosexual men. For example, Volpp highlights how the development of a 'cultural defence' in the US to permit a wider variation of

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<sup>38</sup> See Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso, 2004); Osama bin Laden, 'Declaration of War against the Americans Occupying the Land of the Two Holy Places: Expel the Polytheists from the Arabian Peninsula' in Bruce B Lawrence and Aisha Karim (eds), *On Violence: A Reader* (Duke University Press, 2008) 540, 540.

<sup>39</sup> See, eg, Law Commission (UK), *Murder, Manslaughter and Infanticide*, Project 6 of the Ninth Programme of Law Reform: Homicide (2006) 11.

<sup>40</sup> Compare the responses of the UK, discussed in Law Commission (UK), *ibid*, and of the Australian state of Victoria: 'Victoria Scraps Provocation Murder Defence', *The Age* (Melbourne), 4 October 2005; Lynn Welchman and Sara Hossain (eds), *'Honor': Crimes, Paradigms and Violence against Women* (Zed, 2005).

<sup>41</sup> See, eg, Oliver Quick and Celia Wells, 'Getting Tough with Defences' (2006) *Criminal Law Review* 514, 523.

actions within provocation defences has reinforced male cultural power while negating women's experience of gender as a cultural condition.<sup>42</sup>

In the Australian state of Victoria, the use of a subjective test within the provocation defence led to an increased use of the provocation defence to protect heterosexual male actors from prosecution for violent and fatal attacks on homosexual men and to justify the killing of women by men overcome with jealousy.<sup>43</sup> As a consequence, the Victorian Parliament abolished the defence of provocation and the Victorian Attorney-General at the time stated, 'the defence of provocation promotes a culture of blaming the victim and has no place in a modern society'.<sup>44</sup> The Victorian provocation defence was replaced with the defence of 'defensive homicide', however subsequent analysis has suggested that the change in the law has not brought a change in the types and range of defendants successfully arguing defensive homicide.<sup>45</sup> The disproportionate number of male defendants arguing the defence appears to reflect complex social and cultural norms surrounding male and female violence. In the UK, the 1991 case of *R v Thornton*<sup>46</sup> demonstrates this well. In this case the defence of provocation was rejected by the court due to the time between the provocation and the subsequent killing, although the provocative violence existed within a setting of long-term domestic violence inflicted on the defendant. At a retrial, however, the defendant's murder conviction was quashed after the defence brought fresh medical evidence demonstrating a personality disorder suffered by the defendant as a result of the domestic violence she had experienced. That is, the female violence in this case was neither excused nor justified, but rather explained as abnormal behaviour as a result of a problem with the defendant's mental capacity rather than as a result of the long-term violence of her partner. This contrasts with UK cases where the provocation defence has been successfully argued by men who have killed an intimate partner. In these cases the behaviour of the deceased is seen to have provoked male violence, and thus

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<sup>42</sup> Leti Volpp, '(Mis)identifying Culture: Asian Women and the "Cultural Defence"' (1994) 17 *Harvard Women's Law Journal* 57. In this article, Volpp describes the US case of a man who had killed his wife and, at trial, relied on the evidence of a cultural anthropologist of Chinese cultural expectations with regard to honour because the defendant's wife had a sexual relationship with another man. This resulted in the mitigation of the defendant's sentence (to a period of probation rather than incarceration) and the reduction of the charge from murder to manslaughter. Volpp compares this to a second case involving a Chinese woman who had killed her son and unsuccessfully attempted to argue a cultural defence because the woman's 'independent' lifestyle ultimately meant Western and Chinese cultural expectations about mothering led to the cultural defence being unavailable to her. Volpp argues that the intersection of gender and cultural are screened out of this type of approach and male violence gains increased opportunity for mitigation or justification.

<sup>43</sup> 'Victoria Scraps Provocation Murder Defence', above n 40; Santo de Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110; Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/indices/issue/v11n1.html>>.

<sup>44</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 26 October 2005, 1836 (Rob Hulls, Attorney-General).

<sup>45</sup> Chip Le Grand, 'Overhaul for Murder Defence', *The Australian* (Sydney), 9 August 2010.

<sup>46</sup> [1992] 1 All ER 306.

functions to excuse the loss of self-control by the defendant.<sup>47</sup> The successful use of provocation by men as an excuse to murder has ultimately led to a reform of provocation laws in the UK and the *Coroners and Justice Act 2009* (UK) abolishes the defence of provocation<sup>48</sup> and replaces it with the defence of loss of control.<sup>49</sup> The widespread acceptance in common law states of the gendered limitations of the provocation defence, as well as the additional social and cultural norms that continue to inform the range of contemporary excuses, alludes to the gendered social, cultural and legal assumptions that flow into constructions of the international excuse of pre-emptive force.

The analogy between pre-emptive force and provocation defences also demonstrates the inherent weaknesses of the pre-emptive force argument. The justification fails to adequately set restrictions on force, in terms of proportionality or necessity, as this is akin to the gendered subjectivity that has marred application of the provocation defence.<sup>50</sup> The pre-emptive force argument justifies the use of force through an assumption, made by the state using force, about the future motives of the individuals killed in any pre-emptive attacks. This is a form of 'blaming the victim' in the sense that terrorists are held responsible for the use of force used to destroy them or, in the words of the 2009 US Administration, 'we have a clear and focussed goal: to disrupt, dismantle and defeat al-Qaeda in Pakistan and Afghanistan, and to prevent their return to either country in the future'.<sup>51</sup> This unusual euphemism for killing terrorists ('prevent their return') is formulated in parallel to domestic provocation justifications: the suspected terrorist actor is blamed for low-level, persistent provocation in order to justify the extreme use of force and a circumvention of both international and local criminal justice standards, and to halt the violence of individual (non-state) actors.

The second justification for the use of force articulated by the US within the narrative of the global war against terrorism encompasses the possibility of implied authority from the Security Council. After the failure of the US and its allies to discover WMD in Iraq, perhaps due to the ongoing violence within the Iraqi state, this implied authority is a common justification given for the invasion of Iraq in March 2003.<sup>52</sup> Security Council Resolution 1511 endorsed the presence of the Multi-National Force in Iraq from October 2003;<sup>53</sup> previously, however, excuses and justifications articulated by states and scholars had focused on (the much older) Security Council Resolution 678 to gain legal

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<sup>47</sup> See, eg, the description of the case of Joseph McGrail in Susan S M Edwards, 'Abolishing Provocation and Reframing Self Defence: The Law Commission's Options for Reform' (2004) *Criminal Law Review* 181, 182 n 9.

<sup>48</sup> *Coroners and Justice Act 2009* (UK) c 25, s 56.

<sup>49</sup> *Ibid* ss 54–5; for discussion see Alan Norrie, 'The *Coroners and Justice Act 2009* — Partial Defences to Murder: (1) Loss of Control' (2010) 4 *Criminal Law Review* 275.

<sup>50</sup> Leader-Elliott, above n 35, 522.

<sup>51</sup> Merle David Kellerhals Jr, *Obama Announces New Strategy for Afghanistan, Pakistan* (27 March 2009) America.gov <www.america.gov>.

<sup>52</sup> See Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56 *International and Comparative Law Quarterly* 157.

<sup>53</sup> SC Res 1511, UN SCOR, 58<sup>th</sup> sess, 4844<sup>th</sup> mtg, UN Doc S/RES/1511 (16 October 2003); see also SC Res 1483, UN SCOR, 58<sup>th</sup> sess, 4761<sup>st</sup> mtg, UN Doc S/RES/1483 (22 May 2003).

credibility for the use of force in Iraq.<sup>54</sup> In 2010 the UK government articulated this as occurring through a 'material breach' of the Security Council resolutions. This narrative, apart from its spurious legality, invokes a sense of provocative behaviour by the rogue state that, although not immediately threatening to the hegemon, provokes the use of violence through the continual defiance of the hegemon's demands (although such demands were originally articulated through the institutions of the UN).

