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The Security Council and the rule of law: The use of force, robust peacekeeping and gender perspectives

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1. The Use of Force and Robust Peacekeeping

International attention that was focused on the violence in Libya during 2011 demonstrated the manner in which force and peacekeeping are segregated in public consciousness. As the Security Council, and much of the Western world, debated the merits of intervention into Libya on the grounds of a responsibility to protect civilians in February 2011,¹ the use of force via the peace enforcement mission in the Ivory Coast gained significantly less attention from international media and international legal scholars.² While the Security Council’s authorisation of Chapter VII force garners our attention, the Council’s frequent use of peace enforcement – that is the incorporation of an enforcement component into peacekeeping

¹ See: Security Council resolution 1373 (17th March 2011), in the preamble, which states: ‘Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians’.
² See: Security Council resolution 1967 (19th January 2011), which extends the peace enforcement mandate in the Ivory Coast.
operations less frequently enters our debates and discussions. In this article I centre on peace enforcement, also described as robust peacekeeping, to explore the role of force in peacekeeping, the role of the rule of law in the authorisation of force by the Security Council and the Council’s approach to ‘gender perspectives’ in Chapter VII forces.

The construction of the ‘civilian’ through gendered narratives produced by and through the Security Council’s agenda on women, peace and security is an important component of the twenty-first century propensity of the Council towards humanitarian force, either as Chapter VII action as was authorised in Libya in 2011 or as robust peacekeeping as examined in this paper. In contemplating the Council’s discourse on civilians within conflict communities, it is useful to reflect on soldier motivations. Prior to the creation of Article 2(4) and the prohibition on the use of force in the UN Charter, nationalism both justified the killing of others and propelled a soldier forward toward possible death. In the absence of nationalism as a cause, peacekeeping and humanitarian causes invoke narratives of the cosmopolitan order to sustain the commitment of soldiers. Beyond nebulous ideals of cosmopolitan, democratic goods, robust peacekeeping requires a narrative of civilian as victim rather than active participant within conflict communities. The civilian as victim must, further, be a victim of / vulnerable to the direct threat of extreme violence of which sexual violence becomes a standard trope. The risks of displacement and health risks that communities more readily negotiate throughout conflict are not deployed to justify robust peacekeeping and the use of force, or to mobilise international support. To ask a peacekeeper to kill is to ask a peacekeeper to face the possibility of his or her own vulnerability to being killed. To do so the Council must deploy a cause that justifies killing and the threat of being killed. In constructing the sexual and bodily vulnerability of civilians, the Council is able to sustain the

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3 See Mieville,C., ‘Multilateralism as Terror: International Law, Haiti and Imperialism’ (2008) 19 Finnish Yearbook of international, 63-92, (on Haiti) who suggests this is also a reflection of imperialist legacies that shape international law.
logic of force within its mandates and to effectively mobilise soldiering as robust peacekeeping.

However, analysis of the Council’s discourse on sexual violence is to see how UN peacekeepers are encouraged to use force to protect women (and men) from sexual violence but further that this approach denies women and men in civilian ‘protected’ communities sufficient protection from peacekeepers. Sexual crimes and violence, exploitation and abuse, racist behaviour and cultural insensitivity have all been documented as accompanying peacekeeping communities. In this paper, I argue that the Security Council would benefit from internal rather than external projections of the rule of law to overcome the persistent failures of robust peacekeeping. Integral to a rule of law approach is the treatment of all subjects as equal before the law: UN personnel and non-state actors, women and men in peacekeeping, military and post-conflict communities.

I have defined robust peacekeeping as Security Council peacekeeping operations that gain an enforcement component. Robust peacekeeping, in part, functions similarly to humanitarian interventions under the Responsibility to Protect doctrine, as the protection of civilians provides the trigger for the escalated Security Council involvement in a matter otherwise internal to a State. While humanitarian interventions have tended to be authorised to protect civilians from government forces (as in Kosovo, Libya) robust peacekeeping operations are, by definition, with the tacit or express approval of the state and the force is (primarily) directed at non-state actors. The combination of an existing peacekeeping mandate and the consent of the state functions to obscure the visibility of robust peacekeeping operations, in contrast to authorisations of humanitarian interventions which have attracted international debate. Despite the lesser attention, robust peacekeeping may have increased effectiveness

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due to the existing UN presence and the capacity, therefore, of the authorisation of force to be tailored to the conditions on the ground, for example, through the deployment of rapid reaction forces and specific military resources.

