

Opinion

Aggression, Intervention and Powerful States: Missed lessons from Feminist Methodologies on Peace and Security Issues

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Abstract

This paper offers a feminist critique of certain actions of powerful states which are not only hypocritical but serve to reinforce the elites of international law. By comparing their position on the crime of aggression and their military intervention into other states it is evident that valuable lessons from feminist perspectives on peace and security issues have been missed. Certain powerful states were hesitant to let the International Criminal Court have jurisdiction of the crime of aggression and maintained dominant roles in the negotiations for the amendments to ensure there was an 'opt out' for states who do not wish to be liable for the crime. This position was a reaffirmation of the influence and dominance of certain states in the international community but also a restriction of the ICC itself. This restrictive ICC position on aggression is juxtaposed with the use of the ICC by powerful states for intervention and referral purposes as in the case of Libya. The comparison of these examples highlights the rejection of certain feminist issues or 'missed lessons' while promoting the strategies of powerful states in order to maintain their power, elite status and promote the masculine 'state-centred' view of international law.

Introduction

In 2010 the review conference for the ICC was struggling to come to an agreement on the jurisdictional triggers for the crime of aggression and a last-minute compromise was struck.¹ The 'Kampala Compromise'² outlined that in situations where an act is referred by either the ICC prosecutor *proprio motu* or an individual state party for investigation, the alleged aggressor state can avoid any potential liability for the crime of aggression as long as they have already made an official declaration that they do not accept the jurisdiction of the court and thus they have opted out.³ This proposed 'opt out' for the two types of referrals is akin to an escape clause for states. This paper tracks the problems arising from the amendments made during the negotiations on the crime of aggression at the review conference, such as the contentious opt-out, and draws a comparison with the NATO

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¹ S. Barriga. 'Negotiating the Amendments on the Crime of Aggression.' In S. Barriga & C. Kreb (eds), *The Travaux Preparatoires of the Crime of Aggression*, Cambridge: Cambridge University Press 2011, p. 3.

² Ibid.

³ 2010 Resolution RC/Res. 6 of the Review Conference of the Rome Statute on the Crime of Aggression. Annex 1, Article 15 *bis* (4). Amendments available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed at 14/01/13).

states' involvement in the Libyan civil war in 2011.⁴ The comparison highlights the drive for military intervention by certain powerful Western states on the one hand and the reluctance of those states to allow the crime of aggression to have the same jurisdictional trigger as the other core crimes in the Rome Statute.

This article proposes that powerful states (mostly referring to states that have a veto on the Security Council), rejected the crime of aggression without an opt out because of the potential loss of power to an international organisation such as the ICC, an international organisation not fundamentally controlled by states, unlike the Security Council. It is ironic that while powerful states were hesitant about giving the ICC leeway on the crime of aggression, some of the same states, namely the US, UK and France, were quick to employ the strategic use of the ICC in an attempt to halt the Libyan regime's violence against its own civilians.⁵ This strategic use was meant to refer the situation in Libya (which is not a party to the Rome Statute) to the ICC for investigation.⁶ At the time of the intervention, the leaders of the intervening states repeated that there was a groundswell of support for some form of humanitarian intervention to protect civilian life, but public opinion in the intervening states was divided.⁷ Critical commentator John Pilger categorised the intervention as the "Euro-American attack which is motivated not by the support of democracy but by the need to secure strategic, resource-rich regions of the world and the beginning of a war of attrition against the new imperial rival, China."⁸

However, Libya is just one of many states where pro-democracy movements were crushed by their government's forces.⁹ Yet other Security Council resolutions are non-existent or difficult to achieve due to political allies with veto powers, particularly Russia's determination to veto any Security Council resolutions that they consider problematic for Syria.¹⁰ The uneven application of intervention depends not only on the scale of the uprising and oppression but also on the power alliances between states that have veto powers in the Security Council. But is intervention actually a desirable form of action? A comparison of the negotiations concerning the crime of aggression at the ICC review conference and the use of the ICC for the NATO intervention in Libya clearly exemplifies how the powerful elite utilises its control to determine the most favourable results but also to maintain the 'masculine mode of decision-making'¹¹, ignoring other

⁴ Operation Unified Protector, February to October 2011, See <http://www.nato.int/cps/en/natolive/71679.htm> (accessed at 14/01/13).

⁵ 2011 United Nations Security Council Resolution 1970 s 2(4), S/Res/1970.

⁶ For state parties to the Rome Statute, see www.icc-cpi.int/Menus/ASP/states+parties/

⁷ G. Dinmore, 'Poll Shows little Support for Libyan Intervention', *Financial Times*, 4 May 2011. France showed the highest level of popular support for military intervention according to the poll. Americans opposed to military intervention was at 37%, Germans opposed was at 39% and in the UK 36% were opposed. Available at <http://www.ft.com/cms/s/0/939bb0c4-74b9-11e0-8988-00144feabdc0.html#axzz2Bm8lJj2X> (accessed at 01/03/13).

⁸ J. Pilger. 'David Cameron's Gift of War and Racism, to Them and Us', 6 April 2011. Available at <http://johnpilger.com/articles/david-cameron-s-gift-of-war-and-racism-to-them-and-us> (accessed at 15/01/13).

⁹ See Bahrain, Morocco and others. F. Cunningham. 'BAHRAIN: US-Backed Regime Replays State of Emergency to Crush Pro-Democracy Movement' *Global Research*, 14 February 2012. Available at <http://www.globalresearch.ca/bahrain-us-backed-regime-replays-state-of-emergency-to-crush-pro-democracy-movement/29290> (accessed at 20/03/13).

¹⁰ L. Trevelyan. 'Syria conflict: West 'appalled' by Russia China UN veto', *BBC News*, 19 July 2012. Available at <http://www.bbc.co.uk/news/world-middle-east-18914578> (accessed at 21/03/13).

¹¹ H. Charlesworth, 'Feminist Reflections on the Responsibility to Protect.' in A. Bellamy, S. E. Davies & L. Glanville (eds), *The Responsibility to Protect and International Law*, Leiden: Martinus Nijhoff Publishers 2011, p. 139.

voices. The masculine mode of decision-making is a way of describing decision-making that focuses on abstract logic, excluding other issues or considerations that may impact the result or decision.¹² It stems from viewing law from a gendered perspective, in other words, having certain attributes, structures or processes that can be identified as masculine or feminine. The identification of law, or for that matter, international law as gendered is not new and is part of the postmodern critique.¹³ The dominant masculine view of international law has been discussed by various international scholars such as Christine MacKinnon in her 1989 book 'Towards a Feminist theory of the State'¹⁴ and then by Christine Chinkin, Shelley Wright and Hilary Charlesworth in their groundbreaking article 'Feminist approaches to International Law' (1991) and their subsequent book, to name a few.¹⁵ The masculine mode of decision-making not only prioritises abstract logic, it focuses on hard law, excluding other considerations such as conciliation, negotiation and the importance of soft law and equity.¹⁶ Masculine aspects of international law have often been identified as the representation of the power of the state, supremacy of states as the primary subjects of international law, the use of force and the focus on treaty and custom as the main accepted sources of international law. The feminine aspects of international law have been often identified as focusing on the use of diplomacy, conciliation and the inclusion of non-state actors as important contributors to the development of international law. Traditionally, the masculine aspects of international law have dominated throughout its development and are generally accepted as the more serious facets of the field. For example, "why is there a whole series of treaties obsessed with straddling stocks, when the use of breast milk substitutes, which is a major health issue for women in Africa, remains subject to voluntary W.H.O. codes?"¹⁷