The 2003 use of force in Iraq illustrates the limitations of a provocation-type justification for the use of force, as well as the intrinsic difficulties of equating security with military force.<sup>55</sup> Unilateral state assessment of the magnitude of threats posed by Iraq proved to be vastly overestimated. This diminished the claim that the use of force in 2003 against Iraq had been necessary and demonstrates an analogous feature of the implied authorisation argument/justification with the provocation defence in domestic legal structures: the choice not to act through the collective security structure is, in the implied authorisation argument, bolstered by the self-belief (of the UK and US) that the collective security structure condones the action and thus legitimates the violence. Similarly, provocation defences imply a self-belief by the aggressor in the acceptability of individual acts of violence which gain retrospective legitimacy through the collective legal structure. Responsibility for the violence is ultimately attributed to those against whom the violence is directed. For the husband or partner whose honour is challenged by the sexual activity of his wife/girlfriend/ex-lover, it is her behaviour that justifies and provokes his violence, which is assumed to be sanctioned later by the community through the legal defence of provocation. In the implied authorisation/material breach example, the rogue state's assumed and continual violation of an international norm/expectation/regulation justifies and provokes the powerful state's future violence, because of the legitimate belief of the actors in the validity of their acts, eventually sanctioned — or at least not condemned — by the international community through legal means.

The hindsight offered by the failure of the US and its allies to find WMD in Iraq emphasises the accuracy of Brownlie's curiously predictive 1961 assessment of pre-emptive force justifications as 'extremely vague' such that 'any act or omission by the authorities of a State could be regarded as provocation if it displeased a powerful opponent'.<sup>56</sup>

In addition to the regulative analogy, the consequent social, cultural, legal and economic consequences for women after the use of force in Iraq in 2003 illustrates how military force — whether authorised, justified or illegal — contributes to, rather than eliminates, threats to women's security. The current status of women in Iraq exposes the insecurity resulting from the justification of the use of force as implied authorisation. Al-Ali and Pratt have found in their research on the condition of women in Iraq after the US-led

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<sup>54</sup> SC Res 678, UN SCOR, 46<sup>th</sup> sess, 2963<sup>rd</sup> mtg, UN Doc S/RES/678 (29 November 1990).

<sup>55</sup> See Nadjie Al-Ali and Nicola Pratt, *What Kind of Liberation? Women and the Occupation of Iraq* (University of California Press, 2009).

<sup>56</sup> Ian Brownlie, 'The Use of Force in Self-Defence' (1961) 37 *British Year Book of International Law* 183, 199.

use of force that:

Iraqi women are not suffering because of anything specific to Islam. They are suffering because there is a staggering amount of violence on all levels and no functioning state to provide security, services, and adequate humanitarian assistance. No-one is willing or able to guarantee and implement women's legal rights. The legal rights enshrined in the contested constitution are flawed to start with and do not promote equal citizenship. Iraqi women are also deprived because of widespread and crippling poverty, large-scale unemployment, and lack of access to adequate resources.<sup>57</sup>

As the US and its allies embarked upon their withdrawal from Iraq in 2010, the focus of US foreign military action has centred on Afghanistan and the destruction of the Taliban and al-Qaeda actors along the northern Afghan and Pakistan border. Despite continued violence in Iraq, Western media has re-focused on the Afghan–Pakistan violence. As Western attention and the forces themselves shifted, the Obama Administration utilised the rhetoric of women's rights to underscore the nature of the threat in Afghanistan and Northern Pakistan.<sup>58</sup> The rhetoric of women suffering and under threat from Islamic power is used to supplement the image of terrorist provocation justifying US force in Afghanistan and northern Pakistan. This occurs without reflection on the role that the US and its allies have played in contributing to the insecurity in women's lives and the refraction of women's rights in Iraq. The failure to see the impact of the use of force in Iraq on women's rights, and women's lives, returns us again to the unsatisfactory nature of the implied authorisation argument that cannot engage a notion of proportionality as, like the authority, the threat is implied.

Through contrasting the narratives about women in Iraq and women in Afghanistan, the underlying gendered performance of international law is revealed. The prevalent international narrative on women's rights in Iraq is one of formal equality, as international representations focus on the instability of the state formed after the US-led invasion to justify the use of coalition troops to monitor the re-structuring of the Iraqi state. A formal equality narrative ignores the daily insecurity that Iraqi women navigate and the role that a return to religious legal structures in the area of family law (amongst others) will play in the future (in)security of Iraq women.<sup>59</sup> In Afghanistan, where illustrating the instability of the state is an important aspect of the narrative justifying the continued use of (Western) force, women's vulnerability is brought to the fore, not as an issue in and of itself, but rather to anchor the justification for the use of force. Feminist approaches to international law must look beyond the rhetoric of the global war against terrorism to articulate strategies that challenge women's insecurity from the domestic to the international sphere. The insecurity of women in Iraq is linked to the insecurity of women in Afghanistan, and also to the gendered narratives that confine and restrict women's capacity to be agents for change in Western states. I return to the role of women's participation in challenging the international law on the use of force below.

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<sup>57</sup> Al-Ali and Pratt, above n 55, 166.

<sup>58</sup> Kellerhals, above n 51.

<sup>59</sup> Deniz Kandiyoti, 'Between the Hammer and the Anvil: Post-Conflict Reconstruction, Islam and Women's Rights' (2007) 28 *Third World Quarterly* 503.

The third type of legal argument enlarged in the context of the global war against terrorism engages the narrative of failed states that is apparent in international legal discourse since the end of the Cold War but has become specifically connected to the use of force in the era of the global war against terrorism. Under this narrative, suspected terrorist actors on a foreign territory become factors assisting identification of the status of a state as failed and as symbols justifying the use of force.<sup>60</sup> In 1993 the Security Council identified the Libyan government's failure to renounce terrorism as a threat to international peace and security, leading to the imposition of sanctions by the Security Council which were not lifted until 2003.<sup>61</sup> However, after the instigation of the global war against terrorism, this narrative shifted considerably, as the US sought to justify unilateral military action with the targeting of terrorists in failed states. For example, the US used force intermittently after 2007 in the 'failed' state of Somalia, suggesting that the identification of failed states may permit a softening of international regulations with respect to the principle of non-interference in other states.<sup>62</sup> The continuing use of unmanned drones by the US to attack terrorist actors in the northern regions of Pakistan, the 2008 attack on Syrian territory, and the December 2009 attacks in Yemen have also been justified through the representation of the territory subject to force as outside of the control of the sovereign state.<sup>63</sup>

A similar narrative is presented with respect to rogue states that are perceived to be developing weapons of mass destruction. For example, Feinstein and Slaughter argue in favour of a 'duty to prevent' that is articulated through a comparison with the 'Responsibility to Protect' narrative, claiming that:

Humanitarian protection is emerging as a guiding principle for the international community. In the same vein, we propose a duty to prevent, as a principle that would guide not only the Security Council in its decision-making but also national governments in shaping foreign policy priorities ... Ours is not a radical proposal. It simply extrapolates from recent developments in the law of intervention for humanitarian purposes ... [t]he corollary duty to prevent governments without internal checks from developing WMD ...<sup>64</sup>

The proposed duty to prevent includes the possibility of the use of unilateral force by states to prevent threats from developing. Although yet to be articulated by a state in the language of a duty to prevent, the articulation of what is

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<sup>60</sup> See Ralph Wilde, 'The Skewed Responsibility Narrative of the "Failed States" Concept' (2002) 9 *ILSA Journal of International and Comparative Law* 425; Gerald B Helman and Steven R Ratner, 'Saving Failed States' [1993] (89) *Foreign Policy* 3; Tonya Langford, 'Things Fall Apart: State Failure and the Politics of Intervention' (1999) 1(1) *International Studies Review* 59.