The UN Peacekeeping Mission in the DRC (MONUC), was established under Security Council resolution 1279 (1999). In 2010 MONUC was replaced with the peace enforcement mission named, MONUSCO, established on July 1st 2010 via Security Council resolution 1925 (28th May 2010). The MONUSCO remit includes, in Operative Paragraph 4, the creation of a rapid reaction force.

In this paper, I argue that analysing the Council’s response to sexual violence within UN missions helps us consider better the link between Security Council decisions to authorise the use of force and accountability in peacekeeping, particularly robust peacekeeping. The women, peace and security agenda within the Council’s work assists the discourse through the locating of an identifiable category of civilians, usually peopled by women and children, to justify the use of force in humanitarian crises and post-conflict spaces. To do otherwise, and see young people and women as active participants working to both continue and/or halt conflict within their community would unravel the authorisation use of force, including robust peacekeeping mandates. To demonstrate this conclusion I begin by looking at the relationship between force and sexual violence in armed conflict, particularly the Council’s move toward the perception that widespread and systematic sexual violence may function as a trigger for the authorisation of force. I follow this with an analysis of Security Council’s accountability structures for the perpetrators of sexual violence in armed conflict as well as an analysis of the emergence of ‘gender perspectives’ in Security Council resolutions. The final section of the text analyses these debates in light of a very basic articulation of the rule of law, contrasting this with international legal discussions of legitimacy in relation to the use of force.
In the following section I consider the Security Council’s regulation of sexual violence in armed conflict and peacekeeping to draw conclusions about the deployment of robust peacekeeping and the authorisation of the use of force. I demonstrate the continuum of Council accountability as well as the usefulness of gender as analytical tool to expose bias and shortcomings in existing legal arrangements.

2. Sexual Violence as a Trigger for the Use of Force

The Security Council has produced five resolutions under its women, peace and security agenda, as well as developing text on gender issues within country-specific resolutions. The first of these resolutions, 1325,\(^5\) was drafted in 2000 and the most recent, resolution 1960,\(^6\) in December 2010. Three of the Council’s resolutions focus specifically on sexual violence within armed conflict and these three resolutions, 1820,\(^7\) 1888\(^8\) and 1960, all attach the Council’s activities to combat sexual violence with the use of force. That is, in Operative Paragraph One of each of these three resolutions the Council identifies systematic and widespread sexual violence as exacerbating conflict and as potentially impeding the maintenance of international peace and security. The Council’s choice of language in this thrice repeated paragraph seems to invoke Chapter VII action, specifically the use of force, as a potential means to halt widespread and systematic sexual violence in conflict regions. In identifying sexual violence as impeding international peace and security and following this with the intention to ‘where necessary, adopt appropriate steps to address widespread and systematic sexual violence’ the Council replicates its language that it has, in practice, used to authorise the use of force which is euphemistically referred to as ‘all means necessary’ in Chapter VII resolutions.

\(^5\) UNSC Res 1325, October 31\(^{st}\), 2000.
\(^6\) UNSC Res 1960, December 16\(^{th}\), 2010.
\(^7\) UNSC Res 1820, June 18\(^{th}\), 2008.
\(^8\) UNSC Res 1888, October 29\(^{th}\), 2009.
The link between force and the regulation of sexual violence is one that I wish to draw out in this paper. My central argument focuses on the construction of victim narratives via women as survivors of sexual violence at the hands of local men in conflict scenarios and that the sexual violence victim discourse is vital to the construction of motivations for the authorisation of force. The Council’s production of knowledge on force and its production of knowledge on sexual violence are kept separate and deal with different aspects of conflict – one (force) is the ultimate and last resort enforcement mechanism that focuses on the actions of states while the other (regulation of sexual violence) is centred on individual responsibility. At the same time through Operative Paragraph One of Resolutions 1820, 1888 and 1960, the Council has moved toward the perception that widespread and systematic sexual violence may justify the use of force. While it might be unlikely that this would occur as a straightforward Chapter VII authorisation it is not unlikely or unfeasible that this might evolve as the justification for a robust peacekeeping resolution.