Using relevant examples of the war on terror, Charlesworth has asked why the US would bomb Afghanistan instead of negotiating with other states to cut off arms supplies to the Taliban and then fund sophisticated education programmes.¹⁸ Any alternative to the use of force and the quick fix has been downplayed by Western states in the past. For example, diplomacy has had to come to the forefront with the Syrian crisis because there is a stalemate at the Security Council.¹⁹ The focus on the war on terror itself and security

¹² See C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Harvard: Harvard University Press 1982. This famous work by Carol Gilligan outlined the results of her research on the gender differences in decision-making in young girls and boys, where girls offered a different viewpoint or voice to boys, making decisions based on "the values of caring and connection" while boys' decision-making seemed to "be based on abstract logic". Also see C. Chinkin, S. Wright & H. Charlesworth, 'Feminist Approaches to International Law.', *American Journal of International Law* 1991-85, p. 613, and H. Charlesworth & C. Chinkin, *The Boundaries of International Law*, Manchester: Manchester University Press 2000, p. 3, and C. MacKinnon in 1989 with her book, *Towards a Feminist theory of the State*, Harvard: Harvard University Press 1989, and H. Charlesworth, 'The Hidden Gender of International Law', *Temple International & Comparative Law Journal* 2002 -16 (93) p. 95 97, to name a few sources in this area.

¹³ "Gender draws attention to social aspects of relationships that are culturally contingent and without foundation in biological necessity." in Charlesworth & Chinkin 2000, supra note 12, p. 3.

¹⁴ MacKinnon 1989, supra note 12.

¹⁵ Chinkin, Wright & Charlesworth 1991, supra note 12, p. 618. And Charlesworth & Chinkin 2000, supra note 12.

¹⁶ Ibid., Charlesworth & Chinkin 2000, supra note 12, p. 62-71, p. 78. For example, see R. Buchanan & R. Johnson, 'The 'Unforgiven' Sources of International Law: Nation Building, Violence and Gender in the West(ern)', in D. Buss & A. Manji, *International Law, Modern Feminist Approaches*, Oxford: Hart Publishing 2005, p. 131.

¹⁷ Charlesworth 2002, supra note 12, p. 97.

¹⁸ Charlesworth 2002, supra note 12, p. 101.

¹⁹ R. Prince, 'Syrian 'Stalemate' Shows UN 'not fit for purpose', says Head of General Assembly', *The Telegraph*, 26 May 2013. Available at

issues internationally and the subsequent exclusion of other topics is a primary example of the masculine mode of decision-making. Christine MacKinnon has asked the question “When will women have their '9/11th?” In other words, when will the day come that women's issues and concerns take centre stage on the international plane and dominate all other topics, as terrorism has in a post 9/11 world?²⁰ The entity of the state remains the dominant player in international law regardless of the important influence of non-state actors, as can be seen with regards to the signing of the landmine treaty and the Rome Statute.²¹ As long as the entity of the state remains dominant, powerful elite states will control and manipulate international relations and international law to suit their own foreign policy goals. This is evident in the most structurally unequal organ of the UN, the Security Council with its WWII veto states. Re-examining methodological underpinnings of who makes these decisions, how they are reached and what mechanisms will be deployed in the long term could lead to a better understanding of how to achieve a more balanced form of international relations through a less skewed version of international law.

I. The Negotiations of The Crime of Aggression

Leading up to the review conference for the crime of aggression in 2010, opinions were divided between two main camps.²² The first camp included states who wanted the ICC to investigate an alleged act of aggression using the same referral mechanisms that are in place for the other core crimes in international law outlined in Article 13 of the Rome Statute, namely by a state party, the Security Council, or an investigation started by the Prosecutor acting *proprio motu*. This camp included a group of African states, the Latin American Caribbean states and some other smaller states.²³ The other camp, including France and the UK (supported by non-member but vocal observer states China, Russia and the US, which are all permanent members of the Security Council) wanted the Security Council to have “exclusive power to control prosecutions for the crime of aggression”.²⁴ From the various papers of the Special Working Group on the Crime of Aggression (SWGCA), proposals for a Security Council pre-determination were the most prominent recommendation, although other proposals were also made, such as a predetermination by the General Assembly or the International Court of Justice.²⁵ It was clear from the beginning of the dialogue on the crime of aggression that it was going to be treated differently than the other core crimes.

<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9122740/Syrian-stalemate-shows-UN-not-fit-for-purpose-says-head-of-General-Assembly.html> (accessed at 30/05/13). President of the UN General Assembly Nassir Abdulaziz al-Nasser criticised Russia and China who vetoed a Security Council Resolution condemning the Assad regime in Syria. He promotes UN reform so that the SC could act even with some opposition as long as there is overwhelming support from the General Assembly.

²⁰ C. MacKinnon, 'Women's Sept 11th: Rethinking the International Law of Conflict', *Harvard International Law Journal* 2006-1 (46), p. 22. Referring to the public private divide she identified the lack of emphasis put on violence against women whereas the general public is more aware of the victims of 9/11(p. 4).

²¹ E. Rebasti & L. Vierucci, 'A Legal Status for NGOs in Contemporary International Law', available at <http://www.esil-sedi.eu/sites/default/files/VierucciRebasti.PDF> (accessed at 01/02/12), p. 14 and M. Tornquist-Chesnier, 'NGOs and International Law', *Journal of Human Rights* 2004-8 (2), pp. 253, 257, 259, 260.

²² B. Van Schaack, 'Negotiating the Interface of Power & Law: the Crime of Aggression', *Columbia Journal of Transnational Law*, 2010/2011-49, p. 514.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ 2008 Discussion paper on the crime of aggression proposed by the Chairman (revision June 2008). ICC-ASP/6/SWGCA/2, available at http://www.iccnw.org/documents/ICC-ASP-6-SWGCA-2_English1.pdf (accessed at 14/12/2013). 2007 Report of the Special Working Group on the Crime of Aggression, ICC ASP/6/SWGCA/1, available at http://www.iccnw.org/documents/ICC-ASP-6-SWGCA-1_English.pdf (accessed at 20/09/12).

At the review conference the option for any state party to ‘opt out’ proved the landmark distinction between the crime of aggression and the other core crimes in the Rome Statute. This consent-driven system was a disappointing compromise and members from the US delegation voiced their preference for a Security Council pre-determination,²⁶ not only because of the US veto on the Security Council but also because it would have strengthened the primacy of the Security Council.