<sup>61</sup> See SC Res 883, UN SCOR, 48<sup>th</sup> sess, 3312<sup>th</sup> mtg, UN Doc S/RES/883 (11 November 1993); SC Res 1502, UN SCOR, 58<sup>th</sup> sess, 4814<sup>th</sup> mtg, UN Doc S/RES/1502 (26 August 2003).

<sup>62</sup> Rice, above n 24.

<sup>63</sup> Saeed Shah and Ewen MacAskill, 'Anger in Pakistan at US Plan to Expand Drone Attacks', *The Guardian* (London), 19 March 2009; Patrick Cockburn, 'US Admits Raiding Syria to Kill Terrorist Leader', *The Independent* (London), 28 October 2008.

<sup>64</sup> Feinstein and Slaughter, above n 26, 149–50.

described as ‘the law of intervention for humanitarian purposes’ illustrates how the argument, on the one hand, utilises a past narrative (on humanitarian interventions) while consciously changing that narrative (describing this as law). While the Responsibility to Protect and subsequent institutional documents embracing the Responsibility to Protect model affirmed the *UN Charter*, as well as human rights laws, to articulate the new narrative, both the failed state discourse and the duty to prevent narrative shift away from the *UN Charter* significantly.<sup>65</sup> This cannot be produced by a solely legal narrative; rather, the legal narrative is bolstered by social, cultural, political, even economic narratives that reproduce the fear of the Muslim terrorist or of the rogue state developing WMD to ultimately justify preventive, forceful responses to future potential provocations.

The Responsibility to Protect doctrine, articulated by the International Commission on Intervention and State Sovereignty, maintains a focus on states while giving the appearance of addressing private/domestic violence within a state.<sup>66</sup> The failed state narrative furthers this insufficient understanding of addressing non-state actors on the international plane. The Responsibility to Protect doctrine originates in concerns for non-state actors at risk from violations either tolerated or enacted by the state itself. In contrast, the failed state narrative targets non-state actors themselves, circumventing the complicity or responsibility of the state the non-state actors are operating from and consequently circumventing the potential of other areas of international law to challenge, prevent or combat terrorism. The turn to the use of force through narratives of failed states replicates the provocation defence in national legal structures which permit the legal subject’s subjective assessment of a situation to define an event, regardless of whether that assessment coheres with the agreed norms of the legal community.

Behind each of these arguments stemming from the global war against terrorism, there is a repetition of narratives demanding a response to low-level but persistent threats, such as that posed by transnational terrorism. However, the US government reports that 72 066 individuals were targeted by terrorists, globally, during 2007. Of this figure, 19 individuals were private US citizens, all of whom were in conflict zones at the time of the recorded attack. The report further records that approximately half of the individuals targeted by terrorist acts were of Muslim faith and nearly 100 mosques were attacked during 2007.<sup>67</sup> This data quite clearly illustrates the low-level threat of terrorism, at least to Western states, despite its persistent nature.

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<sup>65</sup> Gareth Evans et al, ‘The Responsibility to Protect’ (Report of the International Commission on Intervention and State Sovereignty, December 2001).

<sup>66</sup> See Gina Heathcote, *The Law on the Use of Force: A Feminist Analysis* (Routledge-Cavendish, forthcoming 2011) ch 6.

<sup>67</sup> See US Department of State, *National Counterterrorism Centre: Annex of Statistical Information* (Country Reports on Terrorism, Office of the Coordinator for Counterterrorism, 30 April 2008) <[www.state.gov/s/ct/rls/crt/2007/103716.htm](http://www.state.gov/s/ct/rls/crt/2007/103716.htm)>.



As a common law defence to homicide, mitigating murder to manslaughter, the provocation excuse until recently existed in England for defendants

who, without acting out of a considered desire for revenge: (1) killed only in response to gross provocation; and/or (2) killed only in response to a fear of serious violence in circumstances where someone of the defendant's age and of an ordinary temperament might have reacted in the same or a similar way.<sup>68</sup>

Since February 2010, the United Kingdom *Coroners and Justice Act 2009* (UK) has replaced the common law on provocation with the new partial defence of loss of control. That is, previous provocation law in the UK developed to define the defence through the acts of the deceased or the defendant's perception of deceased's behaviour even in the absence of actual violence on the part of the deceased. The new UK provision under s 54 of the *Coroners and Justice Act 2009* replaces this test with one that requires a qualifying trigger. Section 55 of the Act identifies a qualifying trigger for the defence of loss of control as a fear of serious violence under s 55(3), circumstances of an extremely grave character under s 55(4), or a justifiable sense of being wronged on the part of the defendant under s 55(5). In both the common law defence of provocation and the new statutory offence of loss of control, the defendant's perception of a future threat (a fear of serious violence) is essential to the successful pleading of the defence. This parallels the international articulation of the pre-emptive self-defence justification where a state's perception of the threat of global terrorism is utilised to justify the use of force on foreign territories. However, the UK shift to the 'loss of control' test demonstrates the normative weakness of a parallel international defence for the use of force because it is difficult, if not impossible, for a state to claim a loss of control in the process of the deployment of military force.

Furthermore, unlike domestic law, international law does not recognise the legal distinction between an excuse and a justification. The constitution of provocation as an excuse rather than a justification for homicide is relevant in terms of the analogy with international pre-emptive force. As an excuse, the provocation defence mitigates rather than absolves criminal responsibility. In this sense, the act remains illegal but the perpetrator is treated with leniency due to the mitigating factor of the provocation. Provocation as a partial defence and excuse, rather than justification for killing, acknowledges that the behaviour is wrongful and illegal. Under international law, arguments for the right to use pre-emptive force function in a similar manner, as the US, at least since 2006, has not argued for a right of pre-emptive force as a widespread justification for the use of force available to all states akin to the right of states to use force in self-defence under art 51 of the *UN Charter*. Instead, the US argued for a right to use pre-emptive force in the special circumstances of a global war against terrorism that is directed at the specific provocation/threat of future terrorist

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<sup>68</sup> Law Commission (UK), *A New Homicide Act for England and Wales?*, Consultation Paper No 177 (2005) 171–6. See also Law Commission (UK), *Partial Defences to Murder*, Final Report (2004) 30–72. Provocation in the UK has also been described as a partial excuse as it mitigates homicide to manslaughter rather than offering a full justification: see *Attorney-General for Jersey v Holley* [2005] 2 AC 580.

attacks by Islamic terrorists against Western territories.<sup>69</sup> This is articulated as a justification rather than an excuse, as the latter concept has not been an aspect of the international system. However, pre-emptive force — and, it might be added, humanitarian interventions — demonstrate a move away from justifications towards the less satisfactory category of excuses if viewed through a domestic analogy.<sup>70</sup> The discursive consequences of this shift have not yet received thorough attention in international legal discourse.