Between July 30th, 2010, and August 2nd, 2010, Mai Mai Cheka fighters embarked on a campaign of systematic sexual violence in Luvungi and surrounding villages in the DRC. Subsequently 242 individuals from Luvungi and a further 260 from surrounding villages were recorded by humanitarian medical personnel in the region as requiring treatment for sexual assaults and related injuries. Although these acts were brought to the Security Council’s attention it was not until a month after the attacks that the nearby UN forces re-commenced patrols and increased their visibility in Luvungi and surrounding villages. The leader of the Mai Mai Cheka group responsible for the Luvungi attacks was subsequently arrested by UN peacekeepers in October 2010.

9 However, see Burke, R., ‘Attribution of Responsibility: Sexual Abuse and Exploitation and Effective Control of Blue Helmets’ (2012) 16 (1) Journal of International Peacekeeping, 1-46.
More recently, in January 2011, in Fizi in the Southern Kivu province in the DRC, after a CNDP General was shot in a bar fight, CNDP soldiers, integrated into the national army in 2009, embarked on a series of revenge attacks on the local community that resulted in 60 serious sexual attacks. After the attacks, Lt. Col. Mutware Kabibi a high ranking officer in the Congolese army was tried and found guilty of leading the attacks. Although UN peacekeeping personnel did not respond to the threat or actual attacks in either the 2010 or 2011 attacks, both resulted in trials and convictions, the latter in the innovative mobile court process. Lt Col Mutware is currently serving a twenty year prison sentence. In both cases the prosecutions focused on commanding officers rather than individual perpetrators. I return to this aspect of the prosecutions for sexual violence committed in the DRC in the following section. In both cases the UN might also have deployed the Rapid Reaction Force to deal with the threat before it materialised into harm. One month prior to the first set of attacks, in Kivu, Security Resolution 1925 had transformed MONUC (also accused of perpetrating sexual abuse in the DRC) from a peacekeeping operation to a robust peacekeeping operation, MONUSCO, authorised to use all mean necessary (force) to protect civilians and to protect the peace. Operative Paragraph Four of Resolution 1925 further authorises MONUSCO to maintain a reserve force capable of rapid redeployment elsewhere in the DRC.

In September 2011 additional attacks in the Northern Kivu province were successfully apprehended by the Rapid Reaction Force – one month after the Luvungi violence and three months prior to the Fizi attacks. In this situation, when the Rapid Reaction Force was deployed, there was no systematic and widespread sexual violence.

Although MONUSCO has chosen not to use force to halt the threat of or to halt actual sexual violence, it is clear that the Security Council has constructed the Rapid Reaction Force, and the women, peace and security mandate, with the capacity for the use of force, as robust peacekeeping, in

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10 National Congress for the Defence of the People (French: Congrès national pour la défense du peuple).
12 See: http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/MONUC%20SEA%20EOA-Rasmussen%202825-02-05%29.pdf (last accessed September 2012).
precisely this type of scenario. The selective deployment of MONUSCO’s Rapid Reaction Force demonstrates the indifferent attitude of militaries to sexual violence. Understanding military perceptions of the harm of sexual violence is further understood when the difference consequences for perpetrators of sexual violence are reviewed: a task I take up in the next section. Prior to considering individual and institutional accountability mechanisms for sexual violence crimes, linkage between robust peacekeeping, the rule of law and the Council’s women, peace and security agenda can be highlighted. Although I have been critical and am concerned by MONUSCO’s failure to react to systematic sexual violence, the call for force as a counter-response to sexual violence remains a problematic one and illuminates the failure of the Council, and its subsidiary bodies, to apply internal checks to appease rule of law criteria. As such, developments in the Council to authorise force in response to changing and clearer understandings of the nature of conflict, as robust peacekeeping can be seen to be, as well as accountability of the Council for the construction and deployment of robust peacekeeping forces remain unchecked and untouched by any conception of the rule of law.

What I demonstrate in the next section is, first, that even as the Council develops this agenda the deployment of force to halt sexual violence remains an unlikely military strategy; second, that the use of force to halt widespread and systematic sexual violence demonstrates the flaw of seeking more rather than less authorisation for the use of force via a women, peace and security agenda and third; the authorisation of force depends on and reinforces the representation of women in conflict as victims of sexual violence. This argument attaches then to our discussions on the rule of law because it demonstrates the poverty of imposing and strengthening rule of law initiatives within post-conflict states when the Council itself insufficiently applies rule of law standards to its own decision making, agendas and action.

3. Individual and Institutional Accountability for Sexual Violence in Armed Conflict
Within Security Council resolutions there remains a distinction between sexual violence in armed conflict and sexual exploitation and abuse; leading to different treatment in terms of labelling and consequences for perpetrators.

