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## Women, Peace, and Security

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Dramatic shifts over the last two decades have transformed the Security Council's ("Council") role in advancing and enforcing international law, particularly international humanitarian law (IHL). The changing nature of armed conflict, universal acceptance of human rights, development of *jus cogens*, and other advances in international law have redefined the limits of state sovereignty and influence the contemporary understanding of the Council's mandate under the United Nations Charter ("Charter").

The Council has made protecting civilians in armed conflict central to its duty to maintain international peace and security and the focus of its measures taken under Chapter VII of the Charter to avert actual threats to peace and to restore breaches of peace. The Council has the singular power to take all measures necessary to avert and end threats to peace and security, including mass atrocities, violations of IHL, and other breaches of *jus cogens*, and is thus the principal instrument through which states can fulfill their legal obligations to act collectively to end such breaches.

Council actions have effected a paradigm change in women's rights under IHL. For example, Resolutions 827 (1993) and 955 (1994),<sup>1</sup> which established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively, led to historic precedents expanding women's right to accountability for sexual violence, including rape. The critical point is that the Council was the only body in the world with the power to create such Tribunals; looking back nearly twenty years later, the Tribunals represent a bright and shining moment for women.

Continuing this momentum, the Council addressed the impact of armed conflict on women and the use of sexual violence in conflict in 2000, with Resolution 1325. These were followed by Resolutions 1820 (2008), 1888 (2009), 1889 (2009), and 1960

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<sup>1</sup> UN Security Council Resolution 827, S/RES/827, May 25, 1993, adopted unanimously; UN Security Council Resolution 955, S/RES/955, Nov. 8, 1994, adopted 13-1-1, with Rwanda voting against and China abstaining.

(2010), which are known collectively as the “Women and Peace and Security” resolutions (“WPS Series”).

The Council had two interrelated but legally distinct goals when it passed Resolution 1325: (1) ending sexual violence in conflict, a gross violation of IHL, being perpetrated against women victims<sup>2</sup> in armed conflicts around the world;<sup>3</sup> and (2) rectifying women’s inequality in peacekeeping processes and post-conflict governments to enable durable peace. This article focuses on the first goal and examines how the Council’s failure to take measures commensurate with the gravity of the ongoing violations of IHL and to guarantee that implementation by states and the United Nations (UN) “ensures respect” for IHL have proven fatal to its efforts to end sexual violence in armed conflict. The Council has repeatedly acknowledged this failure, noting in 2008 in Resolution 1820 that “despite its repeated condemnation of violence against women and children in situations of armed conflict . . . such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality.”<sup>4</sup>

Why have multiple Council resolutions and extensive implementation efforts failed to stop sexual violence in armed conflict? Critical reasons examined in this chapter are: (1) the Council’s failure in the WPS Series to leverage its strongest tool, the preexisting absolute international legal obligations of states and the UN to take positive action to end breaches of IHL; (2) the insufficiency of the Council’s reliance on its recommendatory powers under Chapter VI of the Charter to effectively address situations of ongoing breaches that threaten international peace and security; and (3) the Council’s failure to distinguish the rights of women under IHL.

In many situations that threaten international peace and security, including gross violations of IHL, the Council is the only competent body with the power to take the measures necessary to end breaches, and through which states can act collectively to fulfill their legal obligations to the global community. Once the Council has seized itself of a matter involving gross violations of IHL and serious breaches of peremptory norms, as it has done in the WPS Series, it has “limit[ed] states’ room for maneuver in terms of individual responses to such wrongful acts.”<sup>5</sup> This chapter does not address the scope of the Council’s legal obligations to act in circumstances in which the Council has not seized itself of the situation.

<sup>2</sup> This chapter employs the definition of victim from the Basic Principles and Guidelines on the Rights Law and Serious Violations of International Humanitarian Law: “Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.” UN General Assembly Resolution 60/147, A/RES/60/147, Mar. 21, 2006, ¶ 8.

<sup>3</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 [hereinafter Geneva Convention IV], common Art. 1.

<sup>4</sup> UN Security Council Resolution 1820, S/RES/1820, June 19, 2008, adopted unanimously, preamble.

<sup>5</sup> Pierre Klein, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law, 13(5) EUROPEAN JOURNAL OF INTERNATIONAL LAW 1241 (2002), 1254.

In the WPS Series, the Council has assumed responsibility to act with respect to gross violations of IHL and breaches of *jus cogens* relating to sexual violence in conflict. This chapter examines the Council's actions in the WPS Series against its duties to act under the evolving imperatives of IHL, in particular those rules considered *jus cogens*. The Council's failure to ensure compliance with IHL in the WPS Series harms women victims of war rape and damages the Council's global legitimacy. Given the peremptory nature of the global concerns seized by the Council in the WPS Series, this chapter argues that the Council has a duty to take stronger and more effective measures to address sexual violence against girls and women in armed conflict under its Chapter VII powers.

States and the UN have absolute duties to "respect and ensure respect" for the rights of girls and women under IHL. These rights, which are non-derogable, are in many cases stronger than those under national and international human rights laws. This includes the right to nondiscrimination based on sex in the application of any of the provisions of IHL. The Council's duty to "ensure respect" requires it to use its strongest powers under Chapter VII to enforce the rights of girls and women under IHL, which it has not done. Two such violations discussed in this chapter are the failure to ensure nondiscrimination both in the provision of medical care and the application of the IHL prohibitions on unlawful means and methods of warfare.<sup>6</sup>

Section I presents an overview of the Council's Charter mandate and examines the competency and duties of the Council in light of advances in international law, including *jus cogens*. Section II analyzes the history, progression, and implementation of the WPS Series against the international law framework laid out in Section I. Section III examines how the Council's failure to distinguish obligations under IHL in the WPS has prevented it from making meaningful progress to end sexual violence in conflict and address its consequences. Section IV recommends additional Council measures to eliminate the use of sexual violence against women in conflict.

#### I. THE EFFECT OF ADVANCES IN INTERNATIONAL LAW ON THE SECURITY COUNCIL'S MANDATE UNDER THE UN CHARTER

Advances in international law, including IHL and the customary laws of state responsibility (LSR), have greatly expanded states' duties to respond, both individually and collectively, to gross violations of IHL and serious breaches of peremptory norms, also called *jus cogens*, the highest status in the hierarchy of international law. Concurrently, the Council has increasingly made ensuring compliance with IHL central to its Charter mandate to maintain international peace and security. This section examines the competency and responsibility of the Council under the Charter in light of these developments.

<sup>6</sup> Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21(2) *BERKELEY JOURNAL OF INTERNATIONAL LAW* 288 (2003).

### A. The Core Competency of the Security Council

The impact of advances in international law on the Council must be considered in light of the Council's mandate and competency under the Charter. In 1945, states, cognizant of the failure of the League of Nations to prevent the Second World War,<sup>7</sup> determined that the Council should have the singular power to avert threats to peace, breaches of peace, or aggression. Under Article 1(1) of the Charter, this requires proactive as well as reactive or remedial measures. Under Article 25, member states agree to accept and carry out all decisions of the Council.

Chapters V through VII of the Charter set out the Council's competency to fulfill its core mandate, and there are important distinctions between the Council's powers under these different chapters. Chapter VI sets forth the Council's competency over "peaceful settlement of disputes," permitting it to make recommendations with a view to resolving situations that it finds "likely to endanger the maintenance of international peace and security."<sup>8</sup> The Council passed the WPS Series under its Chapter VI recommendatory powers, which are, as this chapter will demonstrate, insufficient to address the gross breaches of IHL at issue in the WPS Series. Further, in the WPS Series the Council buried, rather than leveraged, a powerful tool: its ability to harness states' preexisting legal obligations under international law.

Chapter VII is the source of the Council's strongest powers. Once the Council identifies an actual threat to peace, breach of the peace, or act of aggression, the Charter requires that the Council "take effective collective measures for the prevention and removal of threats to the peace."<sup>9</sup> The Council has the power to use progressively restrictive measures ranging in intensity: emergency provisional measures; coercive measures that do not involve the use of armed force, including sanctions and severance of diplomatic relations; the establishment of ad hoc tribunals and compensation funds for IHL victims; referrals to the International Criminal Court (ICC); and, as a last resort, the use of armed force.

The Council has taken a wide range of measures to address threats to peace and security under Chapter VII, including ordering military intervention,<sup>10</sup> imposing sanctions on states for war crimes or genocide,<sup>11</sup> declaring a country's constitution null and void,<sup>12</sup> ordering states to ensure reparations for victims of international

<sup>7</sup> United Nations, *Charter of the United Nations*, 1 U.N.T.S. XVI, entered into force Oct. 24, 1945, Art. 24(1) ("[The UN's] Members confer on the Security Council primary responsibility for the maintenance of international peace and security. . ."), preamble. ("We the Peoples of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . .").

<sup>8</sup> United Nations, *Charter of the United Nations*, Art. 33.