Additionally, the consequential social narrative that focuses on a fear of future provocative/violent behaviour to justify increased infringements of civil liberties by the state can be highlighted as analogous to the internalised social discourse many women experience in response to male violence. Feminist writing that emerged in the weeks after the September 11 attacks in the United States emphasised this connection between the internalisation of the fear of male violence by women and the internalisation of fears of the ‘Other’ in the guise of the Muslim terrorist within Western communities. For example, Morgan records, on 19 September 2001, the necessity to

talk about the need to understand that we must expose the mystique of violence, separate it from how we conceive of excitement, eroticism, and ‘manhood’; the need to comprehend that violence differs in degree but is related in kind, that it thrives along a spectrum, as do its effects — from the battered child and raped women who live in fear to an entire populace living in fear.<sup>71</sup>

An important aspect of the analogy between the global war against terrorism and provocation defences, then, lies in the strong social narratives of fear and the consequential curbing of liberties and agency. For women, provocation narratives are co-opted into women’s self-blame for men’s violence. This results in the refusal by many (Western, middle class) women to walk at night, or to move in public spaces unaccompanied, due to the fear of rape or attack from an unknown male assailant. This is despite intimate relationships forming the key global threat to women.<sup>72</sup> In the West, after the instigation of the global war against terrorism a similar fear was enacted culturally against the idea of the ‘unpredictable’ Muslim terrorist.<sup>73</sup> This narrative, similar to discourse on the threats to women’s safety, misallocates the source of the fear as external, the ‘Other’, the irrational Muslim terrorist, denying the role Western imperialist

<sup>69</sup> *The National Security Strategy of the United States of America* (March 2006), above n 18, 12.

<sup>70</sup> I include humanitarian intervention as it has been argued as falling under a necessity type excuse by analogy with Western domestic laws on necessity: see Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, 2002) ch 10; see also Andrea Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretative Method’ (2009) 22 *Leiden Journal of International Law* 651.

<sup>71</sup> Robin Morgan, ‘Week One: Ghosts and Echoes’ in Susan Hawthorne and Bronwyn Winter (eds), *September 11, 2001: Feminist Perspectives* (Spinifex Press, 2002) 21, 25; see also MacKinnon, *Are Women Human?*, above n 6, ch 25.

<sup>72</sup> See Liz Kelly, ‘Wars against Women: Sexual Violence, Sexual Politics and the Militarised State’ in Susie Jacobs, Ruth Jacobson and Jen Marchbank (eds), *States of Conflict: Gender, Violence and Resistance* (Zed Books, 2000) 45.

<sup>73</sup> See also Faludi’s argument that 9/11 instigated a return to traditional gender stereotyping within the US, specifically the myth of a hyper-masculinity alongside a regressive femininity hinged on women as homemakers and victims: Susan Faludi, *The Terror Dream: Fear and Fantasy in Post-9/11 America* (Atlantic Books, 2008).

strategies play in contributing to poverty and violence in foreign states and downplaying the threat of terrorism to Muslim communities outside of the West.<sup>74</sup> This discourse also collapses complex religious and nationalist identities with racial and ethnic identities. It should be noted that this is more than a social or cultural narrative as laws have been implemented to detain individuals who fit the profile of the Western conceived image of the terrorist, although these infringements of civil liberties potentially apply to all citizens. For some writers, this is a necessary sacrifice of liberal freedoms for the goal of greater security.<sup>75</sup>

The impact of the global war against terrorism for *Western citizens* becomes the narrative warning of the threat of future violence rather than actual persistent violence. This justifies those of us in Western communities averting our attention from 'Other' violences and justifies governments in Western communities curtailing civil liberties. As a New Yorker, Morgan wrote in the weeks after the September 11 attacks: '[t]he world's sympathy moves me deeply. Yet I hear echoes dying into silence: the world averting its attention from Rwanda's screams'.<sup>76</sup> That the use of force impacts on those inflicting the force is not a new narrative; Weil writes of the recognition of this in 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 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.<sup>77</sup>

Weil's analysis of the *Iliad* illustrates that which is hidden in the law on the use of force: not only does endless articulation of justifications (or excuses) ignore the consequent harm, violence, death and suffering that force inflicts but those using force are equally harmed because 'at all times, the human spirit is shown as modified by its relations with force'.<sup>78</sup> Through the global war against terrorism, the two way impact of force resounded in Western communities. One consequence was the reinforcement of polarised gendered identities and a gendered division of labour that militaries function within. Thus under the narratives of the 'War on Terror', women's roles, in relation to military actors, are encapsulated by female stereotypes of women requiring protection, women as wives and mothers and women as providers of sexual and domestic services.

The sex and gender of laws, exposed by the domestic analogy, connects with the understanding of law's function as a social and cultural narrative. The US discourse on the global war against terrorism, in an effort to build a legal narrative, utilises social and cultural narratives linking international and national legal structures. Although an increasingly accepted legal narrative regarding

<sup>74</sup> Morgan, 'Week One: Ghosts and Echoes', above n 71, 24, stating: '[n]eed I say that there were not nationwide attacks against white Christian males after Timothy McVeigh was apprehended for the Oklahoma City bombing'.

<sup>75</sup> See generally Goold and Lazarus, above n 21.

<sup>76</sup> Morgan, 'Week One: Ghosts and Echoes', above n 71, 25.

<sup>77</sup> Simone Weil, 'The Iliad, or the Poem of Force' in Simone Weil and Rachel Bepaloff, *War and the Iliad* (New York Review of Books, first published 1945, 2005 ed) 11.

<sup>78</sup> *Ibid* 3; for an alternative reading of *The Iliad* in the context of contemporary conflicts, see Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Allen Lane, 2002) xxxi, describing war as 'a creative act of civilized man'.

pre-emptive force, implied authorisation and a responsibility to prevent became apparent in mainstream international discourse during the years of the Bush Doctrine, an exclusive focus on these narratives ignores the feminist and critical voices that challenged this narrative as a corruption of international law. It is these alternative narratives to which I now turn.

### B *Feminist Responses to the Global War against Terrorism*

Scheherazade breaks the cycle of violence by choosing to embrace different terms of engagement. She fashions her universe not through physical force, as does the king, but through imagination and reflection.<sup>79</sup>

After the acts of 11 September 2001 and the instigation of the US global war against terrorism, feminist scholarship emerged (occasionally) in support,<sup>80</sup> in opposition and in analysis of this Western narrative.<sup>81</sup> In this section I concentrate on feminist legal responses to the global war against terrorism and post-September 11 narratives. In examining feminist responses to the global war against terrorism I indicate the wider possibilities — and limitations — of adapting feminist approaches to international law and to understanding the international law on the use of force. My purpose is to reflect on how the global war against terrorism narratives significantly disrupted any larger feminist study of the law on the use of force during this period. I argue that international legal developments that acknowledged the relevance of feminist approaches and women's participation during the 1990s were either sidelined by the global war against terrorism narrative or developed through the production of restrictive categories of female victim-status.

I have three arguments that I wish to bring to the fore under a feminist narrative on the global war against terrorism. First, alongside the limited narrative of terrorist actors as rogue male actors functioning outside the boundaries of the state, are images of women's sexual vulnerability and need for protection that miscast the threat to women's sexual autonomy as also outside the state. This has recently emerged in specific international legal acts, notably from the Security Council. I argue that the production of a restrictive female sexuality, vulnerable to attack from rogue male actors, is a reiteration of the sexed and gendered discourse which was prevalent in security discourse prior to the global war against terrorism. Consequently, initiatives such as Security Council *Resolution 1820*<sup>82</sup> on women, peace and security do little to challenge the underlying legal structure that is inimical to women's security.<sup>83</sup> Underlying this restraint is the feminist methodological limitation related to the construction

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<sup>79</sup> Azar Nafisi, *Reading Lolita in Tehran: A Memoir in Books* (Fourth Estate, 2003) 19.

<sup>80</sup> Jean Bethke Elshtain, *Just War against Terror: The Burden of American Power in a Violent World* (Basic Books, 2003).

<sup>81</sup> Karen Alexander and Mary E Hawkesworth (eds), *War on Terror: Feminist Perspectives* (University of Chicago Press, 2008); Susan Hawthorne and Bronwyn Winter (eds), *September 11, 2001: Feminist Perspectives* (Spinifex Press, 2002).