Sexual Exploitation has been defined as: ‘Any actual or attempted abuse of a position of vulnerability, differential power or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another’.13

Sexual Abuse is defined as ‘The actual or threatened physical intrusion of a sexual nature, whether by force, or under equal or coercive conditions’. 14 Collectively sexual exploitation and abuse is referenced in the United Nations to describe violations by UN personnel and the UN has repeatedly articulated a policy of zero tolerance for sexual exploitation and abuse committed by UN personnel, both civilian and military. The UN peacekeeping website describes this as meaning:

UN rules forbid sexual relations with prostitutes and with any persons under 18, and strongly discourage relations with beneficiaries of assistance (those that are receiving assistance food, housing, aid, etc... as a result of a conflict, natural disaster or other humanitarian crisis, or in a development setting).15

In the work of the Council, sexual violence has been the terminology used for the development of mechanisms to deal with perpetrators of sexual abuse within an armed conflict or post conflict community, the separate term of ‘sexual exploitation and abuse’ has been developed and deployed by the Council in reference to the acts of UN personnel while working on a UN mission.

14 Ibid.
In Resolution 1960, the focus throughout is sexual violence where the Council reaffirms its intention to use necessary measures to address widespread and systematic sexual violence, reiterates the need for the Secretary-General to list parties responsible for sexual violence during armed conflict\(^{16}\) and reiterates its intention to develop targeted sanctions against those responsible for sexual violence.\(^{17}\) In Operative Paragraph Sixteen, however, the Council focuses on sexual exploitation and abuse and requests the Secretary-General to continue ‘efforts to implement the policy of zero tolerance on sexual exploitation and abuse by United Nations peacekeeping and humanitarian personnel’. The consequences and responsibility for sexual violence perpetrated by UN peacekeeping and humanitarian personnel is not addressed in this Resolution, or any prior resolution of the Council.

The sexual exploitation and abuse threshold, while created to expand the nature of abuses UN personnel could be found accountable for, in effect creates a two-tier structure of sexual abuses within armed conflict and post-conflict communities. This is evidenced through the different culpability attributed to local perpetrators, where sanctions, potential criminal charges and even the use of force may be the international response, while UN personnel are dealt with via internal national military disciplinary structures, often meaning little more than being sent home from the mission. This is evidenced in the DRC violence, described above, as well as the Security Council sanctions listing regime where individual responsibility is bypassed for the pursuit of commanding officer responsibility for sexual violence. Within UN missions, command responsibility for acts of sexual violence, or sexual exploitation and abuse, committed by UN personnel is not pursued. Instead individual perpetrators have their peacekeeping service terminated. It is possible to distinguish between the two sets of crimes identifying, for example, local perpetrators of sexual violence in conflict zones as often

responsible for widespread and systematic attacks thus invoking superior orders and command responsibility while the internal disciplining structures of UN missions seeks to project sexual exploitation and abuse and sexual violence perpetrated by UN personnel as not a policy or ‘weapon’ deployed by UN personnel and certainly not commanding officers. However, the failure to recognise the omissions to act in halting sexual violations of UN troops implicitly adds to the failure of those same commanding officers to respond to the threat, from foreign, local or rogue forces, of sexual violence. International law acknowledges omissions to act as incurring international responsibility of a state so that the often disturbing reports of peacekeeper complicity in sexual abuse, exploitation and violence in conflict communities suggests at the very least a turning of a blind eye by military hierarchies. Yet the MONUC troops, who were in part replaced by MONUSCO due to persistent scandals involving sexual crimes committed by UN personnel, and the post-You Tube identification of peacekeeping sexual attacks in Haiti has continually attracted individual responsibility rather command or institutional responsibility. The failure of the UN to pursue and regulate sexual violence as a crime that the institution itself must take measures to arrest creates cultures of tolerance rather than regulation.

As such, the attempt to develop a Security Council agenda on sexual exploitation and abuse has resulted in lesser consequences for UN personnel and a renaming of sexual violence as sexual exploitation and abuse. While the terminology of sexual exploitation and abuse may have been strategically developed to include more abuses within military disciplinary procedures, this wider term has in fact watered down the offence to one of disciplinary rather than of a criminal nature. This has had the further effect of permitting sexual exploitation and abuse within peacekeeping communities to be regarded as the wayward behaviours of a handful of actors as opposed to being labelled a continuing, global problematic of military sexual cultures. I would add the Security Council’s persistent identification of women in
post-conflict and transitional communities as sexually vulnerable rather than as active, community participants, awaiting the consultation of peacekeepers, fails to disrupt out of date understandings of post-conflict spaces, of gender and of sexuality.