<sup>9</sup> United Nations, *Charter of the United Nations*, Art. 1(1); see generally *ibid.*, Chapters V–VII.

<sup>10</sup> UN Security Council Resolution 794, S/RES/794, Dec. 3, 1992. Adopted unanimously.

<sup>11</sup> UN Security Council Resolution 661, S/RES/661, Aug. 6, 1990. Adopted 13-0-2, with Cuba and Yemen abstaining.

<sup>12</sup> UN Security Council Resolution 554, S/RES/554, Aug. 17, 1984 (addressing apartheid in South Africa). Adopted 13-0-2, with the United Kingdom and the United States abstaining.

crimes,<sup>13</sup> and making recommendations regarding the regulation of armaments.<sup>14</sup> The Council has also acted to ensure criminal accountability for war crimes and crimes against humanity by setting up independent ad hoc criminal tribunals to prosecute perpetrators of grave breaches of IHL,<sup>15</sup> and referring states to the ICC.<sup>16</sup>

The Council can act under Chapter VII to address both concrete and abstract situations as threats to peace and security. For example, the Council has determined that an abstract situation,<sup>17</sup> namely the proliferation of weapons of mass destruction, constitutes a threat to peace and security under Chapter VII.<sup>18</sup> The Council's resolutions on the nonproliferation of weapons of mass destruction, starting with Resolution 1540 (2004), require states to comply with certain 1540 mandates, including passing national laws, and establish a monitoring mechanism, the 1540 Committee, to oversee state compliance. These resolutions reaffirm and expand states' preexisting obligations under IHL contained in treaties regarding biological and chemical weapons.

The 1540 Series, like the WPS Series, are thematic resolutions, but unlike the WPS Series, they are taken under the Council's stronger Chapter VII powers. This contrasts with the Council's failure to take the strongest possible measures under Chapter VII in the WPS Series. This distinction is critical to understanding the inability of the WPS Series to effectively combat sexual violence and hold accountable intransigent violator states and non-state parties to conflict.

It should be noted that the binding effect of a Council resolution on states under Article 25 of the Charter is not dependent upon whether the Council is acting under Chapter VI or VII.<sup>19</sup> Interpreting the legal effect of Council resolutions or parts of resolutions is a "complex art," as other commentators have noted.<sup>20</sup> The International Court of Justice (ICJ) held that the legally binding nature of Council directives, including resolutions, is determined by analyzing "the terms of the resolution to be interpreted, the discussions leading to it, [and] the Charter

<sup>13</sup> UN Security Council Resolution 687, S/RES/687, Apr. 3, 1991. Adopted 12-1-2, with Cuba voting against, and Ecuador and Yemen abstaining.

<sup>14</sup> Charter of the United Nations, Art. 26.

<sup>15</sup> S/RES/827; S/RES/955.

<sup>16</sup> UN Security Council Resolution 1593, S/RES/1593, Mar. 31, 2005, adopted 11-0-4 with Algeria, Brazil, China, and the United States abstaining; UN Security Council Resolution 1970, S/RES/1970, Feb. 26, 2011, adopted unanimously; *Rome Statute of the International Criminal Court*, A/CONF.183/9, 2187 U.N.T.S. 90, entered into force July 1, 2002 [hereinafter *Rome Statute*], Art.13(b); *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, entered into force July 22, 2004, Art. 17.

<sup>17</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Submission of the Government of the United States of America concerning Certain Arguments made by Counsel for the Accused, July 17, 1995 [hereinafter Submission of U.S. in *Prosecutor v. Tadić*], 22.

<sup>18</sup> UN Security Council Resolution 1540, S/RES/1540, Apr. 28, 2004. Adopted unanimously.

<sup>19</sup> Rosalyn Higgins, The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter, 21(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 270 (1972).

<sup>20</sup> Security Council Report, Special Research Report – Security Council Action under Chapter VII: Myths and Realities, June 23, 2008 [hereinafter Security Council Report, Special Research Report No. 1], 1.

provisions invoked.”<sup>21</sup> This chapter makes a significant distinction between Chapter VI and VII powers, though the distinction is not dispositive for determining the legal duty of states to comply.

### B. *Advances in International Law: Obligations Erga Omnes and Jus Cogens*

Advances in international law have effected a normative change in traditional notions of the inviolability of state sovereignty. Council actions reflect this change; for example, in 1999, the Council condemned Iraq’s repression of the Kurdish population and demanded the cessation of such acts, finding the purely internal acts of a state to be a threat to peace and security.<sup>22</sup>

This demonstrates that all states must act in accord with *jus cogens*, laws deemed critical to “the survival of States and their peoples and the most basic human values,”<sup>23</sup> and therefore accorded the highest status in the international law hierarchy. *Jus cogens*, also called peremptory norms of international law, are defined in the 1969 Vienna Convention on the Law of Treaties as norms “accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>24</sup> Significant to the WPS Series, some provisions of IHL provisions are now considered *jus cogens*, in particular the mandates of common Article 3 of the Geneva Conventions<sup>25</sup> discussed in Section III.

States have *erga omnes*, or absolute, duties to take action in response to certain internationally wrongful acts of other states, the most serious of which are breaches of *jus cogens*. States’ duties to respond arise under two separate but interrelated areas of international law: IHL and the LSR.<sup>26</sup> For example, states’ obligations to act can arise under both areas of law, such as the duty to prevent and punish genocide, as the prohibition on genocide is *jus cogens*. When *jus cogens* are breached, all states have *erga omnes* duties to take all possible measures, both individually and collectively, to

<sup>21</sup> International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ 16, Advisory Opinion, June 21, 1971, ¶ 114.

<sup>22</sup> UN Security Council Resolution 688, S/RES/688, Apr. 5, 1991. Adopted 10-3-2, with Cuba, Yemen, and Zimbabwe voting against, and China and India abstaining.

<sup>23</sup> For a discussion of how armed conflicts (which directly implicate IHL) constitute a breach of peace, see International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, ¶ 30.

<sup>24</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980, Art. 53.

<sup>25</sup> Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf>, 25.

<sup>26</sup> See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59(4) LAW AND CONTEMPORARY PROBLEMS 63 (1996), 63 (“*Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens*.”)

end such breaches. The Council is the principal instrument through which states can act collectively to do so.

IHL, or the “laws of war,” are codified in the Geneva Conventions of 1949 (the “Conventions”) and its Additional Protocols, as well as other treaties. It is the joint responsibility of all High Contracting Parties to the Conventions to ensure compliance. Common Article 1 of the Conventions<sup>27</sup> mandates all parties “to respect and to ensure respect for the present Convention in all circumstances,” a duty reinforced by Additional Protocol I (API). The ICJ has characterized this duty as one derived “from the general principles of humanitarian law to which the Conventions merely give specific expression.”<sup>28</sup> This means that the duties spelled out in common Article 1 are considered to be customary international law, meaning they are binding on all states, even those that are not parties to the Conventions.<sup>29</sup>

The *erga omnes* duty of states to “ensure respect” for the Conventions means that when a state violates IHL, all states, acting both individually and collectively, must take all possible measures within their means to seek to end the violation.<sup>30</sup> This obligation under IHL is characterized as one of action, not result,<sup>31</sup> and does not leave an “out” for states to make a political judgment about the efficacy of their actions. For example, a state sitting on the Council that hinders Council action on a breach of IHL may violate its own obligations under common Article 1.<sup>32</sup>

Recognizing the practical limitations of any one state acting individually to end breaches such as heinous crimes committed by a state in armed conflict, Article 89 to API makes explicit the duty of states to act collectively: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.”<sup>33</sup> The requirement for collective action in API signals the clear intent of states that the UN, in particular the Council, has an active role in the enforcement of IHL.

Similarly, the Council’s role in ending impunity for grave breaches of IHL is enhanced by the Rome Statute, the treaty that established the ICC. The Rome

<sup>27</sup> See Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, entered into force Dec. 7, 1978 [hereinafter Protocol I], Art. 1.

<sup>28</sup> International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 1986 ICJ 14, Merits Judgment, June 27, 1986, ¶ 220.

<sup>29</sup> Common Article 1 to all four Geneva Conventions of 12 August 1949; International Committee of the Red Cross, *Customary IHL Database – Rule 144: Ensuring Respect for International Humanitarian Law Erga Omnes*, available at: [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule144](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule144).

<sup>30</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136, Advisory Opinion, July 9, 2004, ¶ 158.

<sup>31</sup> International Committee of the Red Cross, *Improving Compliance with International Humanitarian Law*, June 27, 2008, 2.

<sup>32</sup> Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84(846) INTERNATIONAL REVIEW OF THE RED CROSS 401 (2002), 431.

<sup>33</sup> *Protocol I*, Art. 89.