<sup>82</sup> SC Res 1820, UN SCOR, 62<sup>nd</sup> sess, 5916<sup>th</sup> mtg, UN Doc S/RES/1820 (19 June 2008) ('*Resolution 1820*').

<sup>83</sup> Gina Heathcote, 'Force, Feminism and the Security Council' (SOAS School of Law Legal Studies Research Paper No 06-2010, School of Oriental and African Studies, July 2010) <<http://www.ssrn.com/link/SOAS-LEG.html>>.

of a feminist ethics. While feminist analysis of sex and gender is sophisticated and multifaceted, bringing this knowledge to law often collapses categories and reinstates binaries that feminist legal theorists have worked toward dismantling.

Secondly, subversive feminist accounts in response to the global war against terrorism, alongside other critical and/or subversive approaches, became difficult to articulate when the dominant Western narrative appeared to function to reject international legal norms. Not only are there multiple alternative narratives, but law, as a discipline, effectively screens out radical alternative narratives precisely because of their status as narratives.

The third argument contends that Western feminist approaches in the era of the global war against terrorism were unable to significantly contribute to the debate because of the fundamental lack of discourse within feminist approaches to international law regarding when, if ever, force would or could be justified. This is consistent with the overall conclusion of this article that posits that feminist approaches enlarge our understanding of the law on the use of force, and that the consequences of this knowledge are relevant for the development of feminist legal theories and for international legal approaches generally. For example, the possibilities of a feminist re-imagining of the base of international law through a politics of natality, and the importance of seeing force as impacting upon the communities that force is directed at *and* from where force is directed.

Under the first argument, what is notable about institutional responses to women's issues after 11 September 2001 is the entrenched association of women with peace alongside elaboration of women as a category of protected (usually sexualised) subjects.<sup>84</sup> The anti-terrorism narrative, which revolves around the dynamic of the rogue terrorist versus the just male warrior, also functions as a gendered discourse. To complete the narrative of the violent male actor represented in Western states as the transnational terrorist, the increasing emergence of images of the female mother/child/victim requiring protection is to be expected. Post-9/11 institutional developments used gendered representations of women's sexual vulnerability and consistently suppressed the agency of women in a retrograde manner.<sup>85</sup> Placed alongside the gendered image of the Muslim terrorist, it is not surprising that the narrative of male violence expounded under the global war against terrorism is contemporaneous to projects that centre on women's sexual vulnerability rather than female empowerment or agency.<sup>86</sup> Facilitating the increasingly sexualised representation of women under international law is a general neglect of women's participation and agency.

A further consequence of the discourse on the global war against terrorism is the averting of attention from women's rights and women's participation at the international level. The Secretary-General reported in September 2008 that 2.2

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<sup>84</sup> Hilary Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' (2008) 16 *Feminist Legal Studies* 347; Dianne Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, 2007) 259; Dianne Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005) 105.

<sup>85</sup> See generally Otto, 'Disconcerting Masculinities', above n 84.

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

per cent of UN military personnel were women.<sup>87</sup> At one level this demonstrates the inadequacy of Security Council initiatives such as *Resolution 1325*<sup>88</sup> which is constructed under ch VI of the *UN Charter* as a soft, or non-binding, resolution, and is therefore without compulsory norms for the active participation of women. As a consequence, there is little incentive for states to make changes to the profile of military communities. Feminist approaches to international law, however, demand a more sophisticated analysis. The reliance by the UN on statistical articulation of gender parity indicates a fundamental failure to see feminist awareness as requiring more than adding women to existing security strategies. Furthermore, the dependence on militaries as the key strategy to challenge insecurity indicates a larger failure to see the structure of militaries as complicit in the production of women's insecurity.

The expansion of *Resolution 1325* on women, peace and security in *Resolution 1820* and *Resolutions 1888*<sup>89</sup> and *1889*<sup>90</sup>, refines the approach of the Security Council from one focused on addressing a wide range of issues to a strategy centred on sexual violence in conflict zones.<sup>91</sup> The narrowing of the Security Council focus links women's peace and security with sexual vulnerability. *Resolution 1820* also transfigures the possibility of future force to challenge sexual violence.<sup>92</sup> The reduction of the Security Council attention to a linkage of women's sexual vulnerability with potential military actions miscasts the causal element between military action and sexual violence, presenting the possibility that military action might halt, rather than function as a cause of, sexual violence, exploitation and abuse.

The only prevalent alternative image of women present in international security literature and institutional acts assumes the success of feminist and women's movements, prescribing women's formal equality as a marker of democracy. In this sense the juxtaposed images of the Western woman, the free citizen/actor in a liberal democratic state, beside the non-Western woman, vulnerable to sexual violence, exploitation and abuse that is prevalent in conflict zones, ignores the agency of the latter and the sexed and gendered notion of freedom available to the former. In this sense current institutional moves, such as Security Council Resolutions 1820 and 1888, parallel the global war against terrorism articulation of the non-Western rogue male actor with the vulnerable non-Western female victim. The only acceptable Western feminist narrative, in this context, is the narrative of Western women 'saving' non-Western women through the institutions of international law. While it is possible to situate these two narratives alongside the 'War on Terror' era, the 'end' of the Bush doctrine appears to have led to a furtherance of these two models of female citizenship; so that the Obama era may be thus far characterised as focusing on sexual violence in conflict zones alongside the exponential rise of the Western gender expert in international institutions.

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<sup>87</sup> *Women and Peace and Security: Report of the Secretary-General*, UN Doc S/2008/622 (25 September 2008) [51].

<sup>88</sup> SC Res 1325, UN SCOR, 55<sup>th</sup> sess, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) ('*Resolution 1325*').

<sup>89</sup> SC Res 1888, UN SCOR, 6195<sup>th</sup> mtg, UN Doc S/RES/1888 (30 September 2009).

<sup>90</sup> SC Res 1889, UN SCOR, 6196<sup>th</sup> mtg, UN Doc S/RES/1889 (5 October 2009).

<sup>91</sup> *Resolution 1820*, UN Doc S/RES/1820.

<sup>92</sup> *Ibid* [1].

Secondly, alternative feminist responses to the legal narratives embedded in the global war against terrorism narrative become increasingly difficult to articulate in a cultural environment that rests on the refrain, '[e]ither you are with us, or you are with the terrorists'.<sup>93</sup> The occasional legal engagements from feminist legal theorists headed in two directions during the 'noughties': the first category of feminist writing centred on the reiteration of a legal status quo while the second category of feminist writers focused on the production of non-legal materials to make critical sense of the legal narrative on terrorism. For example, under the first category, Gardam provides a response that applies a formal legal reading to diminish the viability of the rhetoric that emerged from the US, and its allies, after the September 11 attacks.<sup>94</sup> Under the second approach, Charlesworth and Chinkin invoked social and cultural knowledge to challenge the narrative of the global war against terrorism; similarly, Buchanan and Johnson gave a subversive non-legal account that engaged narrativity, law, film theory and gender theory in order to understand the West(ern) preoccupation with violence and law's foundation.<sup>95</sup> Buss also utilised a narrative approach to engage the multiple narratives that emerged in international legal scholarship otherwise limited to a dichotomy between US unilateralism and the cosmopolitan ethic of the international legal order.<sup>96</sup> Similar then to George W Bush's decree, 'you are with us, or you are with the terrorists', critical feminist writing produced a split: you are either with the formalists, reinforcing the 'good' and 'moral' basis of the existing international order, or you are with 'them' — a category encompassing US defenders of the global war against terrorism at the expense of international law. For feminist and critical theorists in Western liberal democracies, this created a dilemma in that the mainstream was often posited as the only alternative to a pro-Bush/global war against terrorism stance. The consequence was a reduction of debates and answers to the legal questions produced in the era of the 'War on Terror' to a dichotomy between texts re-imagining international law (constructed by those developing the global war against terrorism narrative) and texts asserting the relevance of the status quo of international law, which are represented as the only 'other' space for discourse.<sup>97</sup> The assertion of a mainstream (or formalist) return to the key values of the *UN Charter*, or international law, leaves little space for feminist approaches to international law that are premised on the possibility of re-imagining international law's core.