This institutionalised response seems to reflect the perspectives of Western military leadership who are yet to publicly or effectively challenge internal sexual cultures within militaries and the destructive gender expectations and abuses that co-exist with such attitudes.

4. The Role of ‘Gender Perspectives’

Through the adoption of the five resolutions on women, peace and security the Council has increasingly come to use the term ‘gender perspectives’ to reference the range of initiatives it has described, activated and considered under the women, peace and security agenda. The meaning of ‘gender perspectives’ within the Council’s texts is not clear, although with an absence of attention to the construction of masculinity and femininity and the gendered experiences of conflict that both men and women encounter, gender perspectives, increasingly appears to refer to women’s perspectives. It is clear that the motivation behind the insertion of ‘gender perspectives’ into the Council’s output is a desire to change and challenge understandings of security. Through the prioritising of women’s perspectives an implicit assumption of biological, cultural, social and natural difference marking women is thus incorporated into the Council’s work, playing out, at the same time, a history of gendered understandings of what it means to be a female human. Despite feminist scholarship, activism and institutional forms for understanding and projecting a diversity of women’s experiences that define and understand gender as extraordinarily more complicated than ‘adding’ women’s ‘perspectives’, the shift to a legal (or quasi-legal) document such as a Security Council resolution trades the complicated, unfolding and diverse readings of gender into a very simple narrative where gender equals women.
Furthermore, the emergence of Security Council ‘gender perspectives’ may lead to more authorisations of force, especially with regard to robust peacekeeping and the regulation of widespread and systematic sexual violence, while at the same time creating renewed opportunities for the crimes of peacekeepers to be insufficiently accounted for by individuals, states or the UN. The Prosecution of the MaiMai and CNDP cases in 2011 can be contrasted with the UN procedures for responding to sexual exploitation and abuse and/or sexual violence by peacekeepers. For example, the Security Council’s withdrawal of 3000 UN personnel from Haiti in 2011 was largely reported as ‘misconduct’ by peacekeepers and follow up prosecutions to establish command or individual responsibility have not occurred, instead the UN has considered setting up a ‘peacekeeper blacklist’ to identify countries whose peacekeepers have been banned from missions.

5. Raising the Rule of Law

Robust peacekeeping as such becomes an important site for understanding the limited role for the rule of law in Security Council authorised force. Although the rule of law itself may be a contested concept, it is also an emergent feature of the Council’s own work, particularly in relation to the standards the Council elaborates for transitional and post-conflict communities to conform with. The Council has conducted debates on the rule of law since 2003 and Security Council resolutions and Secretary-General reports regularly refer to the rule of law in relation to specific situations on the Council’s agenda. These outward projections of the rule of law as good governance and as global standards may be questioned; however this is not the focus of this paper. Instead there are two aspects connected to the absence of the rule

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18 However, prior violence, involving Uruguayan personnel did result in five domestic prosecutions and an apology from the Head of State after video footage was released on the internet documenting specific attacks: http://www.aljazeera.com/news/africa/2012/05/2012511532816737.html (last accessed September 2012). The charges were disobeying orders and dereliction of duties.

of law that I have brought out in this discussion and which adhere not to the transitional society but to the decision making structures of the Council itself.

First, the creation of the sexual violence trigger in Operative Paragraph One of Resolutions 1820, 1888 and 1960 demonstrates the lack of rule of law safeguards on decisions to use force or to advance force mandates as the background and consultation behind the creation of this new ground for the use of force is absent checks and balances.

Second, peacekeeping accountability, especially with regard to sexual violence, subsumed under the sexual exploitation and abuse language, raises questions about the viability of robust peacekeeping initiatives if peacekeeping operations themselves are on the one hand, not responding to the threat of or actual sexual violence within post-conflict states and, on the other hand, if the accountability mechanisms within UN missions are insufficiently pre-empting and addressing sexual violence committed by peacekeeping personnel.

The issue of peacekeeper accountability within UN forces has been addressed elsewhere. What I have demonstrated in this paper is this lack of accountability extends from the action of peacekeeper personnel while deployed to the failure of robust peacekeeping missions to respond to either the threat or actual crimes of sexual violence. This aspect of robust peacekeeping does not receive review, judicial or otherwise, and further to the decisions of the Council itself to authorise the use of force, including in situations of robust peacekeeping.