Statute and the 2004 UN-ICC Relationship Agreement firmly establish the Council's role in supporting the Court's mission. Under the Rome Statute, the Council, acting under Chapter VII, has the ability to grant the ICC jurisdiction over states that have not ratified the Rome Statute but have committed war crimes.<sup>34</sup> Thus, with respect to situations of impunity for grave breaches of IHL of non-state parties to the Rome Statute, the Council is positioned as the gatekeeper to justice. In this way, the Council is the only international body with the power to give effect to states' *erga omnes* duties to ensure criminal accountability for victims in those states.

This duty of states to respond to breaches of *jus cogens* exists concurrently under IHL and the LSR, which are codified in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles.")<sup>35</sup> The Draft Articles set forth states' duties to respond, both individually and collectively, to serious breaches of *jus cogens*.<sup>36</sup> The framework set forth by the Draft Articles covers *jus cogens* breaches generally as well as those that are concurrently breaches of IHL. The duty to ensure that individual perpetrators of grave breaches of IHL are criminally prosecuted is accompanied by a duty to ensure that violator states are held civilly accountable for such breaches, which includes a duty of cessation of the wrongful conduct and the right to reparations separate from any criminal processes.<sup>37</sup>

The Draft Articles provide that when a wrongful act by one state arises to the level of being a serious breach of *jus cogens*, even in the absence of a court determination or a Council resolution, all states have a duty to act and respond, including by not aiding or assisting the violator state in the maintenance of the breach.<sup>38</sup> The Draft Articles provide that all states have a duty to engage in a "joint and coordinated effort . . . to counteract the effects of these breaches," including through the UN to respond to serious breaches of *jus cogens*.<sup>39</sup> This legal framework was cited approvingly by the ICJ, in its 2012 opinion on "jurisdictional immunities of the state" (*Germany v. Italy*), when it found that Article 41 of the Draft Articles provides the correct legal framework for states' responses to serious breaches of peremptory norms.<sup>40</sup> Similarly, the ILC's Draft Articles on the Responsibility of International Organizations outline the duty of international organizations, such as the Council, to not aid or assist in the maintenance of a breach of *jus cogens*.<sup>41</sup>

<sup>34</sup> *Rome Statute*, Art. 13(b).

<sup>35</sup> UN General Assembly, Report of the International Law Commission, Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), A/56/10, 2001 (Draft Articles on Responsibility of States for Internationally Wrongful Acts) [hereinafter Draft Articles on Responsibility of States].

<sup>36</sup> Draft Articles on Responsibility of States.

<sup>37</sup> Draft Articles on Responsibility of States.

<sup>38</sup> Draft Articles on Responsibility of States, Art. 41.

<sup>39</sup> Draft Articles on Responsibility of States, commentary to Art. 41, ¶¶ 2–3.

<sup>40</sup> International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 ICJ 7, Judgment, Feb. 3, 2012, ¶ 93.

<sup>41</sup> UN General Assembly, Report of the International Law Commission, Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), A/66/10, 2011 (Draft Articles on the Responsibility of International Organizations), Art. 14.

Advances in international law on genocide also call for the Council to play a significant role in preventing genocide. The ICJ, in its judgment interpreting the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), decided that a state must take all means reasonably available to it to prevent genocide “the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”<sup>42</sup> States acting alone are limited in their ability to combat genocide in another state, therefore, in practical terms; this duty needs to be discharged collectively, with the Council as the most effective body for such collective action. Article 8 of the Genocide Convention provides that states may call upon the competent organs of the UN, including the Council, to prevent and suppress acts of genocide,<sup>43</sup> which was done by the United States with respect to the situation in Darfur.<sup>44</sup>

The emerging Responsibility to Protect (RtoP) doctrine, outlining the duty of the international community to prevent and halt four serious international crimes – genocide, war crimes, crimes against humanity, and ethnic cleansing – under international law, goes beyond the existing legal mandates of IHL and the LSR. RtoP focuses on each state’s obligations to protect its citizens and establishes that the international community has a duty to protect populations from these serious crimes. The UN General Assembly, in considering obligations under RtoP, found that “[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>45</sup> In invoking Chapter VI and VII of the Charter, the UN recognizes the role the Council must play in the implementation of states’ obligations under RtoP.

Developments in international law have greatly enhanced states’ *erga omnes* obligations under IHL and the LSR to respond to breaches of IHL and *jus cogens*. Concomitantly, it is recognized that collective action must be taken in order to be effective; the UN, in particular the Council, is the most competent body to give effect to states’ *erga omnes* obligations to act collectively. These substantive developments in international law frame the Council’s mandate and its role in maintaining international peace and security.

The Council has recognized in the WPS Series that it must act to stop sexual violence, a *jus cogens* crime. The Council has acted to do so in a series of resolutions now spanning over thirteen years. Yet, such actions have not stopped these *jus cogens*

<sup>42</sup> International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ 43, Judgment, Feb. 26, 2007, ¶ 431.

<sup>43</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, Art. 8.

<sup>44</sup> William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide*, United Nations Audiovisual Library of International Law (2008), 4.

<sup>45</sup> UN General Assembly, 2005 *World Summit Outcome Document*, A/60/L.1, Oct. 24, 2005, ¶ 139.

crimes nor ensured that states and the UN comply with their obligations to uphold the IHL rights of women in armed conflict. The Council, given its actions and its role under the Charter, has a duty to take further action, as outlined in this chapter.

### C. *The Security Council and Ensuring Compliance with IHL*

Over the last twenty years, the Council has increasingly made state compliance with IHL central to its mandate.<sup>46</sup> This shift reflects the increased salience of international law and the global consensus against impunity for states that engage in genocide, war crimes, and crimes against humanity.<sup>47</sup> The Council's competence to take actions to "ensure respect" for IHL is firmly established: "[T]he furtherance of international humanitarian law is essential to the accomplishment of one [of the Council's] . . . core functions – the maintenance of international peace and security under Chapter VII."<sup>48</sup>

The Council found that gross violations of IHL, including sexual violence, constituted a threat to peace and acted under its Chapter VII powers in addressing the conflicts in the Former Yugoslavia and Rwanda.<sup>49</sup> The Council concluded that ending impunity for violations of IHL would contribute to the restoration and maintenance of peace in those situations, leading to the Council's historic establishment of the ICTY and ICTR.<sup>50</sup>

The Council also acted under Chapter VII to ensure accountability for gross violations of IHL in referring the situations in Darfur (2005)<sup>51</sup> and Libya (2011)<sup>52</sup> to the ICC. Similarly, the Council found the existence of a threat to peace when it imposed sanctions under Chapter VII for violations of IHL in the Democratic Republic of the Congo (DRC)<sup>53</sup> and Somalia.<sup>54</sup>

The Council's use of Chapter VII in these situations demonstrates the panoply of measures available to it under Chapter VII in response to gross violations of IHL.

<sup>46</sup> UN Security Council Resolution 1674, S/RES/1674, Apr. 28, 2006, adopted unanimously (reaffirming the need to comply with international humanitarian law and the fact that ending impunity is essential); UN Security Council Presidential Statement, S/PRST/2009/1, Jan. 14, 2009 (condemning all violations of international humanitarian law and emphasizing obligations to end impunity); UN Security Council Presidential Statement, S/PRST/2006/28, June 22, 2006 (discussing international law in general and international humanitarian law in particular and reaffirming the need to end impunity).

<sup>47</sup> S/RES/688.

<sup>48</sup> For a description of the Council's role in ensuring state compliance with IHL, see Submission of U.S. in *Prosecutor v. Tadic*, 22.

<sup>49</sup> S/RES/955; S/RES/827.

<sup>50</sup> S/RES/827.

<sup>51</sup> S/RES/1593.

<sup>52</sup> S/RES/1970.

<sup>53</sup> UN Security Council, Security Council Committee Established Pursuant to Resolution 1533 (2004) concerning the Democratic Republic of the Congo, available at <http://www.un.org/sc/committees/1533/>.

<sup>54</sup> UN Security Council, Security Council Committee Pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, available at <http://www.un.org/sc/committees/751/>.

Furthermore, these situations contrast with the Council's failure to use its Chapter VII powers to end the ongoing gross and discriminatory violations of the IHL rights of female victims of war in the WPS Series. In the case of the Former Yugoslavia where conflict was still ongoing, the Council found that prosecutions for sexual violence would "contribute to ensuring that such violations are halted and effectively redressed."<sup>55</sup> This determination is important for evaluating the Council's failure in the WPS Series to use its Chapter VII powers to ensure accountability for sexual violence, including referrals to the ICC or other competent criminal tribunals.

#### D. *The Security Council and Jus Cogens*

States have *erga omnes* obligations to both comply with *jus cogens* and respond to violations by other states of *jus cogens*, as described in Section I(B) above. How then do states' obligations to ensure compliance with *jus cogens* apply to, expand, or limit the Council and its mandate under the Charter?