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<sup>93</sup> George W Bush, 'Address to a Joint Session of Congress and the American People', (Speech delivered at the US House of Representatives, Washington DC, 20 September 2001) <[http://www.dhs.gov/xnews/speeches/speech\\_0016.shtm](http://www.dhs.gov/xnews/speeches/speech_0016.shtm)>; also see also discussion in Judith Butler, *Precarious Life*, above n 38, 2.

<sup>94</sup> Gardam, above n 37.

<sup>95</sup> Ruth Buchanan and Rebecca Johnson, 'The "Unforgiven" Sources of International Law: Nation-Building, Violence and Gender in the West(ern)' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005) 239; Hilary Charlesworth and Christine Chinkin, 'Editorial Comment: Sex, Gender, and September 11' (2002) 96 *American Journal of International Law* 600.

<sup>96</sup> Doris E Buss, 'Keeping Its Promise: Use of Force and the New Man of International Law' in Amy Bartholomew (ed), *Empire's Law: The American Imperial Project and the 'War to Remake the World'* (Pluto Press, 2006) 86.

<sup>97</sup> Lori Fisler Damrosch et al, 'Agora: Future Implications of the Iraq Conflict' (2003) 97 *American Journal of International Law* 553.

For Orford, drawing on the work of Charlesworth, the fake crisis of a dilemma posed between the global war against terrorism and the perceived canons of international law acts as a ‘founding’ moment that ultimately reasserts the legitimacy and potential of international law.<sup>98</sup> Described in this way, the global war against terrorism is demonstrated as a crucial initiatory moment or foundational discourse, a re-affirming of the discipline of international law. We should not be surprised, in this sense, to find feminists, women, critical theorists, writers from the global south, postcolonial theorists and third world approaches excluded from the dialogue.<sup>99</sup> The Western discourse that responds to the 9/11 attacks, and mobilises a forceful solution, becomes, then, not *the* founding moment but *one* founding moment amongst many in a discipline that asserts its legitimacy and authority through crisis.<sup>100</sup> In a text written prior to the ‘War on Terror’, but with increased relevance since, Rajagopal writes:

This is nothing but a retelling of that old problem in international law: how to establish order in a world of sovereign states. But at a deeper level, this is a problem faced by law in general: on the one hand, law needs to constitute itself as the ‘other’ of violence to be legitimate, on the other hand, the law needs to use violence instrumentally to preserve power. The contradictions created by this paradox become part of the constant crises of law.<sup>101</sup>

For feminist theory this reading, on the need for crisis and the role of the crisis moment as a foundational narrative, illustrates a methodological abyss in feminist approaches to international law. As a theory that posits an alternative vision, indeed the possibility of a restructured international legal order responsive to feminist knowledge, feminist theory has been able to partake in the unearthing and exposure of the discursive violence associated with foundational narratives in law. What feminist legal theories have failed to do is indicate whether a re-imagined feminist international order must also assert a foundational narrative and whether that narrative is implicitly violent.<sup>102</sup> Law and violence jurisprudence, for example the work of Robert Cover, argues that founding law is to enact violence.<sup>103</sup> If feminist politics is a quest for a new founding moment, can the violence be in the act of severance from past narratives or must feminist theory take the further step and use force? To articulate the range of feminist positions on when, if ever, force may be justified, the relationship between law, violence and gender requires increased engagement.

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<sup>98</sup> Anne Orford, ‘The Destiny of International Law’ (2004) 17 *Leiden Journal of International Law* 441.

<sup>99</sup> For a ‘Third World Approaches to International Law’ (‘TWAIL’) analysis of the global war against terrorism, see Symposium, ‘Third World Approaches to International Law after 9/11’ (2005) 43 *Osgoode Hall Law Journal* 1.

<sup>100</sup> Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65 *Modern Law Review* 377.

<sup>101</sup> Balakrishnan Rajagopal, ‘International Law and the Development Encounter: Violence and Resistance at the Margins’ (1999) 93 *American Society of International Law Proceedings* 16, 22.

<sup>102</sup> But see Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003) ch 6.

<sup>103</sup> See the discussion of Robert Cover’s work in Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005) 69–74.



Specific feminist responses to the global war against terrorism circle these questions. For example, MacKinnon argued as early as 1992 that an international feminist approach would justify the use of force in the former Yugoslavia to halt the horrendous sexual violence and rapes.<sup>104</sup> After the September 11 attacks, MacKinnon finds:

It is the 'war on terror' that is the metaphor — legally a mixed one at that — although its pursuit has been anything but, and violence against women that qualifies as a *casus belli* and a form of terrorism every bit as much as the events of September 11th do.<sup>105</sup>

MacKinnon's work comes close to suggesting a feminist response to violence against women may be the controlled violence of legal coercion. At this point, the global war against terrorism highlights a crucial methodological limitation that is yet to be theorised or discursively engaged with by feminist approaches to international law. That is, if alternative narratives, or alternative institutional structures, are an implicit aspect of the feminist legal project, then the relationship between law and violence needs to be embraced or rejected — or, at the very least, cease to be avoided in feminist scholarship. If we sever the assumptions of a feminism ground on peace work, feminism must confront her own violence as an aspect of the human proclivity for violence.<sup>106</sup> This encounter, by definition, also interrogates the association of masculinity with war and the warrior. Even if feminist legal theory rarely condones or justifies the use of force between states, unanswered questions remain about the larger complicity of law in gendered violence. Feminist legal theories must acknowledge that a re-imagined international legal structure needs to address the relationship between law and violence to understand the further association of law, violence and gender. Although this article is unable to answer this question, it concludes with the placing of the question at the forefront of future feminist approaches to international law.

I have indicated Arendt's political model of natality as a potential feminist framework to build new narratives on force. However, as a non-legal narrative, the radical potential of Arendt's insightful work is difficult to accommodate in the contemporary international legal structure. This difficulty demonstrates the limitation of the law as a narrative technique that is at once 'inside' (as it engages with the existing mainstream of international law) and 'outside' (as it posits solutions that engage discourses and narratives outside of law's disciplinary boundaries).

Feminist approaches to international law must, first, engage directly with the question of why a critique and challenge of the international legal edifice should be mounted, if it is only to find a deep rooted structural bias that potentially negates any future project. Secondly, feminist approaches must respond to the claim that law itself may be the 'gentle civiliser'. The use of the law as narrative technique throughout this article has been, in part, a choice made to illustrate the view that current international legal arrangements need not be the only

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<sup>104</sup> MacKinnon, *Are Women Human?*, above n 6, 260; see also Catharine A MacKinnon, 'Turning Rape into Genocide' in Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994) 73.

<sup>105</sup> MacKinnon, *Are Women Human?*, above n 6, 266.

<sup>106</sup> See generally Otto, 'Disconcerting "Masculinities"', above n 84.

international legal arrangement. Furthermore, drawing on the work of Otto, feminist approaches must function as projects ‘inside’ and ‘outside’ the mainstream of international law to provide long-term, productive engagement and solutions.<sup>107</sup> The second claim, on the potential of law to restrain war and armed conflict, can only be made by blinding ourselves to the realities of armed conflict for women living in conflict regions and the impact of force on those of us living in communities who justify the use of force on the territory of another state. Furthermore, law that seeks to restrain armed conflict through controlled force rests on a fundamental error about the possibility of military violence to be controlled, rational or useful for the creation of women’s security.