Unlike with the negotiations for the Rome Statute, NGOs did not form a unified force to lobby states for the passing of the amendments. Amnesty International remained neutral and Human Rights Watch felt that the inclusion of the crime would diminish the ICC’s role as an “impartial arbiter of international criminal law”.²⁷ Even the NGO that is the ICC’s greatest supporter, the Coalition for the International Criminal Court, did not take a unified position, as different members opted for various opinions on the amendments being proposed.²⁸

Kreb and Holtzendorff have correctly categorised the amendments as a combination of a “Security Council based Pillar” and the “(Softly) Consent-based Pillar”.²⁹ The softly consent-based referrals are referrals by state parties and by the prosecutor *proprio motu*, which are lumped together in Article 15 *bis*, and are the most restrictive, which is not surprising considering the US wanted the Security Council to be the only method for referral to the court.³⁰ This is an example of the supremacy of the ‘state-centred’ approach to international law by powerful elite states. Article 15 *bis* clearly states that the court’s jurisdiction does not apply to states that are not a party to the statute.³¹ A limitation that was reminiscent of the preamble in the now famous Security Council Resolutions 1970 and 1593 (paragraph 6)³². Ironically these are the Security Council

²⁶ Van Schaack 2010-2011, *supra* note 22, pp. 515, 599.

²⁷ Human Rights Watch, ‘Making Kampala Count’, 10 May 2010, available at www.hrw.org/en/node/90282/section/8 (accessed at 14/01/13).

²⁸ Van Schaack 2010-2011, *supra* note 22, p. 515.

²⁹ C. Kreb & L. von Holtzendorff, ‘The Kampala Compromise on the Crime of Aggression.’ *Journal of International Criminal Justice* 2010-8 (5), pp. 1179-1217. “Article 121(5) of the ICC Statute through the Kampala compromise is obvious from the fact that the second preambular paragraph of the ‘Amendments to articles 8 of the Rome Statute’ does *not* endorse the ‘positive understanding. Nor has there been an agreement on the latter understanding just for the crime of aggression, because other than under the ‘Art. 121(5) Model with a Positive Understanding’ crimes of aggression arising out acts of aggressions committed by or against non-States Parties are excluded from the Court’s jurisdictional reach through the combined effect of draft Article 15 *bis* (4) and (5) of the ICC Statute. Japan is therefore right in assuming that the jurisdictional regime embodied in draft Article 15 *bis* ICC Statute reflects neither Paragraphs 4 nor 5 of Article 121 ICC Statute and thus constitutes a creative solution *sui generis*. Perhaps it can be said that the ‘softly consent-based pillar’ of the Kampala compromise takes the ‘Adoption’ and the ‘Article 121(4)’ Models as its starting point, and then qualifies these by the entry into force mechanism enshrined in Article 121(5) ICC Statute and a *sui generis* set of fairly far-reaching conditions for the exercise of jurisdiction.”

³⁰ Van Schaack 2011, *supra* note 22, p. 514. Quoting *infra* text accompanying notes 204-210.

³¹ RC/Res. 6, *supra* note 3, Article 15 *bis* 5.

³² 2005 United Nations Security Council Resolution 1593, S/Res/1593. “6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State”

Resolutions that referred the situation in Libya and Sudan to the ICC while neither is a party to the statute. This is to remain the same, a state that is not a party to the statute has nothing to fear after an act of aggression if they have a Security Council veto state on their side, because a referral by another state party or by the prosecutor will never gain jurisdiction over the crime of aggression. The same can be said for a state party because of the opt out for member states.

There is a further filter for referrals made by the Prosecutor *proprio motu*. In these referrals the Prosecutor must first see if the Security Council has made a determination of an act of aggression and the inform the UN. If there is no determination by the Security Council the Prosecutor has to wait six months after notification before an investigation can begin and as long as the Pre-Trial Division has authorised the investigation.³³ In summary there are three possibilities of a referral to the ICC for a crime of aggression investigation. The first two fall under Article 15 *bis*: (1) an act of aggression by a state party on another state party, where neither has opted out of the jurisdiction by the court, (2) an act of aggression where the aggressor state is party to the statute and has not opted out and the receiver or victim state is a state party but has opted out of the jurisdiction of the court. The third falls under Article 15 *ter* and basically gives the Security Council leeway to refer any situation to the court for investigation whether a state has opted out of the jurisdiction or is a party to the statute or not.

Further evidence of the supremacy of the 'state centred' approach to international law can be found in the definition of the crime of aggression. Previously, in most academic writing on the crime of aggression, the author would usually state in a footnote that aggression was listed but not defined in the Rome Statute to allow party states and others time to agree on a definition. This did not seem to be much of a problem in Kampala, where 111 countries agreed with the definition of aggression that largely stemmed from the General Assembly Resolution 3314.³⁴ The major difference from the 1974 resolution was the inclusion of the phrase concerning "character, gravity and scale" of the crime that "constitutes a manifest violation of the Charter of the United Nations".³⁵ Thus, states had no problem with agreement on the definition that has been circulating for a substantial period of time, it is just the 'character, gravity and scale'³⁶, that was a sticking point. It would appear that smaller attacks may not fall under the definition, for instance attacks across the border into Pakistan by US military in Afghanistan, or the use of unmanned drones³⁷ or the targeted killing of Osama Bin Laden. Thus a threshold would have to be reached before any acts fall under the definition of the crime at the ICC. According to Annex III of the amendments, all three requirements of the threshold must be met before an act or situation is "sufficient to justify a manifest determination. No one component can be significant enough to satisfy the manifest standard by itself."³⁸ This part of the definition was offered by the US delegation, although Canada was the state that initially proposed the three requirements.³⁹

³³ Resolution RC/Res. 6 2010, supra note 3, Article 15 bis (6), (7) and (8).

³⁴ 1974 United Nations General Assembly Resolution 3314, Definition of Aggression, GA/Res/3314 (XXIX).

³⁵ Resolution RC/Res. 6 2010, supra note 3, Article 8 *bis* (1).

³⁶ *Ibid*.

³⁷ A. Rodriguez & D. Zucchini, 'U.S. drone attacks in Pakistan get mixed response'. *LA Times*, 2 May 2010, available at <http://articles.latimes.com/2010/may/02/world/la-fg-drones-civilians-20100502> (accessed at 14/01/13).

³⁸ RC/Res.6, supra note 3, Annex III Other Understandings 7.

³⁹ *Kreb & von Holtzendorff* 2010, supra note 29, p. 1206.

The Security Council is not bound by any restrictions when it comes to a referral which is in keeping with the main function of the body to have “primary responsibility for the maintenance of peace and security”.⁴⁰ In a practical sense this does not inspire much confidence as the five permanent members to the Security Council are some of the largest exporters of arms in the world⁴¹ and may not be inclined to see an allied state, let alone one of the permanent members, referred to the ICC for investigation. It was not surprising that the UK and France⁴² were state parties to the statute who opposed the activation of the crime of aggression in the Rome Statute, while the US, Russia and China, who were observers, also opposed any referral for aggression that did not go through the Security Council.⁴³ It would appear that there was a real concern the ICC could weaken the power of the Security Council. It also highlights how the foreign policy of states is seamlessly translated into a position on the jurisdiction of the crime of aggression.