Discussions of *jus cogens* in relation to the Council have largely arisen in the context of concerns about the almost unlimited discretion given the Council under the Charter to decide both which situations constitute a "threat to peace" and what measures are needed to address those situations. For example, as an ICJ justice commented, it would be illegal for the Council to order genocide.<sup>56</sup> These discussions of constraints on the Council arise out of the widespread criticism that the Council is too susceptible to political influences. Critics advocate for curbs on the power of the Council,<sup>57</sup> in part to avoid the dangers of Chapter VII "anomie."<sup>58</sup>

This section considers the inverse of constraints: Does the Council have a duty to act in the face of breaches of *jus cogens*? Does the Council have a duty to order, for instance, that genocide be stopped?

States must not fail to act, both individually and collectively, when faced with a breach of *jus cogens*. Thus, *jus cogens* requires not only constraints on certain actions, but also duties to act in response to breaches.<sup>59</sup> This writer would argue that the Council has a concomitant duty to act because it is the only international body with the ability to give effect to this duty of collective state action, which is

<sup>55</sup> S/RES/827, preamble.

<sup>56</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 1993 ICJ 407, Order (Separate Opinion of Judge Lauterpacht), Sept. 13, 1993, ¶ 102; International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ¶ 110.

<sup>57</sup> See Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16(1) *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 59 (2005); Matthias J. Herdegen, *The "Constitutionalization" of the UN Security System*, 27(1) *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 135 (1994).

<sup>58</sup> Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6(1) *NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS* 24 (2008), 80.

<sup>59</sup> Draft Articles on Responsibility of States, Art. 41.

specifically envisioned by certain bodies of international law such as IHL and RtoP, as discussed previously. Any discussion of Council obligations must acknowledge the political realities of Council action, however, which all too often influence the Council's decisions on when and whether to avert threats to peace.

A full exploration of the potential duty of the Council to respond to any and all breaches of *jus cogens* is outside the scope of this chapter. However, in the case of the WPS Series, the Council has already seized itself of the issue of sexual violence. The issues in the WPS Series involve breaches of IHL rules that are *jus cogens*, including the prohibitions on rape and other crimes of sexual violence, the use of an unlawful means or method of warfare, and the violation of the guarantees of common Article 3 of the Geneva Conventions, including its nondiscrimination mandate. In the WPS Series, as the Council has positioned itself as a gatekeeper to justice with the primary responsibility to end these breaches of *jus cogens*, it has a legal responsibility to act effectively to end such breaches.

## II. THE WOMEN AND PEACE AND SECURITY SERIES AND INTERNATIONAL HUMANITARIAN LAW

This section presents an overview of the WPS Series and its impact on stopping the gross violations of the rights of women victims of sexual violence in armed conflict. The WPS Series, passed under Chapter VI, has two interrelated but legally distinct goals: (1) addressing inequality as a root cause of conflict, and (2) addressing ongoing breaches of IHL. This chapter focuses on the second goal, analyzing the implementation and enforcement of the WPS Series in light of the legal framework governing gross violations of IHL, including breaches of *jus cogens*, which was outlined in Section I.

In twelve years of the WPS Series implementation by states and the UN, the Council has failed to leverage its strongest tool to end sexual violence in armed conflict: states' preexisting *erga omnes* obligations to stop breaches of *jus cogens*. The failure to harness states' legal obligations, combined with the limitations of acting under Chapter VI, doomed from the start the WPS Series' ability to stop breaches of IHL.

This section will demonstrate that the WPS Series has failed to effectively address sexual violence because the Council used only its Chapter VI powers. In contrast, the Council has addressed gross violations of IHL in other situations using its strongest powers under Chapter VII, as discussed in Section I. When measures under both Chapter VI and VII are required, the Council has divided resolutions into distinct parts and clearly designated which part is under Chapter VII.<sup>60</sup>

<sup>60</sup> See, e.g., UN Security Council Resolution 814, S/RES/814, Mar. 26, 1993, adopted unanimously; UN Security Council Resolution 918, S/RES/918, May 17, 1994, adopted without vote; UN Security Council Resolution 1576, S/RES/1576, Nov. 29, 2004, adopted unanimously.

In the case of the WPS Series, the Council addressed itself to violations of IHL, yet failed to utilize the strong protection mandates under IHL, which states have preexisting obligations to uphold.<sup>61</sup> States' duties under these frameworks, as discussed previously, are *erga omnes*; these obligations are non-derogable and exist independently of the WPS Series, as well as under it. Furthermore, sections of the WPS Series are binding under Article 25 of the Charter, under the test set forth by the ICJ in its Namibia decision<sup>62</sup> (see Section I(A)), in which it references the preexisting legal obligations of states.

#### A. *Laying Down the Gauntlet: Resolution 1325*

In 2000, as the Council increasingly acted in the face of gross violations of IHL, it took a historic step to address the widespread sexual violence against women and girls in ongoing armed conflicts by unanimously passing Resolution 1325. The Preamble of 1325 situates it with earlier Council resolutions addressing civilians and armed conflict such as 1261 (child soldiers) (1999),<sup>63</sup> 1265 (civilians) (1999),<sup>64</sup> 1296 (civilians) (1999),<sup>65</sup> and 1314 (child soldiers) (2000).<sup>66</sup>

In Resolution 1325, the Council embraces a broad definition of peace as not merely the interlude between conflicts, but rather a set of conditions critical to sustainable peace, including equality of women. The recognition of gender inequality as a root cause of conflict is the source of the Council's proactive measures to promote gender equality. Resolution 1325 aims to rectify this inequality by ensuring the equal participation of women in conflict resolution and peace processes, and by gender mainstreaming within UN operations, including peacekeeping operations and field-based operations. These measures for promoting gender parity, which contribute to preventing conflict, fall within the Council's competency under Chapter VI.

To end ongoing violations of IHL in Resolution 1325, the Council affirmed "the need to fully implement international humanitarian and human rights law that protects the rights of women and girls during and after armed conflict."<sup>67</sup> It is important to note that although Resolution 1325 deals with human rights law and IHL, it does not call anywhere for the two legal regimes to be differentiated in implementation efforts. IHL is the subject of three operative provisions in

<sup>61</sup> Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 879 (2005), 891.

<sup>62</sup> International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ¶ 117.

<sup>63</sup> UN Security Council Resolution 1261, S/RES/1261, Aug. 30, 1999. Adopted unanimously.

<sup>64</sup> UN Security Council Resolution 1265, S/RES/1265, Sept. 17, 1999. Adopted unanimously.

<sup>65</sup> UN Security Council Resolution 1296, S/RES/1296, Apr. 19, 2000. Adopted unanimously.

<sup>66</sup> UN Security Council Resolution 1314, S/RES/1314, Aug. 11, 2000. Adopted unanimously.

<sup>67</sup> UN Security Council Resolution 1325, S/RES/1325, Oct. 31, 2000, adopted unanimously, preamble.

Resolution 1325: the Council “[c]alls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians;”<sup>68</sup> the Council “[c]alls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict;”<sup>69</sup> and the Council “[e]mphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls” and “stresses the need to exclude these crimes, where feasible from amnesty provisions.”<sup>70</sup>

To guide implementation of Resolution 1325, the Council called for the Secretary-General to carry out a study of the impact of armed conflict on women and girls.<sup>71</sup> The resulting comprehensive study, incorporated into the Secretary-General’s 2002 report to the Council, was clear that “in particular the four Geneva Conventions of 1949 for the protection of victims of war and their two Additional Protocols of 1977” is the “area of law of primary relevance to the protection of women and girls during armed conflict”<sup>72</sup> and that IHL must “apply on the basis on non-discrimination.”<sup>73</sup> Further, the Secretary-General concluded that “[g]ender-based and sexual violence have increasingly become weapons of warfare and are one of the defining characteristics of contemporary armed conflict.”<sup>74</sup>

The Secretary-General’s report emphasized the centrality of IHL to Resolution 1325 and envisioned that its implementation would advance women’s rights under IHL as had been accomplished by the ICTY and ICTR.<sup>75</sup> However, this intention never translated into strong enforcement actions by the Council or clear directives to states and the UN to ensure respect for IHL. In fact, the first Presidential Statement (PRST) issued by the Council in 2002<sup>76</sup> on Resolution 1325 failed to mention the term “international humanitarian law” once. This is significant as PRSTs are official Council statements that reflect the consensus of Council members and indicate the Council’s “future intentions and course of action.”<sup>77</sup>

<sup>68</sup> UN Security Council Resolution 1325, ¶ 9.

<sup>69</sup> UN Security Council Resolution 1325, ¶ 10.

<sup>70</sup> UN Security Council Resolution 1325, ¶ 11.

<sup>71</sup> UN Security Council Resolution 1325, ¶ 16.

<sup>72</sup> UN Security Council, Report of the Secretary-General on Women, Peace and Security, S/2002/1154, Oct. 16, 2002, ¶ 16.

<sup>73</sup> UN Security Council, Report of the Secretary-General on Women, Peace and Security, ¶ 17.