### III FEMINIST STRATEGIES IN THE OBAMA ERA

Beyond the global war against terrorism, the Charter-based norms on the law on the use of force, as well as the customary international law perceptions of justified force, require sustained feminist engagement. This article has examined the arguments that construct justifications for the use of force under the US-led global war against terrorism, as well as feminist discourse in response to the global war against terrorism. This final part enlarges the argument that feminist legal theories must look at laws beyond the global war against terrorism discourse to re-examine the law on the use of force generally.

The first two claims discussed here — the demand for an increase in women’s participation in security mechanisms, and the need for an elaboration and development of the prohibition on the use of force — are directed at feminist strategies that function ‘within’ the mainstream of international law. Both of these recommendations, however, must be read within the context of the arguments for a politics of natality discussed above. In this sense I acknowledge that any reform strategies are of limited value in a system that is structurally sexed and gendered. By drawing conclusions that pertain to the development of laws as they currently exist, alongside conclusions that challenge the edifice of international law generally, I utilise Lacey’s critique/utopia/reform model and Otto’s recognition of the ‘inside–outside’ status of feminist legal theories.<sup>108</sup>

Arguments for the increased participation of women in international security mechanisms are cogent with the general focus of the article. This should not be regarded as a quota-type strategy. While the empirical, or substantive, aspect of the participation claim lies in recognising the relative absence of women in international and national decision-making structures, my own strategy for addressing this absence would be to address the incorporation of women’s narratives from outside of the mainstream of international law to explain, analyse and challenge the international law on the use of force. The methodological aspect of participation claims is to replace demands for gender equality, in terms of women’s representation, with a more sophisticated approach to women’s participation in international and state structures. The latter would involve seeking out women’s understanding of their own and society’s needs, as well as

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<sup>107</sup> Dianne Otto, ‘A Sign of “Weakness”? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325’ (2006) 13 *Michigan Journal of Gender and Law* 113.

<sup>108</sup> *Ibid*; Nicola Lacey, ‘Feminist Legal Theory and the Rights of Women’ in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004) 13.

understanding the role of women on the 'peripheries' in challenging social, cultural and legal norms.<sup>109</sup> To seek women's full participation in legal processes is, therefore, to embark on a (slow) reworking of legal structures and normative categories.

Consequently, the pursuit of women's participation shifts beyond quotas towards recognition of the failure of current legal arrangements to be inclusive of women at the foundation. Underlying this conclusion, then, is recognition that the 'foundations' of international law are neither settled or permanent but gendered and socially constructed. Furthermore, my claim is not that women's experiences and knowledge are innately different to men's, but rather that women's experiences and knowledge are informed, globally, by social and cultural norms that result in women having different priorities and needs from those of men, as well as from other women. Reflecting the cultural diversity of women's experiences and knowledge, as well as the socially constructed spheres of reference understood as female, demands a re-working of fundamental legal categories and processes built on women's participation that goes well beyond proportionate representation.

Beyond the move to incorporate a conceptual shift in understanding how and when women could and should participate in international decision-making, my second claim is that the preoccupation of states and scholars with the articulation of justifications, rather than the prohibition on the use of force, is instrumental to the perpetuation of the use of force by states.<sup>110</sup> The placement of art 2(4) as the epitome of state agreement on the nature of prohibited force reflects the legal positivist origins of the international legal structure. As the reflection of a specific theoretical perspective on law, the prohibition provides a marker of the legitimacy of the international legal structure. Rather than perceiving art 2(4) as the pinnacle of human creativity in the outlawing of violence, time would be well spent on elaboration and development of what it means to have a prohibition on the use of force, its limits, its regulation and its cooption into a gendered understanding of law and violence. This coheres with a politics of natality that acknowledges the capacity for new ideas (birth) as the essential characteristic of the human condition.

Other attempts to expand the contours of the art 2(4) prohibition, such as the *Definition of Aggression*<sup>111</sup> and the *Declaration of Friendly Relations*<sup>112</sup> are marked as historical attempts that add little in the contemporary setting and, at the time of their articulation, were circumscribed by political realities. The achievements of the International Criminal Court Special Working Group on the Crime of Aggression in 2010<sup>113</sup> are not inclusive enough to offer a genuine or

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<sup>109</sup> Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge, 2005) ch 4.

<sup>110</sup> See also Bianchi, above n 70.

<sup>111</sup> GA Res 3314, UN GAOR, 29<sup>th</sup> sess, 2319<sup>th</sup> plen mtg, Agenda Item 86, Supp No 19, UN Doc A/RES/29/3314 (14 December 1974).

<sup>112</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, Agenda Item 85, Supp No 18, UN Doc A/RES/8028 (24 October 1970) ('*Declaration of Friendly Relations*').

<sup>113</sup> ICC Special Working Group on the Crime of Aggression, *The Crime of Aggression*, Resolution RC/Res.6, Review Conference of the Rome Statute, 13<sup>th</sup> plen mtg (11 June 2010).

workable elaboration of the prohibition and re-iterate the Definition of Aggression rather than re-model this area of international law. Although institutional reports, such as the *More Secure World Report*<sup>114</sup> and *In Larger Freedom*,<sup>115</sup> have addressed the international law on the use of force, this has been to enlarge and develop justifications rather than to strengthen the prohibition. In contrast, the *Protocol on Non-Aggression and Mutual Defence* annexed to the *Great Lakes Peace and Security Pact*,<sup>116</sup> while not without fault, utilises three separate provisions to articulate what it means to prohibit the use of force on the African continent post-millennium. In the *Protocol on Non-Aggression and Mutual Defence*, states agree to the following:

- 1 The Member States undertake to maintain peace and security in accordance with the Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region, and in particular:
  - (a) To renounce the threat or the use of force as policies means or instrument aimed at settling disagreements or disputes or to achieve national objectives in the Great Lakes Region;
  - (b) To abstain from sending or supporting armed opposition forces or armed groups or insurgents onto the territory of other Member States, or from tolerating the presence on their territories of armed groups or insurgents engaged in armed conflicts or involved in acts of violence or subversion against the Government of another State;
  - (c) To cooperate at all levels with a view to disarming and dismantling existing armed rebel groups and to promote the joint and participatory management of state and human security on their common borders.
  - (d) If any Member State fails to comply with the provisions of this Article, an extraordinary Summit shall be convened to consider appropriate action.<sup>117</sup>

While the Pact does face immense implementation difficulties, it stems from the cooperation and consultation of heads of states, governments and communities in the region and is supplemented by further Protocols extending meanings and expectations for states. As a regional document, the *Great Lakes Protocol on Non-Aggression and Mutual Defence* may be inappropriate for direct transplantation into the international collective security structure and it does not explicitly address women's security,<sup>118</sup> but it does illustrate the potential and capabilities of states choosing to work to eradicate rather than justify conflict.

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<sup>114</sup> *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, 59<sup>th</sup> sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) ('*More Secure World Report*').

<sup>115</sup> *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, 59<sup>th</sup> sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) ('*In Larger Freedom*').

<sup>116</sup> *Pact on Security, Stability and Development in the Great Lakes Region*, signed 15 December 2006, 46 ILM 175 (entered into force 21 June 2008).

<sup>117</sup> Ibid art 5, *Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region*.

<sup>118</sup> Although women's groups were consulted throughout the drafting process.