II. Problems with the Security Council

The reason for this restriction on the crime of aggression could possibly relate to the heritage of the crime itself and the protectionist policies of states. The US normally refers to the fear of political prosecutions as the reasoning behind the distinction between the crimes.⁴⁴ Furthermore, Stephan Rapp, US Ambassador for War Crimes, warned that aggression investigations could undermine the ICC if there was not “genuine consensus”,⁴⁵ and could potentially lead to uncertainties in terms of state action.⁴⁶ This is an argument that is similar to the US’s ‘arm twisting’ for Security Council Resolution 1422 which gave immunity from the ICC to UN peacekeepers who were nationals of non-state parties.⁴⁷ Initially the Bush administration stated it would veto peace-keeping missions, including a mission to Bosnia, if the resolution was not approved.⁴⁸ Security Council Resolution 1422 was so widely criticised it was not renewed in 2004 after the Abu Ghraib torture scandal.⁴⁹ To quote Nigel White, “Resolution 1422 is the clearest example of a decision that is extremely difficult if not impossible to reconcile with UN law... its demise is illustrative of a basic form of accountability to the member states.”⁵⁰

⁴⁰ 1945 Charter of the United Nations UNTS XVI, Article 24.

⁴¹ With the exception of China, according to the Stockholm International Peace Research Institute (SIPRI), ‘Trends in International Arms Transfers’, 2009, Fact Sheet, March 2010, available at <http://books.sipri.org/files/FS/SIPRIFS1003.pdf> (accessed at 24/11/12).

⁴² M. Simons, ‘International Court May Define Aggression as Crime’, *New York Times*, 30 May 2010, available at http://www.nytimes.com/2010/05/31/world/31icc.html?_r=1 (accessed at 24/11/12).

⁴³ *Ibid.*

⁴⁴ ‘US says State Aggression Issues Could Undermine ICC’, *Reuters*, 2 June 2010, available at <http://www.reuters.com/article/idUSTRE6513RQ20100602> (accessed at 14/01/13).

⁴⁵ *Ibid.*

⁴⁶ S. Miley, ‘ICC Nations Lack Consensus on Crime of Aggression’, *Jurist*, 11 June 2010, available at <http://jurist.org/paperchase/2010/06/icc-nations-lack-consensus-on-crime-of-aggression.php> (accessed at 24/11/12).

⁴⁷ 2002 Security Council Resolution 1422, S/Res/1422.

⁴⁸ American Non Governmental Organizations for the ICC. AMICC. Peacekeeping and the ICC. Available at http://www.amicc.org/usinfo/administration_policy_pkeeping.html.

⁴⁹ S. Notar, ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of Congo’, *Journal of Gender, Social Policy & the Law* 2006-14 (2), pp. 14, 413.

⁵⁰ N. White, *Law of International Organisations*, Manchester: Manchester University Press 2005, p. 194.

The main problem with the Security Council when considering the crime of aggression is the political nature of the body, the skewed power dominance and in some cases the lack of adherence to the basic principles of international law and due process principles. Security Council resolution 1422 is but one example. The Security Council Al-Qaida and Taliban Sanctions Committee is another; it allows sanctions without trial or recourse to judicial remedy. The committee's chairperson in 2010, Thomas Mayr-Harting, has highlighted its shortcomings, saying the list contains 443 names, some with no full name or date of birth.⁵¹ Over 400 of these are subject to not only travel bans but also freezing of assets, removing their right to earn a living.⁵² Mayr-Harting also mentioned that the list contained the names of dead people whose assets were still frozen and were not being released to the families and beneficiaries.⁵³ Several recent cases in domestic and regional courts have highlighted the Sanctions Committee's violations of the right to a fair trial.⁵⁴

Another example of Security Council resolutions that potentially violate international law and principles are the severe economic sanctions against Libya in the 1990s and Iraq, leading to the 2003 war, which caused large scale suffering of the civilian population. One UNICEF report listed the deaths of a half million children under the age of five, as a direct result of the economic sanctions.⁵⁵ Dennis Halliday, former Assistant Secretary General of the UN, resigned after refusing to carry out the sanctions. He stated that the "very provisions of the Charter and the (Universal) Declaration of Human Rights have been set aside and we are waging a war through the UN..."⁵⁶

Certain powerful states believed any investigation of the crime of aggression must be subsequent to an initial Security Council determination in order for the ICC to be legitimate and secure in the future. Arguments for a prior determination by the Security Council before the ICC can investigate focus around the interpretation of the Article 24 (1) of the UN Charter, citing that the Security Council has "primary responsibility for the maintenance of peace and security."⁵⁷ However this is only one interpretation of the

⁵¹ 'UN Panel Removes 45 Names from Taliban Sanctions List After Reviewing Nearly 500', 2 August 2010, <http://www.un.org/apps/news/story.asp?NewsID=35512&Cr=Taliban#.Ub9bCx5wbwo> (accessed at 17/06/13). Also see Briefing by H.E. Mr. Thomas Mayr-Harting, Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, to the Security Council on 15 November 2010. https://www.un.org/sc/committees/1267/pdf/1267_Chairman_Briefing_to_SC_15.11.10.pdf (accessed at 17/06/13).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See *A, K, M, Q and G v HM Treasury* [2010] UKSC at 2 and *Hay v HM Treasury* [2009] EWHC at 1677. Also see Case T-306/01, *Aden v. Council*, [2002] E.C.R. II at 2387; see also 2001 Commission Regulation 2199/2001, Official Journal of the European Communities, L 295/16. See 1999 Security Council Resolution 1267, para. 4, S/RES/1267 (freezing the funds of the Taliban as well as closing Taliban operated property off to aircraft); see also 2003 Security Council Resolution 1455, para. 4, S/RES/1455 (requesting that all States provide information concerning Al-Qaida and the Taliban); 2002 Security Council Resolution 1390, para 2, S/RES/1390 (continuing restrictions on Taliban and Al-Qaida); 2000 Security Council Resolution 1333, paras. 5–8, S/RES/1333 (continuing to freeze funds of Taliban and close off Taliban controlled territory and offices). Also see joined cases C-402/05P and C-4-14/05P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I at 6351.

⁵⁵ UNICEF, 'Questions and Answers for the Iraq child mortality surveys', 16 August 1999, at <http://www.casi.org.uk/info/unicef/990816qa.html> (accessed at 14/11/12).

⁵⁶ D. Halliday. Stated in the documentary, *The War you Don't See*, 2010. Also see D. Rieff, 'Were Sanctions Right?', *New York Times*, 27 July 2003. Available at <http://www.nytimes.com/2003/07/27/magazine/were-sanctions-right.html?pagewanted=all&src=pm>. (accessed at 12/01/13).