<sup>74</sup> United Nations, Women, Peace and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325 (2000), 2002 [hereinafter Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325], ¶ 7.

<sup>75</sup> S/2002/1154, ¶ 24.

<sup>76</sup> UN Security Council Presidential Statement, S/PRST/2002/32, Oct. 31, 2002.

<sup>77</sup> PeaceWomen, *Presidential Statements (PRST)*, available at [http://www.peacewomen.org/security\\_council\\_monitor/debate-watch/presidential-statements-prst](http://www.peacewomen.org/security_council_monitor/debate-watch/presidential-statements-prst).

Between 2002 and 2008, the Secretary-General issued six reports<sup>78</sup> on Resolution 1325 and the Council issued six PRSTs.<sup>79</sup> What is particularly notable about these reports and PRSTs is that, despite consistent recognition by the Secretary-General in all six of his reports of the importance of fully implementing and ensuring compliance with IHL, in particular with respect to the use of sexual violence during conflict, only a single presidential statement incorporates an explicit call for compliance with IHL. What is more, the call was for parties to a conflict to respect IHL; there was no concomitant call for all states to ensure that this goal was accomplished. In its 2004 PRST, the Council called for the Secretary-General to submit a plan for implementing Resolution 1325 throughout the UN.<sup>80</sup> The Secretary-General's resulting sixty-page system-wide action plan (SWAP), which includes contributions from twenty-seven countries, mentions the terms "international humanitarian law" or "Geneva Conventions" only four times. Nowhere in the SWAP is there an indication that IHL is a distinct legal regime, separate from international human rights law, which imposes special obligations on UN entities and states. This is a significant omission because the WPS Series is but one example of the ways in which UN agencies are increasingly taking on the task of monitoring and enforcing IHL, yet these same agencies fail to comply with the IHL imperatives that apply to them. Such work requires clear directives from the Council, similar to the guidelines issued by the European Union (EU),<sup>81</sup> which require all EU organs to distinguish between IHL and other legal regimes "within their areas of responsibility and competence."<sup>82</sup>

In its 2004 PRST, the Council called for states to develop national action plans (NAPs) to fully implement Resolution 1325. To date, only 39 of 193 member states have developed NAPs.<sup>83</sup> Even when states have developed NAPs, those plans fail to set forth any concrete and explicit measures to accomplish the IHL-related goals of Resolution 1325. In fact, few plans even contain the phrase "international humanitarian law." Accordingly, a fatal flaw of all NAPs to date is that they in no way reflect each state's own obligations *erga omnes* to ensure respect for IHL and fail to set out

<sup>78</sup> S/2002/1154; UN Security Council, *Report of the Secretary-General on Women and Peace and Security*, S/2004/814, Oct. 13, 2004; UN Security Council, *Report of the Secretary-General on Women and Peace and Security*, S/2005/636, Oct. 10, 2005; UN Security Council, *Report of the Secretary-General on Women, Peace and Security*, S/2006/770, Sept. 27, 2006; UN Security Council, *Report of the Secretary-General on Women and Peace and Security* S/2007/567, Sept. 12, 2007; UN Security Council, *Report of the Secretary-General on Women and Peace and Security*, S/2008/622, Sept. 25, 2008.

<sup>79</sup> S/PRST/2002/32; UN Security Council Presidential Statement, S/PRST/2004/40, Oct. 28, 2004; Presidential Statement, S/PRST/2005/52, Oct. 27, 2005; Presidential Statement, S/PRST/2006/42, Nov. 8, 2006; Presidential Statement, S/PRST/2007/40, Oct. 24, 2007; Presidential Statement, S/PRST/2008/39, Oct. 29, 2008.

<sup>80</sup> S/PRST/2004/40.

<sup>81</sup> European Union, Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law, OJ 2009/C 303/06, Dec. 15, 2009.

<sup>82</sup> European Union, Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law, ¶ 1.

<sup>83</sup> PeaceWomen, *List of National Action Plans*, available at <http://www.peacewomen.org/naps/list-of-naps>.

any proactive measures to address WPS Series–related breaches of IHL by other states. For example, countries could include in their NAPs the option of referring (either individually or collectively with other states) another state to the ICC when it is violating IHL by committing sexual violence in conflict with impunity. The Council has failed to make clear that the WPS Series requires states to explicitly incorporate their IHL obligations into their plans, and has condoned such flawed implementation efforts.

### B. *New Gauntlets: Security Council Resolution 1820 and Onward*

Four resolutions subsequent to 1325 – 1820 (2008), 1888 (2009), 1889 (2009), and 1960 (2010) – expand upon the mandates set forth in Resolution 1325. Three of them, Resolutions 1820, 1888, and 1960, demand the cessation of sexual violence in conflict and call on all states to comply with their duties to ensure respect for IHL.

Prior to the adoption of Resolution 1820 in 2008, the United States circulated a Concept Paper<sup>84</sup> noting that “[i]n the eight years since the Council adopted resolution 1325 (2000) on women and peace and security, sexual violence as a weapon of war has been perpetrated with almost universal impunity.”<sup>85</sup> The United States further noted that despite the Council’s repeated calls for cessation, thousands of women and girls continue to be “gang-raped, mutilated, or abducted into sexual slavery.”<sup>86</sup>

It was in this context that the Council passed Resolution 1820, in which it explicitly acknowledges that despite its repeated condemnations and calls for cessation, sexual violence against women and children in armed conflict continues to occur, “and in some situations have become systematic and widespread, reaching appalling levels of brutality.”<sup>87</sup> Resolution 1820 takes a decidedly different tack from the dual-purpose Resolution 1325 by focusing solely on sexual violence in armed conflict. In Resolution 1820, the Council employs strong language, including its declarations that it “[d]emands the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect”<sup>88</sup> and “[d]emands that all parties to armed conflict immediately take appropriate measures to protect civilians.”<sup>89</sup> The Council reaffirms in Resolution 1820 that rape is being used as a “tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group, and [the Council] call[s] for the complete exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes.”<sup>90</sup>

<sup>84</sup> PeaceWomen, List of National Action Plans.

<sup>85</sup> PeaceWomen, List of National Action Plans, 2–3.

<sup>86</sup> PeaceWomen, List of National Action Plans, 2.

<sup>87</sup> S/RES/1820, preamble.

<sup>88</sup> S/RES/1820, ¶ 2.

<sup>89</sup> S/RES/1820, ¶ 3.

<sup>90</sup> S/RES/1820, ¶ 5.

In another step forward, Resolution 1820 expressed the Council's "readiness, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence."<sup>91</sup> The limitation to "situations on the agenda of the Council," however, ignores states' duties to respond in all situations of breaches of *jus cogens*. The deficiency of this limitation to "situations on the agenda of the Council" is alluded to by the Secretary-General in his 2009 Report on Resolution 1820, in which he notes that "sexual violence occurs in armed conflicts around the world that are *not* on the Council's agenda."<sup>92</sup> Furthermore, the Council in Resolution 1820 expressed its intention to "address widespread or systematic sexual violence" in countries on its agenda as "its intention, when establishing and renewing state-specific sanctions regimes, to take into consideration the appropriateness of targeted and graduated measures against parties to situations of armed conflict who commit rape and other forms of sexual violence against women and girls."<sup>93</sup> The Council's commitment to use sanctions, one of its strongest measures, in response to sexual violence is groundbreaking – though to date, it has only followed up on this commitment with respect to sexual violence in the DRC.<sup>94</sup>

The Secretary-General's 2009 report on Resolution 1820 detailed situations of armed conflict where sexual violence had been widely used over the preceding two decades and was still being used. The Secretary-General further cited twelve states on the Council's agenda where sexual violence "has been used or commissioned to deliberately attack civilians and communities, including by targeting women and girls, on a widespread and/or systematic basis" in recent and ongoing armed conflicts.<sup>95</sup> Following this report, in 2009, the Council unanimously passed Resolution 1888, which calls for the Secretary-General to appoint a Special Representative for Sexual Violence in Conflict and to identify and deploy a team of experts on the rule of law. It also asks the Secretary-General to include in his annual reports "detailed information on parties to armed conflict that are credibly suspected of committing or being responsible for acts of rape or other forms of sexual violence, and to list in an annex to these annual reports the parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda."<sup>96</sup> Finally, the Council repeats its pledge to take appropriate steps to address sexual violence in situations of armed conflict, although it again limits its consideration to countries

<sup>91</sup> S/RES/1820, ¶ 1.

<sup>92</sup> UN Security Council, Report of the Secretary-General Pursuant to Security Council Resolution 1820, S/2009/362, July 15, 2009, ¶ 3 (emphasis added).

<sup>93</sup> S/RES/1820, ¶ 5.

<sup>94</sup> UN Security Council, *Sexual Violence in Conflict – Report of the Secretary-General, A/67/792–S/2013/149*, Mar. 14, 2013, ¶ 115.