My recommendation, to develop the legal finesse of art 2(4), is in contrast to the increasing emphasis placed on justifications and is voiced in the context of further recommendations regarding women's participation and agency. To develop the legal finesse of art 2(4) would require recognition of the inadequacy of the prohibition because it has been consistently read as accommodating justifications for violence that utilise Western patriarchal justifications to underpin their normativity. Development of the prohibition would therefore require strategies that seek to disassociate constructions of the nation-state under international law from understandings of the Western sexed legal subject. Consequently, what begins as a strategy 'within' the contemporary contours of international law also requires a larger feminist project of re-imagining the basic premises that shape international normativity. Underlying this claim is an expectation that a renewed focus on the prohibition encourages peace-building initiatives and preventative strategies.

Moreover, a review of the 2009 report of the Special Working Group on the Crime of Aggression demonstrates the limitations of contemporary institutional endeavours with respect to women's participation.<sup>119</sup> The low representation of women in the drafting and the subsequent negotiating stages is fundamentally circumscribed through the absence of recognition of the impact of gender on security, and of the relationship between law, gender and violence. Moreover, the definition of aggression recommended by the Special Group uses the words 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state'.<sup>120</sup> This proposed definition focuses on interstate violence that is retrograde in terms of contemporary understandings of violence and aggression, and fails to recognise critical and institutional knowledge of the limitations of security mechanisms that neglect to respond to the relationship between women's insecurity and state insecurity.<sup>121</sup>

In addition to these specific recommendations, the article makes the following general observations and conclusions. Primarily, justified violence within legal discourse has been constructed through gendered understandings of legal subjectivity. Underlying this knowledge are embedded assumptions, at least in Western legal liberalism, regarding the nature and capabilities of the (sexed) legal subject. Consequently, feminist legal theories that challenge the sexed and gendered representations of justified violence within national legal structures provide a useful starting place for a domestic analogy. This is an analogy in terms of the regulation of violence, and helps to expose how persistent dilemmas will remain unresolved without attention to the gender of justified violence under law. This conclusion is of relevance to feminist approaches to international law and to mainstream scholars. Mainstream international legal actors can learn from feminist debates on essentialism<sup>122</sup> and law as a narrative.<sup>123</sup> This knowledge

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<sup>119</sup> *Report of the Special Working Group on the Crime of Aggression*, 7<sup>th</sup> sess, ICC-ASP/7/SWGCA/2 (20 February 2009).

<sup>120</sup> *Ibid* annex I, 11.

<sup>121</sup> See, eg, *In-Depth Study of All Forms of Violence against Women*, Report of the Secretary-General, 61<sup>st</sup> sess, Item 60 (a) of the preliminary list, UN Doc A/61/122/Add.1 (6 July 2006).

<sup>122</sup> Kapur, above n 109.

addresses the limitations of Western discourse (including within this article) and the necessity of perceiving law as a narrative with multiple interpretations and meanings. This allows for attention to the necessary generality of any narrative and the attendant problems of traversing the particular and the universal in legal accounts. My approach to these limitations has been to reiterate the need for the Western subject/author/perspective to be analysed in terms of her own subjectivity. In this article, I have begun a feminist dialogue on how, as Westerners, our culture impacts on constructions of international law on the use of force, and how sex/gender play a central role in Western cultural and legal accounts, specifically through a project of acknowledging the regulative analogy between provocation and pre-emptive force.

Feminist strategies for change also acknowledge the unpredictability and thus the limitations of solely legal reform. In this sense the search for articulations of political theories that re-imagine the relationship between the state and its subjects or, under international law, the state as the legal subject, are necessary. I have suggested Arendt's natality model as one potential site for this type of work. Other post-liberal articulations of legal subjectivity, such as contemporary work on the vulnerable subject, might also offer relevant contours to re-imagining international legal subjectivity.<sup>124</sup> However, these remain extensions and refinements of the project discussed across this article. With respect to the law on the use of force, the claim is that a return to the prohibition, rather than increased articulations of justifications, would signal a return to the reduction and limiting of force that coalesces with feminist expectations of international security.

Finally, this article has considered the global war against terrorism as a narrative akin to Western cultural narratives on provocation that have been used to curtail women's movement in public space. The analysis of provocation narratives highlights the continued sex and gender of post-9/11 developments in the law on the use of force. I have also used this discussion to indicate the limitations of the feminist tools used across the article. Of particular concern, with regard to the use of a narrative approach to explain law, is the consequential level of generality and the invocation of stereotypes to expose the weaknesses of legal narratives. This may play a role in disguising discrepancies in narratives and the capacity for subversive narratives to be articulated alongside, and sometimes within, dominant narratives. A further limitation of the law as narrative approach is the risk of contributing to stereotypes of masculinity and femininity rather than challenging essentialism. I have sought to disrupt this consequence of gender narratives, but I acknowledge that the very articulation of the words, 'gender', 'sex', 'woman', 'man', 'women', 'men', 'female', 'male', 'femininity' and 'masculinity' plays a role in enshrining sexed difference in discourse. However, this is also a representation of the gendered reality within which we live and enact laws. I have also considered the next step for feminist

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<sup>123</sup> See Margaret Davies, 'Feminism and the Flat Law Theory' (Paper presented at the Centre for Law, Gender and Sexuality Conference: Up against the Nation States of Feminist Legal Theory, University of Kent, 30 June – 1 July 2006) <<http://www.kent.ac.uk/clgs/news-and-events/nationstatesflt.htm>>.

<sup>124</sup> See, eg, Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

approaches to international law with respect to the international law on the use of force, recognising the necessity of further dialogue on what it means to re-imagine international law and law's foundation.

With respect to the domestic analogy, a key limitation of the approach is that the whole article becomes tied to Western constructions of law, ignoring analogies between international legal forms and non-Western legal structures, as well as those outside of the common law model. This has implications for feminist approaches to international law and for international legal discourse. For feminist legal theories, Murphy's question about the methodological choices feminist theories make, and the prolonged association of feminist approaches to international law with the tools of Western feminist legal theories, require greater attention.<sup>125</sup> While it may be that feminist approaches to international law will need to develop their own range of tools to engage a sustained discussion with international law, there are some problems with this approach because international law itself is so heavily coopted into a projection of Western legal methods and regulatory practices onto conceptions of the international. For mainstream scholars, the questions Murphy asks of feminist legal scholars working within the discipline of international law need to be spotlighted on the construction of the international legal subject, so that the personification of the state as the international legal subject, and the composite sexing of that subject, gains increased interrogation and critical engagement. The purpose of the domestic analogy is not to endorse the analogy but to open the topic for critical engagement and to argue that feminist legal theories offer useful tools for developing hypotheses. It may be that answers, however, extend beyond the remit of feminist legal theories as other vectors of difference beyond sex and gender (certainly race, culture, ethnicity and sexuality) are developed as necessary narratives within international jurisprudence.

To conclude, the purpose of this article has been to identify the legacy of the 'War on Terror' for feminist approaches to international law, specifically the international law on the use of force. The parallel between the 'War on Terror' and domestic provocation laws aids identification of the gendered paradigms within which legal justifications for violence are deployed. The domestic analogy also highlights the sexed model of legal subjectivity that international law assumes through the parallels with Western liberal models for the regulation of violence. Although the narrative of the 'War on Terror' appears to have been relinquished by the Obama Administration in the US, unmanned drones continue to be used as a form of 'justified' force against the potential provocations of suspected terrorists around the globe, women in Afghanistan continue to see their security needs utilised as a justification for military force while women in Iraq suffer increased insecurity and violence as a result of the Western military intervention and, at the institutions of the UN, Western women arrive as 'gender experts' to be deployed to conflict zones around the world to save the sexually vulnerable women of other cultures. In these senses the 'War on Terror', and its consequences, remain a fundamental part of the international security landscape.

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<sup>125</sup> Thérèse Murphy, 'Feminism Here and Feminism There: Law, Theory and Choice', in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005) 67.