⁵⁷ U.N. Charter, supra note 39, Art. 24, para. 1.

phrase and as stated previously, 'primary' does not mean exclusive.⁵⁸ The discussions of the role of the Security Council ignore the reality of the political nature of the organ, its structural dominance by powerful states and its faltering accountability at times. It would be a mistake to rely on the Security Council for all possible referrals to the ICC for the crime of aggression. In that case, instead of politically motivated prosecutions the result may be politically motivated avoidance of the necessary determinations.

III. The Problem With Powerful States

The problem with powerful states is reminiscent of what Charlesworth and Chinkin proposed, that for too long international law has focused on the dominant masculine aspect of interaction, the supremacy of the nation state, the notion of absolute sovereignty, the lack of adherence to international customary law, and the deliberate disregard of the contribution of non-state actors and NGOs.⁵⁹ The Rome Statute itself is a reflection of a state-centred approach because of the nature of its conception, the negotiation between states as opposed to the rules developed for the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY). Even though the creation of the *ad hoc* tribunals was legitimised by a Security Council resolution,⁶⁰ their rules of procedures and evidence were a mixture of human rights laws and criminal procedure from a variety of sources that were incorporated in order to fill the void when the Courts were constituted.⁶¹

There are also several persuasive arguments that the state-centred approach to international law is defective because international law "became the servant of the state, subject to the state's wishes alone" and "[a]lternative ideas to this inflexible doctrine were ridiculed and dismissed as if they were heresy"⁶² Koskenniemi discussed statehood as something that "operates to privilege particular voices and silence others."⁶³ Far too often the state is seen as abstract and value-free whereas this, according to him, is far from the truth. States tend to act in order to suit their own foreign policy goals and special interests. Furthermore, in the case of the Security Council, the most powerful states seek to protect their 'turf' or special hold on this UN organisation by opposing reform of the coveted veto power. Knop aptly categorised state sovereignty as a "function of political power, rather than justice."⁶⁴ It is true that non-state actors are gaining more influence in the international system through active NGO involvement on specific issues in treaty negotiations and regional organisations⁶⁵ and this was certainly a reality of the negotiations for the Rome Statute, but not necessarily for the crime of aggression. However, this still

⁵⁸ T. Lavers, '[Pre]Determining the Crime of Aggression: Has the Time Come to Allow the ICC its Freedom?', *Albany Law Review* 2008-71 (1).

⁵⁹ Charlesworth, & Chinkin 2000, *supra* note 12, p. 78.

⁶⁰ 1994 Security Council Resolution 955 S/Res/955 for ICTR and 1993 Security Council Resolution 808 S/Res/808 for ICTY on the procedural and evidentiary rules developed by both courts.

⁶¹ Charlesworth & Chinkin 2000, *supra* note 12, p. 78.

⁶² R. McCorquodale, 'International Community and State Sovereignty: An Uneasy Symbiotic Relationship', in C. Warbrick & S. Tierney (eds), *Towards an International Legal Community*, London: British Institute of International and Comparative Law, 2006, p. 241.

⁶³ M. Koskenniemi, *From Apology to Utopia: The Structures of International Legal Argument*, Cambridge: Cambridge University Press 1989, p. 499.

⁶⁴ K. Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', *Transnational Law & Contemporary Problems* 2003, pp. 3, 296.

⁶⁵ Tornquist-Chesnier 2004, *supra* note 21. Also see influence in human rights movement, C. Welsh (ed), *NGOs and Human Rights, Performance and Promise*, Pennsylvania: University of Pennsylvania Press 2000.

amounts to a series of small steps within a system that is solely designed by states and for states.

The state-centred approach to international law not only ignores or minimises non-state actors in the international system, its positivist emphasis also prefers international treaty provisions or Security Council Resolutions to customary norms, well-founded general principles of law or the doctrine of equity. Security Council resolutions that inspired tremendous criticism in the past highlight this problem,⁶⁶ such as the contentious resolution 1422 on the immunity of peace keepers and the economic sanctions against Iraq that potentially violated international human rights, mentioned earlier.⁶⁷ The main focus of a UN body, such as the Security Council, can arguably create a tension with its output and fundamental principles of international law. Other times it is the lack of output that creates a problem, and the Council's inactivity due to diplomatic pressures in the international community produces deleterious effects. This has certainly been the problem with the number of determinations of acts of aggression in the past. It is quite astounding that the Council has made only three determinations since its inception.⁶⁸ It is indeed undeniable that the number of actual acts of aggression is far higher. The reason there are so few determinations is due to the fact that the Security Council downgrades the incidents and refers to them as 'threats to peace' because of diplomatic reasons. This problem is inherent to the nature of the organ.

Two specific examples of aggression, namely the Suez Canal Crisis and the Iraq war, link through time to show the difference in individual states' view of legal obligations, the hidden conspiracy orchestrated by the UK, France and Israel in 1956 as opposed to the open justification, however fraught, by the US and UK in 2003.⁶⁹ Aggression is an expression of the power of the state regardless of legal restrictions. In the reality of international relations, international law seems helpless to stop the most powerful states from these acts. This still holds true with the current amendments to the Rome Statute, which constitute a reinforcement of the masculine state-centred approach to international law and international relations.

IV. War, Intervention and Feminist Perspectives

⁶⁶ 1997 General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights, United Nations Committee on Economic, Social and Cultural Rights, Seventeenth session, E/C.12/1997/8. Final Report of the ILA Committee on the Accountability of International Organisations. Berlin Conference, April 2004, as quoted in White 2005, supra note 50, p.215.

⁶⁷ Ibid., and Halliday 2003, supra note 56. See 1990 United Nations Security Council Resolution 661, S/Res/0661; 1991 United Nations Security Council Resolution 687, S/Res/687; 1991 United Nations Security Council Resolution 706, S/Res/0706; 1991 United Nations Security Council Resolution 712, S/Res/0712 and 1999 United Nations Security Council Resolution 1284, S/Res/1284.

⁶⁸ Lavers 2008, supra note 58. See 1976 United Nations Security Council Resolution 387, S/Res/387; 1977 United Nations Security Council Resolution 405, S/Res/405; 1985 United Nations Security Council Resolution 573, S/Res/573 and subsequent 1985 United Nations Security Council Resolution 577, S/Res/577 on the same matter of South Africa's violation of Angola's territorial integrity.

⁶⁹ In October 1956 three countries signed an agreement in a villa in the south west suburbs of Paris known as Sèvres to plan an attack on Egypt in order to regain control of the Suez Canal after President Nasser had nationalised it.⁶⁹ This agreement between the UK, France and Israel was a an outline for a plan of attack by the three countries on Egypt. The written protocol was uncovered in 1996 for a BBC documentary on the 40th anniversary of the war and remains in the Israeli archives of [Ben-Gurion Archives](http://www.ben-gurion.gov.il/eng/press/1996/1996092001.htm). For a description of the written agreement between the UK, France and Israel to enter into a war with Egypt see A. Shlaim, 'The Protocol of Sèvres, 1956: Anatomy of a War Plot', at <http://users.ox.ac.uk/~ssfc0005/The%20Protocol%20of%20Sevres%201956%20Anatomy%20of%20a%20War%20Plot.html> (accessed at 21/09/2010).