<sup>95</sup> S/2009/362, ¶ 9 (citing the recent or ongoing armed conflicts in the Former Yugoslavia, Rwanda, Sierra Leone, Sudan, Chad, DRC, Nepal, Côte d'Ivoire, Afghanistan, Myanmar, Iraq, and Haiti).

<sup>96</sup> UN Security Council Resolution 1960, S/RES/1960, Dec. 16, 2010, ¶ 3. Adopted unanimously.

on its agenda<sup>97</sup> despite the Secretary-General's explicit recommendation that the Council "consider giving equal attention to sexual violence in all situations of concern where sexual violence is perpetrated against civilians."<sup>98</sup>

A week after passing Resolution 1888, on September 30, 2009, the Council unanimously passed Resolution 1889, which largely focuses on expanding the Resolution 1325 measures to rectify inequality in peace processes and post-conflict situations. In Resolution 1889, the Council also reiterates its demand that parties to conflict cease violations of IHL, including rape and sexual violence, and emphasizes that all states have obligations to end impunity for such grave breaches of IHL.<sup>99</sup> The resolution calls for the Secretary-General to submit to the Council a global tracking plan using "indicators," or measurements, of trends and progress in implementation of Resolution 1325.<sup>100</sup>

In 2010, the Secretary-General submitted the global tracking plan, called for in Resolution 1889. The complex plan consists of twenty-six indicators, which were categorized under one of four pillars: prevention, participation, protection, and recovery.<sup>101</sup> These indicators, however, like previous implementation efforts, failed to distinguish which women's rights fell under the IHL legal regime – as opposed to the human rights regime – and to set out obligations to ensure these non-derogable rights.

In November 2010, the Secretary-General submitted his annual report on 1820 and 1888 to the Council.<sup>102</sup> Importantly, the report singles out for focus developments in IHL regarding rape and sexual violence, including those emanating from ICTY and ICTR jurisprudence.<sup>103</sup> The Secretary-General again notes that although his report is limited to situations on the Council's agenda, sexual violence in armed conflict "traverses all of history and geography."<sup>104</sup> The Secretary-General's report concludes with recommendations to the Council, including the need to use stronger measures (including sanctions) on perpetrators of sexual violence, calls for compliance with international law by parties to conflict, and asks for his reporting mandate to be expanded to allow for the "naming and shaming" model<sup>105</sup> of violator parties used in other situations such as Children in Armed Conflict.

<sup>97</sup> UN Security Council Resolution 1888, S/RES/1888, Sept. 30, 2009, ¶ 1. Adopted unanimously.

<sup>98</sup> S/2009/362, ¶ 56(1).

<sup>99</sup> UN Security Council Resolution 1889, S/RES/1889, Oct. 5, 2009, ¶ 3. Adopted unanimously.

<sup>100</sup> UN Security Council Resolution 1889, ¶ 17.

<sup>101</sup> See UN Security Council, Report of the Secretary-General on Women and Peace and Security, S/2010/173, Apr. 6, 2010.

<sup>102</sup> UN Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), S/2010/604, Nov. 24, 2010.

<sup>103</sup> UN Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), ¶ 4.

<sup>104</sup> UN Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), ¶ 3.

<sup>105</sup> UN Security Council, Report of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009), ¶ 46.

The last resolution (to date) in the WPS Series, Resolution 1960 (2010), continues to acknowledge that sexual violence against girls and women in armed conflict is not abating and “in some situations ha[s] become systematic and widespread, reaching appalling levels of brutality.”<sup>106</sup> The Council reaffirms its intention to consider sexual violence when adopting or renewing sanctions, and repeats its call for all parties to conflict to comply with international law.<sup>107</sup>

Laudably, with Resolution 1960 the Council adopted the Secretary-General’s recommendation to expand reporting and asked that he include in his reports an annex that lists parties credibly suspected of committing patterns of sexual violence in situations of armed conflict on the Council’s agenda.<sup>108</sup> This was done for the first time by the Secretary-General in his January 2012 report on “conflict-related sexual violence” and implementation of Resolutions 1820, 1888, and 1960, in which he included information on twelve parties to conflict, from the Central African Republic, Côte d’Ivoire, Democratic Republic of Congo, and South Sudan.<sup>109</sup> Although the creation of the annex demonstrates progress, it is insufficient because it excludes situations that are not on the Council’s agenda.<sup>110</sup>

The 2013 report of the Secretary-General to the Council emphasizes that rape is being used as a tactic of war,<sup>111</sup> including in Mali.<sup>112</sup> The Secretary-General notes that one of the priority areas for his Special Representative on Sexual Violence in Conflict is to “enhance understanding of sexual violence as a tactic and consequence of war”<sup>113</sup> and calls upon the Council and member states to “address sexual violence as a tactic of conflict in peace agreements.”<sup>114</sup>

### *C. The Failure to Ensure Respect: WPS Implementation and the IHL Rights of “Protected Persons”*

Girls and women who are victims of sexual violence in armed conflict have non-derogable rights under IHL, including the right to accountability and reparations. This section examines the failure of the Council to “ensure respect” for these rights by considering the “protection pillar” established as a part of WPS implementation.

<sup>106</sup> S/RES/1960, preamble.

<sup>107</sup> See S/RES/1960, ¶¶ 3, 7.

<sup>108</sup> S/RES/1960, ¶ 18(c).

<sup>109</sup> UN Security Council, Conflict-Related Sexual Violence – Report of the Secretary-General, S/2012/33, Jan. 13, 2012.

<sup>110</sup> S/RES/1960, ¶ 18(c).

<sup>111</sup> A/67/792–S/2013/149, ¶ 10.

<sup>112</sup> A/67/792–S/2013/149, ¶ 52.

<sup>113</sup> A/67/792–S/2013/149, ¶ 3.

<sup>114</sup> A/67/792–S/2013/149, ¶ 134.

The Geneva Conventions, in particular common Article 3 and the Additional Protocols, provide protection for civilians. The minimum protections provided for under common Article 3 are considered *jus cogens* and absolutely non-derogable.<sup>115</sup> These provisions include protection from violence, hostage taking, outrages upon personal dignity, and summary executions, as well as guarantees that all persons “wounded and sick” in armed conflict be provided with nondiscriminatory medical care. These protection guarantees are thought to be so fundamental that they are considered to extend protection guarantees to cover those persons providing services for “protected persons.”<sup>116</sup>

The Council has repeatedly acknowledged the overriding importance of enforcing these IHL protection guarantees. For instance, in three aide-memoires on “protection of civilians,” the Council has issued detailed guidance to states and the UN on implementing the protection guarantees, including protection from gender-based violence, calling for strict compliance with IHL. The Council’s 2009 Aide-Memoire makes clear that, by calling for compliance with IHL in the context of the protection of women, the Council is demanding that all parties fully respect the “protection of women” within the meaning of the Geneva Conventions and the Additional Protocols.<sup>117</sup>

Despite this clear acknowledgment by the Council that IHL must govern the protection of women in armed conflict, the “protection pillar” for implementing the WPS Series has failed to fully incorporate protection within the meaning of IHL. Starting with the first implementation plan, SWAP I, Council efforts have not clearly detailed women’s distinct rights to protection under IHL, much less set forth measures to ensure that these rights are respected. In fact, the Secretary-General’s April 2010 report on women and peace and security leaves out mention of IHL entirely in his description of the protection pillar as designed to “strengthen and amplify efforts to secure the safety, physical or mental health, well-being, economic security and/or dignity of women and girls; promote and safeguard human rights of women and mainstream a gender perspective into the legal and institutional reforms.”<sup>118</sup> Currently, the sole indicator to assess compliance with the protection pillar is one that examines the extent to which directives issued by heads of peacekeeping missions and military forces include measures to protect the human – not IHL – rights of women.<sup>119</sup>

<sup>115</sup> Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, 25.

<sup>116</sup> See International Committee of the Red Cross, *Persons Protected under IHL*, Oct. 29, 2010.

<sup>117</sup> S/PRST/2009/1, 33 (“Calls upon all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the obligations applicable to them under the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977 . . .”).

<sup>118</sup> S/2010/173, ¶ 9(c).

<sup>119</sup> See S/2010/173, ¶¶ 27–34.

### III. ENSURING RESPECT FOR THE NON-DEROGABLE IHL RIGHTS OF WOMEN AND GIRLS RAPED IN ARMED CONFLICT

Women and girl victims of sexual violence in armed conflict have absolute rights, and states have non-derogable duties to secure these rights. This section provides examples of states' duties under IHL that are buried in the WPS Series. The invisibility of these legal obligations has a devastating impact on the lives and rights of women and girls subjected to sexual violence in armed conflict.