If we take Dicey’s very basic assertion that the rule of law incorporates the requirement that law be clearly articulated in advance, equality under the law and the right to judicial review, the rule of law is not applied in decisions to extend the trigger to use force, the application of

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20 See: Burke, above note 9.
21 For a modern articulation, see: Lord Bingham’s speech 16th November 2006, at the Centre for Public Law, University of Cambridge, where he concludes: ‘the individual . . . accepts the constraints imposed by laws properly made because of the benefits which, on balance, they confer. The state for its part accepts that it may not do, at home or abroad, all that it has the power to do but only that which laws binding upon it authorise it to do.’ See: http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php (last accessed September 2012).
such force or the accountability of actors responsible for the deployment of force including in robust peacekeeping situations.

6. Conclusions

Robust peacekeeping is not always regarded or included in our discussions of the Security Council’s authorisation of the use of force. At the same time, robust peacekeeping has increasingly become the mechanism through which the Council authorises the use of force, bypassing the larger questions and challenges raised by its other early twenty-first century models of humanitarian intervention and the responsibility to protect. Yet humanitarian intervention joins robust peacekeeping as dependent on the identification of civilians in conflict regions that are often (implicitly and increasingly explicitly) gendered female and identifiably at risk via women, peace and security agendas. The particular focus on women as victims of sexual violence in conflict reinforces the need for the Council to save women, a discourse that invokes outmoded understandings of women’s honour. Robust peacekeeping mandates may be preferable to humanitarian intervention as they are often able to provide a responsive mandate because by definition the peacekeeping mission already exists in the conflict region. Yet the blurring of peacekeeping and peace enforcement has made the application of the accountability components of a rule of law type measure increasingly difficult.

Decisions to deploy the ‘robust’ aspect of peacekeeping are not assessed or reviewed. As the responses to the systematic sexual violence attacks in the DRC in 2010 and 2011 demonstrate, military understandings of a ‘threat’ in the field continue to dismiss the threat of widespread and systematic sexual violence as appropriately dealt with through the

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22 Above note 4.
deployment of Rapid Reaction Forces. At the same time the Council itself has opened up the possibility of the use of force to halt widespread and systematic sexual violence, although this widening of the notion of what constitutes a threat has also not been subject to due process, review or a clear set of decision-making processes. To add to these two aspects of robust peacekeeping, understandings of the complicity of UN personnel in sexual violence, in fact crimes that are regarded as disciplinary offences, raises questions about why the Council regards the sexual violence of non-state actors as justifying force but the sexual violence of its own actors as minor offences.

1. Accountability Failures and the Peacekeeping Continuum

Accountability failures within the Security Council, for example with respect to the management and disciplining of peacekeeping personnel responsible for sexual violence, need to be understood as functioning on a continuum that extends from the authorisation of the use of force through to the management of UN forces. As such, a discrepancy continues where the Council invokes various terms prefaced by gender – equality, perspectives, balancing - in peacebuilding and post-conflict initiatives as mechanisms that assist transitional societies to demonstrate their commitment to the rule of law. That is, transitional societies are compelled by the Council to pay attention to gender equality, gender perspectives and gender balancing to help evidence the development of state structures that comply with the Council’s rule of law requirements. This indicates the Council’s recognition of the role of gender justice within the re-building and the reconstruction of institutions but does not sufficiently address the questions a gender perspective raises about the Council’s own working structures, decision-making spaces and agendas.

In addition the limited model of gender justice the Council deploys in post-conflict communities – where gender balancing often dominates policy and indicators – itself reflects
a limited understanding of community building where a liberal democratic template is insufficiently responsive to existing local women’s networks and forums. Gender balancing is often little more than a euphemism for adding women, or even just counting the women within a specific institutional or government structure.

2. The Democratic Deficit in the Council

While other texts identify the democratic deficit in the Security Council I have tried to illustrate how the Council’s women, peace and security agenda is of itself a limited democratic model. This happens in both a practical and a substantive manner, although there is crossover. At the level of practice, it is important to pay attention to which feminist voices actors gain access to international institutional forums and how the diversity of feminist discussions can be a necessary causality due to the need for these actors to present themselves as in agreement. At the level of substance, the consequence is that important feminist understandings – for example, of the role of disarmament in a feminist politics of peace – of the diversity of interconnected issues in re-imagining security have not been welcomed by the Security Council. As a consequence, the feminist ideas that shape the legal reform around women, peace and security become un-linked from wider feminist debates, tensions and dialogues. Furthermore, the Council is itself mis-representative of regional diversity or gender diversity limiting the production of resolutions and of action to a very narrow global mindset.