A similar case exists for so-called humanitarian interventions, justifications for which range from attempts to prevent genocide to serious human rights violations. Even though France, the UK and the US opposed the crime of aggression without an opt out for states, they were very quick to use the ICC as a deterrent for the Gaddafi forces in Libya.⁷⁰ The question is: do humanitarian interventions lack an aggressive aim? This will be debated for some time to come. The recent humanitarian interventions in Kosovo and Libya were both a response to military advances on civilian populations and seen as a necessary step to protect human life, but their consequences were not purely positive:

“An on-the-ground examination by The New York Times of airstrike sites across Libya during the conflict – including interviews with survivors, doctors and witnesses, and the collection of munitions remnants, medical reports, death certificates and photographs – found credible accounts of dozens of civilians killed by NATO in many distinct attacks. The victims, including at least 29 women or children often had been asleep in homes when the ordnance hit.... By NATO’s telling during the war, and in statements since sorties ended on October 31, the alliance-led operation was nearly flawless.”⁷¹

‘Collateral damage’ is a common phrase in this era of war. Whether it is in Iraq, Afghanistan, Libya or Syria, war always creates casualties and displaced civilians. This is one of the problems with interventions, however humanitarian in spirit or name. Several feminist writers in the early 1990s encouraged intervention in Kosovo in order to end the violence and systematic raping aimed at Muslim women.⁷² One unforeseen side-effect of the intervention was the trafficking of other women to use as prostitutes for the NATO troops in the territory.⁷³ Godec argues that although the intervention did stop that specific act from continuing, it set up further problems for other women as well as a disproportionate use of force.⁷⁴

Feminist perspectives on international law and humanitarian interventionism seem on the surface to hold opposite ideologies. Feminist scholars who support the responsibility to protect doctrine, such as Nesiiah and Mackinnon, recognise that the ideology may not cohere with certain feminist concerns, but the responsibility to protect doctrine can be used to achieve a better situation for women’s rights.⁷⁵ On the one hand, humanitarian intervention may diminish or halt civilian casualties of atrocities and it generally is a reaction to breaches of a state’s responsibility towards their citizens, which coheres with a feminist agenda. But a humanitarian intervention is also a representation of force, a blunt intervention, usually promoted by Western states, which has at least three consequences besides it potentially being a disproportionate use of force. Firstly, it reinforces the ‘world police’ view of powerful Western states by its use. Secondly, it gives rise to the perception that diplomacy has failed once again, even if it was never deployed and finally, it elevates the result as opposed to the process, so that the ends justify the means. Nesiiah used the term “marriage of convenience” to describe the relationship between military

⁷⁰ 2011 United Nations Security Council Resolution 1970 s2(4), P. Levina, 'A Show trial for Saif Gaddafi would only promote discord in Libya', *The Guardian*, 24 Jan 2012, available at <http://www.guardian.co.uk/law/2012/jan/24/show-trial-saif-gaddafi-libya> (accessed at 14/01/13).

⁷¹ C. Stea, 'Manipulation of the UN Security Council in support of the US-NATO Military Agenda', *Centre for Global Research*, 10 Jan 2012, at <http://www.globalresearch.ca/manipulation-of-the-un-security-council-in-support-of-the-us-nato-military-agenda/28586> (accessed at 15/03/13).

⁷² S. Godec, 'Between rhetoric and reality: exploring the impact of military intervention upon sexual violence post conflict sex trafficking in Kosovo', *International Review of the Red Cross*, 2010-92, p. 877, p. 235. The issue became famous in the movie ‘The Whistleblower’.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Godec 2010, *supra* note 72, p. 57.

hawks and the so-called feminist hawks.⁷⁶ This is part of the 'saving women' narrative which is discussed in feminist literature in international law.⁷⁷ To quote Mackinnon, "the treatment of women under the Taliban was not the justification of the invasion but seen by western hawks as a positive side effect".⁷⁸ The notion of the Western feminist saving oppressed Middle Eastern women reminds us of Gunning's "Arrogant perception, world-travelling and multicultural feminism", which warns "Western liberals of the problem of perspective, where victims are perceived as the 'other' through the neo-colonial lens."⁷⁹

From the point of view of the state, especially the powerful state, feminist peace and security issues are largely ignored. The Coalition for the Responsibility to Protect has included in its outcome document, which was passed by the General Assembly of the UN, a section on Gender Equality and Empowerment of Women, where it "promotes increased representation of women" in government and decision-making bodies.⁸⁰ Section 116, entitled 'Women in the prevention and resolution of Conflicts', mentions some insightful passages including a commitment to Security Council Resolution 1325 and its "full and effective implementation".⁸¹ But these words are generalities and whether they will ever have an impact on the power brokers of international law remains to be seen.

However, as Charlesworth points out, the "language of responsibility resonates with the research on female reasoning,"⁸² whose focus is on values of caring and connections between people, as identified by Gilligan.⁸³ The problem is that actual interventions tend to be more traditional and less concerned with the more holistic approach of the responsibility to protect doctrine. This is not to say that the doctrine is the solution to all the problems associated with interventions, in fact Charlesworth raises the useful argument that the doctrine can marginalise women if it is applied in a limited, narrow fashion and does not take account of the factors that affect women's lives. In other words, the post-conflict doctrine of responsibility to protect focuses on "disarmament, demobilization and reintegration of armed forces", not the types of issues that would aid women, such as economic aid to families, women's inclusion in peace building and access to health and education.⁸⁴ These are the missed lessons of feminist peace and security issues.

V. Missed Lessons from Feminist Peace & Security Issues

The distinction between humanitarian intervention and the responsibility to protect doctrine is usually the timescale and the post-conflict aid, assistance or control the intervening state has in the target state. The initial point of this paper was to highlight the hypocrisy of powerful states that fought against the criminalisation of the crime of

⁷⁶ V. Nesiiah, 'From Berlin to Bonn to Baghdad: a space for infinite justice,' *Harvard Human Rights Journal* 2004-17, p. 197, quoted in Godec 2010, supra note 72.

⁷⁷ R. Kaput, 'The Tragedy of Victimisation Rhetoric: Resurrecting the "Native" Subject in International/Post Colonial Feminist Legal Politics', *Harvard Human Rights Law Journal* 2002-15 (1), pp. 1-37.

⁷⁸ MacKinnon 2006, supra note 20, p. 22.

⁷⁹ I. Gunning, 'Arrogant perception, world-travelling and multicultural feminism: The case of female Genital Surgeries', *Columbia Human Rights Law Review* 1991/1992-23, p. 189.