#### A. *Duty to Ensure Accountability for Grave Breaches of IHL*

Central to the obligation under common Article 1 of the Conventions to respect and ensure respect for IHL is the mandate for states to ensure accountability for grave breaches of IHL,<sup>120</sup> including sexual violence.<sup>121</sup> This accountability mandate is *ius cogens*<sup>122</sup> invoking *erga omnes* obligations to bring perpetrators to justice,<sup>123</sup> whether through prosecution via universal jurisdiction, extradition to a state willing to prosecute, or collective action through an organ such as the Council to refer the situation to the ICC. When faced with grave breaches of IHL, including that of sexual violence, all states have a duty to take all possible measures to ensure accountability, including by not “grant[ing] impunity to the violators of such crimes”<sup>124</sup> through amnesty provisions. The accountability mandate is an obligation of means: states parties to the Rome Statute have the means to refer a violator state party to the ICC and therefore should do so.

#### B. *Duty to Act in all Situations When Faced with Breaches of IHL*

The non-derogable duty under common Article 1 to “respect and ensure respect” for IHL imposes duties on both state parties to a conflict, as well as all other High Contracting Parties, to act in all situations of breaches of IHL, as more fully discussed in Section I. Accordingly, where the Council has seized itself of sexual violence in armed conflict – as it has under the WPS Series – it must act to respond to such breaches in all situations. Although the Council is a political body, this

<sup>120</sup> See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, entered into force Oct. 21, 1950, Art. 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 U.N.T.S. 85, entered into force Oct. 21, 1950, Art. 50; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950, Art. 129; Geneva Convention IV, Art. 146.

<sup>121</sup> Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* (Intersentia, 2005), 222.

<sup>122</sup> De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*.

<sup>123</sup> Bassiouni, *International Crimes*, 66.

<sup>124</sup> Bassiouni, *International Crimes*, 66.

requires that the Council act in all situations, not only in those that are politically expedient.

### C. Duty to Regulate the Means and Methods of Warfare

There is global consensus that sexual violence has been and is currently being used as a tactic of war, as the Council has acknowledged numerous times in the WPS Series. Under IHL, the use of sexual violence in this manner in war falls under rules governing illegal means and methods of warfare. As part of its implementation of the WPS Series, the UN has developed a definition of what it means for sexual violence to be used as a “tactic of war”: “Sexual violence [used] as a ‘tactic of war’ refers to acts of sexual violence that are linked with military/political objectives and that serve (or intend to serve) a strategic aim related to the conflict.”<sup>125</sup>

All states have absolute and non-derogable duties<sup>126</sup> under IHL to ensure that “all weapons and tactics of war” that they use or plan to use in armed conflict are “lawful.”<sup>127</sup> The prohibition on the use of unlawful means and methods of warfare is *jus cogens*, imposing *erga omnes* obligations on all states to stop their use and ensure accountability. Despite the Council’s acknowledgment that sexual violence is currently being used as an unlawful tactic of war, no sexual violence–using state party to a conflict or individual perpetrator has been held accountable for the use of rape as a prohibited means or method of warfare. Nor has any facet of implementation of the WPS Series included any measures that address sexual violence as a prohibited tactic. Therefore, to comply with its absolute obligations under IHL, the Council needs to take proactive measures to ensure enforcement of IHL provisions prohibiting and punishing the use of unlawful means and methods of warfare.

### D. Duty to Ensure Application of IHL without Discrimination

Common Article 3’s prohibition on “adverse distinction,” which is now used interchangeably with the term nondiscrimination, is a foundational principle of IHL. Nondiscrimination, including on the basis of sex, is a part of customary international humanitarian law<sup>128</sup> and is *jus cogens* in cases in which the underlying right has that same status, as with the protections provided for in common Article 3, and the Additional Protocols to the Conventions. Women have an absolute right to nondiscrimination in the application of IHL, which is largely unenforced. Although

<sup>125</sup> UN Action against Sexual Violence in Conflict, *Analytical & Conceptual Framing of Conflict-Related Sexual Violence*, available at <http://www.stoprapenow.org/uploads/advocacyresources/1321456915.pdf>, 2.

<sup>126</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, Advisory Opinion, July 8, 1996, ¶¶ 78–79.

<sup>127</sup> International Committee of the Red Cross, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, Jan. 2006, 4.

<sup>128</sup> International Committee of the Red Cross, *Customary IHL Database – Rule 88: Non-discrimination*, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule88](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule88).

women are accorded unique substantive protections under IHL, the definition of nondiscrimination under IHL is the same as that in major human rights treaties, including the Convention on the Elimination of Discrimination against Women.<sup>129</sup> Under both IHL and human rights law, nondiscrimination takes into account that men and women may require different treatment, and prohibits only unfavorable or adverse treatment.<sup>130</sup>

Under common Article 3 of the Geneva Conventions, women and girls raped in armed conflict, as the “wounded and sick,” are entitled to medical care based on their medical condition, which must be guaranteed to them in a nondiscriminatory manner.<sup>131</sup> Because “[d]istinctions on the basis of sex are . . . prohibited only to the extent that they are unfavourable or adverse,”<sup>132</sup> favorable distinction – where necessary to guarantee women the same outcome as men – is permissible. For instance, because rape can result in additional medical consequences for women and girls as compared with men – for instance, pregnancy – these additional injuries necessitate distinct medical care, including the option of abortion. The denial of essential medical treatment, abortion, to girls and women raped and impregnated in conflict – while others (male and nonpregnant female rape victims) receive all medical care necessitated by their condition – violates IHL’s prohibition on discrimination and the right to comprehensive medical care.<sup>133</sup>

Additionally, the denial of abortion to women and girls impregnated by war rape violates common Article 3’s prohibition on torture and cruel treatment. This is because, as has been confirmed by various human rights bodies, including the Committee on Torture, denial of abortion to women and girls raped in conflict can constitute torture or cruel, inhuman, and degrading treatment.<sup>134</sup> The Secretary-General, in his 2013 report on Resolution 1960, acknowledged the need for Council action on this issue by calling for access to abortion for women and girls made pregnant by rape to “be an integral component of any multisectoral response.”<sup>135</sup>

Therefore, the Council must make clear that the denial of the option of abortion to women and girls impregnated by war rape violates their absolute right to

<sup>129</sup> International Committee of the Red Cross, *Customary IHL Database – Rule 88*.

<sup>130</sup> International Committee of the Red Cross, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, Oct. 2001, 20.

<sup>131</sup> Common Article 3 to all four Geneva Conventions of Aug. 12, 1949.

<sup>132</sup> International Committee of the Red Cross, *Women Facing War*, 20.

<sup>133</sup> See Global Justice Center, *The Right to an Abortion for Girls and Women Raped in Armed Conflict: States’ Positive Obligations to Provide Non-discriminatory Medical Care under the Geneva Conventions*, Jan. 2011.

<sup>134</sup> See, e.g., UN Committee Against Torture, *Concluding Observations of the Committee against Torture: Nicaragua*, CAT/C/NIC/CO/1, June 10, 2009, ¶ 16 (“The Committee is deeply concerned by the general prohibition of abortion . . . even in cases of rape, incest or apparently life-threatening pregnancies that in many cases are the direct result of crimes of gender violence. For the woman in question, this situation entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression.”).

<sup>135</sup> A/67/792–S/2013/149, ¶ 12.

comprehensive, nondiscriminatory medical care under common Article 3 of the Geneva Conventions, regardless of any conflicting national laws, such as criminal abortion laws.

#### IV. THE FAILURE OF THE WPS SERIES TO SECURE WOMEN'S RIGHTS UNDER IHL: MYANMAR AND DRC

The Council's failure to take all necessary measures to address violations of IHL, pursuant to its seizure of the matter of sexual violence in conflict in the WPS Series, is well-illustrated in the situations of Myanmar and DRC. Although endemic sexual violence in armed conflict has been found by the Council under WPS mandates in Myanmar and the DRC, the Council in neither country has ensured respect for IHL. The section considers the Council's actions in DRC and Myanmar<sup>136</sup> with respect to the breaches of IHL discussed previously in Section III: ending impunity for grave breaches of the Geneva Conventions, responding in all situations to breaches of IHL, ending the use of sexual violence as an illegal means or method of warfare, and requiring that nondiscriminatory medical care be provided to women and girls raped in conflict.

##### A. Myanmar

Myanmar is the site of the world's longest running armed conflict.<sup>137</sup> Its military forces systematically use rape and sexual violence to target ethnic women and girls, in what groups have described as an ongoing genocide against ethnic minority groups. The UN has thoroughly documented the grave breaches of IHL by military forces in Myanmar; between 1997 and 2012 alone, the General Assembly, Commission on Human Rights, and Human Rights Council passed over twenty resolutions calling for an end to the government of Myanmar's violations of human rights and IHL, including sexual violence.<sup>138</sup> The Secretary-General's reports on the

<sup>136</sup> It is worthwhile to note that this failure to act occurred when Myanmar was a pariah state, predating recent overtures by Myanmar's new quasi-civilian government to increase engagement with the global community. Yet Myanmar's increased willingness to align itself with international human-rights norms only increases the Council's imperative to act when faced with continuing evidence of sexual violence and *jus cogens* crimes in Myanmar. And such evidence continues to come to light: As recently as February 2013, reports detail that "[a]t least 13 women, including teenagers, have been subjected to prolonged rape by Burmese security forces . . ." *Rapes by Burmese Security Forces "May Cause More Strife" in Troubled Region*, THE GUARDIAN, Feb. 26, 2013.