3. Securing Legitimacy, whose Legitimacy?

Not only does this reinforce ‘benign’ and seemingly acceptable model of robust peacekeeping (i.e designed to protect civilians, women and children, vulnerable groups and sexual violence victims) the use of force as robust peacekeeping bypasses the normative role of the General

Assembly. As such, there is an ongoing need to discuss the move toward the Council functioning as a quasi-legislative body that does not abide by a rule of law, precisely because it is a political body (with legal implications to its decisions). The deployment of the gender perspectives or the women peace and security mantra appears to enhance the legitimacy of the Council but as the gender perspectives, flawed and partial as they might be, are only applied outwardly and not inwardly (i.e. the Council remains untouched) the distance between the Council and the rule of law is unfortunately widened in the post-1325 era.

4. The Gap between Legitimacy and the Rule of Law

At times the term legitimacy is used as equivalent to the term the rule of law. Understandings of legitimacy have produced volumes within the discipline of international law, however this is distinct from the rule of law. Indeed compliance with the rule of law may aid the production of institutional legitimacy. As the discussion here demonstrates, the Council’s initiatives on women, peace and security functions as a mechanism for legitimating the work of the Council, including the authorisation of the use of force, while downplaying the need for accountability in the authorisation, deployment and use of force.

In 1992, Franck wrote, with respect to the emergent right to democratic governance that ‘the key to solving these residual problems is . . . that older democracies should be the first to be volunteered to be monitored in the hope that this will lead to near-universal compliance.’

Two decades later we must demand the same application of standards to the Council, as it deploys notions of the rule of law into transitional communities, that it too be subject to the checks and measures of the rule of law rather than the notion of legitimacy through the enlargement of its own, unchecked agenda.

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5. Force without ‘womenandchildren’?

To finish it seems time to ask what happens if we cease to look for ‘womenandchildren’ within conflict regions and cease with the category of civilians. That is, if we see women, children and civilians as agents actively producing both conflict and peace within their community we take away the justification for the use of force, either in humanitarian communities or in situations of robust peacekeeping. Calls for a humanitarian intervention into Syria in 2012, as in Libya in 2011, require a discourse of civilians, womenandchildren, to justify the use of force. The alternative position, under international law, is to recognise incursions into State sovereignty and UN Security Council support for non-state actors in humanitarian crises, such as Libya. In situations of robust peacekeeping the identification of the risk women face in conflict zones not only fuels the authorisation of force, it allows the military forces to disregard women in local communities as human beings who should be afforded not only sexual and bodily integrity but a stake in decision making processes. Furthermore, in undertaking robust peacekeeping operations the Council deploys imagery of civilians to downplay the problems of the Council choosing to support the goals of specific States, in the process often downplaying the violations the State itself may be responsible for, as well as the absence of a legal basis for Council authorisation to use force to support governments against insurgent groups. In an era when we understand the power of media and cultural representations we must be cautious of a policy for force that seeks to triumph one group of ‘rebels’ challenging state oppression while selectively outlawing others.

The Security Council’s women, peace and security resolutions not only presents the conundrum that (in Otto’s words) ‘women’s participation may be used to advance military and institutional agendas while maintaining women’s marginality . . . [and] while enacting
the formal performance of inclusivity’. We must extend this finding to think beyond the legitimacy of the Council secured by these moves to identify that the Security Council increasingly needs the women as victim narrative to justify the use of force, to justify the robust protection of civilians, robust peacekeeping and humanitarian interventions. The development of these narratives without attention to how the rules are decided, how they are adjudicated and how they are applied makes a mockery of the Council’s separate agenda on the rule of law. In terms of gender, this paper demonstrates the ruptures between feminist thinking on gender as socially constructed discourse and security discourse that has been unable to avoid collapsing gender as a discourse into the category of women. In armed conflict this means:

[m]ost women fight wars on two fronts, one for whatever the putative topic is and one simply for the right to speak, to have ideas, to be acknowledged to be in possession of facts and truths, to have value, to be a human being.28