⁸⁰ 2005 World Summit Outcome, United Nations General Assembly at its 60th session, GA/A/60/L.1., Section 58 'Gender Equality and the Empowerment of Women'.

⁸¹ Ibid., Section 116, 'Women in the Prevention and Resolution of Conflicts'.

⁸² Charlesworth 2011, supra note 11, p. 146.

⁸³ Gilligan 1982, supra note 12.

⁸⁴ Charlesworth 2011, supra note 11, p. 151.

aggression for fear of an international institution having determination power over states, while at the same time utilising that same institution in a pre-intervention strategy of deterrence. For whatever reason or rationale, powerful states seek to maintain their political and legal supremacy and ignore the voices of others, including other states, NGOs and most of all women. Nevertheless, there are initiatives that put women in the forefront, such as the UK's development of a task force to be deployed into post-conflict areas and collect information and statements that will help promote prosecutions of gender crimes against women as a national action plan on UN Security Council Resolution 1325 on Women, Peace and Security.⁸⁵ This initiative, as well as others, are made on a learning curve and usually require backing from senior politicians because of the necessary support and funding. However, it is important to move beyond the gender sensitivity training for members of the armed forces. Despite the calls for inclusion of women in the peace process in Security Council Resolution 1325, the reality of recent conflicts has not reflected this.

Peace activist Leymah Gbowee stated in her Nobel Peace Prize lecture: "When you talk about... conflicts, the first image that appears is.... rape, abuse and exploitation. The last image that comes to their mind is the image of women trying to fight for peace."⁸⁶ In the past, the systematic exclusion of women from official peace processes was not only the beginning of the marginalisation of women but the exclusion also brought into question the effectiveness of the peace process in the long term. A study of fourteen peace negotiations since 1992 shows that less than 8% of the negotiating teams were women and less than 3% of the signatories were women.⁸⁷ Even more disconcerting was the fact that of the 585 peace agreements signed since 1990 only 92 mention women at all, even only in passing.⁸⁸ Nicol's study is important because it discusses the reasons and justifications of this exclusion, which include the fact that women do not tend to be combatants or make up the majority of combatants in a conflict. Other justifications include the fact that peace negotiations can be too crowded and they need to limit participants to the conflict groups, plus there are simply fewer women in the position of representative or public official and are therefore not represented as much.⁸⁹ The fact remains that women's participation in peace building is usually at grass roots level and tends to be community-based; these groups are not considered important at the national level.

The fact that Security Council Resolution 1325 is disregarded so blatantly can be explained by a lack of finances and/or the fact that the resolution does not include any concrete specifications for implementation. But it is not only its lack of practical implementation that is the problem, as Di Otto has discussed. The resolution portrays

⁸⁵ See 'Preventing Sexual Violence Initiative. UK Government National Action Plan on UNSCR 1325 Women, Peace and Security' available at http://www.peacewomen.org/assets/file/NationalActionPlans/uk_nationalactionplan_november2010.pdf (accessed at 15/03/13).

⁸⁶ Nobel lecture by L. Gbowee, upon receiving the 2011 Nobel Peace Prize, available at http://www.nobelprize.org/nobel_prizes/peace/laureates/2011/presentation-speech.html (accessed at 14/01/13).

⁸⁷ C. Nicol, 'Women's Participation In Peace Processes: A Critical Analysis.' *Australian Institute of International Affairs* 2012, available at <http://www.aiaa.asn.au/qa/qa-vol4-issue1/757-womens-participation-in-peace-processes-a-critical-analysis> (accessed at 13/01/13).

⁸⁸ Ibid.

⁸⁹ Ibid.

women as victims and promotes the protective stereotypes.⁹⁰ Where are the women who are involved with the application of this resolution? It reconfirms the old public/private divide: women are still being relegated to the private sphere.⁹¹ In reality, women groups have had an effect on the development of international law instruments, treaties, conventions and Security Council resolutions with regards to women, but they all lack teeth, unlike the binding resolution regarding the intervention in Libya.⁹²

In the new post-war Iraq, every religious and ethnic group was represented in the Governing Council, but out of the 25 members, only three are women.⁹³ This is directly opposed to the first post-war survey of rights completed by the NGO 'Women for Women International', which outlined that 94% of women wanted equal rights, 84% wanted the right to vote on the constitution and 80% wanted no limitation on women's participation in local or regional councils.⁹⁴ The US and UK, powerful states intent on the war with Iraq, spent billions on the bombing campaign of 'shock and awe' but faltered in the peace process with women. Unlike Afghanistan, Iraq under Saddam Hussein had a constitution that guaranteed rights for women and the government encouraged women to get an education and participate fully in the workforce⁹⁵ until the Gulf War years when, according to Human Rights Watch, Saddam Hussein decided "to embrace Islamic and tribal traditions as a political tool in order to consolidate power."⁹⁶

In Libya, after the civil war and intervention, the Libyan Human Rights Alliance and other members of civil society protested the very small 10% quota for women in the new Libyan Parliament.⁹⁷ Libya Women's Platform for Peace, along with other NGOs, put together a series of recommendations to empower participants and to recommend actions to include women in reconstruction efforts for the Libyan Interim Council, which was the precursor to the General National Congress.⁹⁸ Peace activists from eleven other states met in the US to put pressure on the UN to ensure there was a gender component in

⁹⁰ D. Otto, 'Power and Danger: Feminist Engagement with International Law through the UN Security Council.' *Australian Feminist Law Journal* 2010-32, p. 99. Also see G. Heathcote, 'Feminist Politics and the Use of Force: Theorising Feminist Action and the Security Council Resolution 1325', *Socio-legal Review* 2011-7.

⁹¹ Classical liberal philosophy where the public sphere is that of the government and the private is that of family and home life; traditionally women's issues have been relegated to the private sphere. For a full discussion see C. Chinkin, 'A Critique of the Public/Private Dimension', *European Journal of International Law* 1999-10 (2), p. 387.

⁹² 2000 United Nations Security Council Resolution 1325, S/Res/1325 is not a binding Chapter VII resolution like 2011 United Nations Security Council Resolution 1970, S/Res/1970.

⁹³ 'Iraqi Governing Council Members' *BBC News*. 14 July 2003, available at http://news.bbc.co.uk/1/hi/world/middle_east/3062897.stm (accessed at 17/01/13).

⁹⁴ 'Women for Women, 'First Post-War Survey of Iraqi Women Shows Women Want Legal Rights; Disperses Notions That Women Believe Tradition, Culture Should Limit Their Participation in Government' at <http://www.womenforwomen.org/news-women-for-women/assets/files/Post%20War%20Iraq%20Women%20Report%20Press%20Release.pdf> (accessed at 15/01/13).

⁹⁵ Human Rights Watch Briefing Paper, 'Background to Women's Status in Iraq Prior to the Fall of the Saddam Hussein Government', November 2003, at <http://www.hrw.org/legacy/backgrounder/wrd/iraq-women.htm> (accessed at 15/12/12).

⁹⁶ *Ibid.*

⁹⁷ Libyan Human Rights Alliance, 'Libya's 10% Parliament Quota for Women. Press Release', May 2012, at <http://www.wluml.org/news/libya-libyas-10-parliament-quota-women> (accessed at 15/12/12).

⁹⁸ Libya Women's Platform for Peace - Final Policy Recommendations from Tripoli and Benghazi' at <http://www.el-karama.org/content/libya-womens-platform-for-peace-final-policy-recommendations-from-tripoli-and-benghazi> (accessed at 10/03/13).

Libya's reconstruction process.⁹⁹ The main issue here is that history is repeating itself: attempts by civil society groups to get the power brokers to include women in the transition to a new type of state post-conflict are limited. The amount of effort and money going into this type of intervention is meaningless compared to the amounts put into military campaigns.

The key to sustainable political influence by women on the decision-making of institutions may have to follow the 30 percent critical mass formula proposed by the 1995 Beijing Platform for Action.¹⁰⁰ This could be applied to all levels of decision-making in post-conflict states and their new governments, and it could also apply to decision-making in powerful states as well. A minimum critical mass of women formula does not guarantee that women's needs will be met, but it does allow for the opportunity in a more democratic way.

Returning to the war in Afghanistan and the ancillary justification that the 'war on terror' created the opportunity to remove women from the oppression of the Taliban, Hentschel points out that even though 12% of the Lloya Jirga government were women, intimidation by local war lords caused several women to leave their posts, including the Minister for Women's Affairs after she received death threats.¹⁰¹ Hentschel recommended that funds for reconstruction could have been dependent on the inclusion of a certain number of women in order to reduce the intimidation of women who wish to participate.¹⁰² She also recommends the development of a gender index for the fields of foreign and security politics, which would be applied to military and civilian missions in cases of intervention and post-conflict rebuilding.¹⁰³

Missed lessons from feminist peace and security issues can cover several relevant problems when examining war, intervention and reconstruction. These lessons range from the practical such as the inclusion of women and civil society in every level of peace building, to the more ideological, the evaluation of security as a term for the protection of all civilians, not the entity of the state. These 'missed lessons' urge powerful states to re-evaluate their reasoning for consistency and inclusiveness and to reject the traditional 'masculine mode of decision-making'.¹⁰⁴

VI. Conclusion

The point of this article was to discuss how certain states have missed valuable lessons from feminist peace and security perspectives through a comparison of their positions on the crime of aggression and their interventions in other states. The comparison showed the hypocrisy of powerful states who stifled the negotiations of the crime of aggression in

⁹⁹ S. Bhagwan Rolls, 'Women Peace Activists call for Women's Participation in Libya's Reconstruction Process', 25 October 2011, at http://www.isiswomen.org/index.php?option=com_content&view=article&id=1507:women-peace-activists-call-for-womens-participation-in-libyas-reconstruction-process&catid=22:movements-within&Itemid=229 (accessed at 12/09/12).

¹⁰⁰ United Nations, 'Women and Democracy', *Global Issues*, available at <http://www.un.org/en/globalissues/democracy/women.shtml> (accessed at 16/09/12).

¹⁰¹ G. Hentschel, 'Gender Justice in Peace and Security Politics Feminist Approaches and Perspectives in the 21 Century' at http://www.glow-boell.de/media/de/txt_rubrik_3/gender_justice.pdf (accessed at 19/01/13).

¹⁰² Ibid., p. 17.

¹⁰³ Ibid., p. 21.

¹⁰⁴ Charlesworth 2011, *supra* note 11, p. 139.

Kampala, but were quick to use a referral to the ICC as a deterrent against Gaddafi and his forces. It is not about the promotion of the court itself, but the skewed actions of states who seek to maintain their own power base among the elite group of states. They had a determinative impact on the jurisdictional trigger for the crime of aggression and ensured any potential liability could never occur due to the infamous state opt out. These are the states that control the Security Council and yet will have no limit placed upon them when it comes to the crime of aggression. In reality the legacy of Nuremberg may be applied to others but never to the powerful states.

The preamble to the Rome Statute includes this statement: “To establish an independent permanent ICC in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.”¹⁰⁵ The court does not truly have jurisdiction over what was deemed at Nuremberg to be the most serious crime¹⁰⁶ if every state chooses to have an opt out. Times have changed and even though aggression may join the other core crimes of the court, depending on if the rule comes into force, it will always be treated very differently.¹⁰⁷ Recently the ICC has become a tool for neo-colonial punishment as with the cases of Sudan and Libya. Some states did fear that any future acts of humanitarian intervention might be criminalised with the amendments to the crime of aggression, but this was probably more a fear of political prosecutions than anything else.

Humanitarian intervention can be very risky business for the civilian population. Questionable types of interventions can be risky for the emerging acceptance of the responsibility to protect doctrine. Powerful states need to interpret security issues with regard to civilians, not just the security of the entity of the state. In order to avoid the continued use of an interventionist strategy, powerful states need to adopt other modes of reasoning and examine what responsibility can mean as a concept. For instance, powerful states need to re-evaluate their responsibility and contributions to supporting certain leaders and dictators in different parts of the world, such as in Egypt and Libya, and look to upholding international human rights norms instead of helping to maintain power to a leader who happens to be friendly to Western governments. Other types of responsibility might include peace building that is actually inclusive and linked to the disenfranchised or the marginalised in society, including women.

Feminist peace and security recommendations need to be incorporated into the foreign relations of powerful states. As stated earlier, re-examining methodological underpinnings of who makes the decisions, how they are taken and what are the mechanisms that will be deployed in the long term could lead to a better understanding of a more balanced form of international relations. Powerful states could avoid claims of

¹⁰⁵ 1998 Rome Statute of the International Criminal Court, 2187 UNTS, Preamble, available at http://untreaty.un.org/cod/icc/STATUTE/99_corr/preamble.htm (accessed at 02/11/12).

¹⁰⁶ Crimes against peace, as described by the Judgement of the Nuremberg International Military Tribunal 1946, “To initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole,” p. 186.

¹⁰⁷ Resolution RC/Res.6 (1)(4). Supra note 3 Adopted at the 13th Plenary meeting 11 June 2010. Article 15 *ter* (2)(3) and Article 15 *bis* (2)(3). According to article 5 (2), “[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”. http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

hypocrisy by not opting out of the crime of aggression at the ICC. They could also use their influence with other states in diplomatic efforts and link investments and aid to ethical issues, human rights standards and the status of women.

During the time of the civil conflict in Libya, a newspaper headline stated “Cameron and Obama vow to fight for the heroes of the Arab Spring”¹⁰⁸ showing thus that the traditional masculine mode of reasoning remains: combatants are important, civilians are not mentioned and women as a group are forgotten.

¹⁰⁸ S. Coates & D. Haynes, 'Cameron and Obama vow to fight for the heroes of the Arab Spring', *The Times*, 24 May 2011, available at <http://www.thetimes.co.uk/tto/news/world/europe/article3034858.ece> (accessed at 06/12/12).