<sup>137</sup> Conflict in Myanmar began in 1949.

<sup>138</sup> See, e.g., UN General Assembly Resolution 51/117, A/RES/51/117, Dec. 12, 1996, ¶ 11; UN General Assembly Resolution 52/137, A/RES/52/137, Mar. 3, 1998, ¶¶ 2, 12; UN General Assembly Resolution 53/162, A/RES/53/162, Feb. 25, 1999, ¶¶ 4, 10; UN General Assembly Resolution 54/186, A/RES/54/186, Feb. 29, 2000, ¶¶ 5, 13, 14; UN General Assembly Resolution 55/112, A/RES/55/112, Mar. 1, 2001, ¶¶ 14, 16, 17; UN General Assembly Resolution 56/231, A/RES/56/231, Feb. 28, 2002, ¶¶ 4, 18, 20, 21; UN General Assembly Resolution 57/231, A/RES/57/231, Feb. 28, 2003, ¶¶ 3(b), 5(c); UN General

WPS Series have regularly identified Myanmar's military as committing, and remaining unpunished for, sexual violence against ethnic women as part of the ongoing conflict. In fact, the military's use of sexual violence continued unabated after the installation of a civilian government in 2011.<sup>139</sup>

Myanmar has flouted all the Council's demands in the WPS Series to end sexual violence in conflict and that perpetrators be held accountable for such crimes. The government, for instance, has never launched any criminal prosecutions of members of the military perpetrators of sexual violence. In addition, Myanmar's military has acted to immunize itself in perpetuity from accountability for all crimes, including those of sexual violence in conflict, by inserting an amnesty provision in the country's 2008 Constitution,<sup>140</sup> which violates the WPS Series' prohibition on amnesties. Furthermore, the Constitution eliminates any possibility of civil or criminal redress for survivors of war rape by removing all jurisdiction over the military from civilian courts.<sup>141</sup>

The Council has failed to take any action addressing the Myanmar military's ongoing use of sexual violence as well as the entrenchment of impunity for such crimes in the 2008 constitution. Despite its duty under international law and its pledges to take action where necessary in the WPS Series, the Council has refused to take effective measures against Myanmar's grave breaches of IHL: it has neither listed Myanmar as a state party credibly suspected of using patterns of rape in armed conflict, nor used its Chapter VII powers to impose sanctions on Myanmar or refer it to the ICC.

Myanmar is not only an example of the Council's failure to effectively address grave breaches in the WPS Series, but also an example of the Council's failure to ensure respect for IHL in all circumstances. The Council must effectively respond to all situations of grave breaches covered by the WPS Series, not just to situations

Assembly Resolution 58/247, A/RES/58/247, Mar. 11, 2004, ¶ 3(a)(i); UN General Assembly Resolution 59/263, A/RES/59/263, Mar. 17, 2005, ¶ 3(a); UN General Assembly Resolution 60/233, A/RES/60/233, Mar. 23, 2006, ¶¶ 2(a), 3(f), 3(l); UN General Assembly Resolution 61/232, A/RES/61/232, Mar. 13, 2007, ¶¶ 2(a), 3(b), 3(e)(ii); UN General Assembly Resolution 63/245, A/RES/63/245, Jan. 23, 2009, ¶¶ 2(a), 4(b), 4(k); UN General Assembly Resolution 64/238, A/RES/64/238, Mar. 26, 2010, ¶¶ 7, 12; UN General Assembly Resolution 66/230, A/RES/66/230, Apr. 3, 2012, ¶¶ 9, 14; UN Commission on Human Rights Resolution 1998/63, E/CN.4/RES/1998/63, Apr. 21, 1998, ¶ 3(c); UN Commission on Human Rights Resolution 1999/17, E/CN.4/RES/1999/17, Apr. 23, 1999, ¶ 4(d); UN Commission on Human Rights Resolution 2000/23, E/CN.4/RES/2000/23, Apr. 18, 2000, ¶ 6(c); UN Commission on Human Rights Resolution 2001/15, E/CN.4/RES/2001/15, Apr. 18, 2001, ¶ 4(d); UN Commission on Human Rights Resolution 2002/67, E/CN.4/RES/2002/67, Apr. 25, 2002, ¶¶ 5(a), (e); UN Commission on Human Rights Resolution 2003/12, E/CN.4/RES/2003/12, Apr. 16, 2003, ¶ 3(c); UN Commission on Human Rights Resolution 2005/10, E/CN.4/RES/2005/10, Apr. 14, 2005, ¶¶ 3(a), 5(d), 6(b); UN Human Rights Council Resolution 13/25, A/HRC/RES/13/25, Apr. 15, 2010, ¶¶ 9, 14.

<sup>139</sup> S/2012/33, ¶¶ 39–41; A/67/792–S/2013/149, ¶¶ 58–60; see also *Burmese Army Accused in Four Rape Cases in Shan State*, IRRAWADDY, July 14, 2011.

<sup>140</sup> Constitution of the Republic of the Union of Myanmar, Sept. 2008, Art. 445.

<sup>141</sup> Constitution of the Republic of the Union of Myanmar, Sept. 2008, Art. 343.

where there is sufficient political will or cooperation from the violator state. This is why the Council was given – and why it must use – its unchallenged powers under the Charter to investigate IHL breaches and ensure accountability and reparations.

### B. Democratic Republic of Congo

The conflict in the DRC has been prioritized in the Council's implementation of the WPS Series. Although the Council has paid significant attention to the plight of women and girls raped in the DRC, however, it has not always sought to ensure respect for IHL in the manner required by the Geneva Conventions. Two examples, detailed later in the section, are that: (1) although the Council has acknowledged a duty to end the use of rape as a weapon/tactic of war, it has not properly addressed the rape epidemic in the DRC through this lens; and (2) the Council has not taken steps to ensure the provision of nondiscriminatory medical care to women and girls raped in conflict in the DRC.

As to the first example, although sexual violence in the DRC has been addressed in a variety of ways by the Secretary-General, the Council, and various other UN entities, no efforts under the WPS Series have been made to end the use of rape as a prohibited weapon/tactic of war or to ensure either state or individual accountability for the use of it as such. A state's use of an unlawful weapon/tactic of war is a grave breach distinct from other crimes arising out of the same act (be they war crimes, or crimes against humanity, or constitutive acts of genocide). One example of the UN's failure to treat rape as an unlawful weapon of war is evident in the WPS Series' Team of Experts' (TOE) response to sexual violence in the DRC. The TOE, sent to the DRC in January 2011 to assess the situation of sexual violence, has thus far failed to call for accountability for the use of rape as an illegal weapon/tactic of war in the DRC, despite finding that it is being used in such a manner.<sup>142</sup>

As to the second example, the Council has failed to address the systemic violation in the DRC of the rights of women and girls to nondiscriminatory medical care under IHL. Women and girls who are raped and impregnated in armed conflict are entitled to complete, nondiscriminatory medical care based solely on their medical condition. Such medical care would require the option of abortion, regardless of conflicting national laws. In violation of IHL, however, abortion is routinely omitted from the services provided to war rape victims in the DRC, imperiling their physical and mental health. In the face of this violation, the Council has failed to remind both the DRC and states delivering humanitarian aid to the DRC that they have an obligation to respect and ensure respect for IHL's nondiscrimination mandate.

Thus far, the implementation of the WPS Series by states and UN entities, including the Council, has focused on the efforts to combat gender inequality as a

<sup>142</sup> See Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Team of Experts – Rule of Law/Sexual Violence in Conflict: Progress Report, January–May 2011*, 2011, 1, 7.

root cause of conflict, rather than on non-derogable IHL obligations, as illustrated by the examination of Myanmar and DRC previously. Furthermore, although the WPS Series' Chapter VI efforts are essential to the prevention of conflict and the attainment of durable peace and security, they have also stolen the spotlight from the immediate imperative to take decisive action under Chapter VII to remedy ongoing breaches of peace and security, including the use of sexual violence as an illegal means or method of warfare.

#### V. THE WPS SERIES: THE COUNCIL'S DUTY TO TAKE ALL POSSIBLE MEASURES TO END SEXUAL VIOLENCE AGAINST WOMEN IN ARMED CONFLICT

The WPS Series reflects the growing consensus of the global community that adherence to certain fundamental international laws, particularly IHL, is critical to maintaining global peace and security. The Series also embodies an evolving understanding that "peace" is not just an interlude between conflicts, but rather the establishment of a set of conditions, including women's equality, that are critical to durable peace. Further, advances in international law, particularly the development and recognition of *jus cogens*, change how the Council must interpret the scope of what constitutes a threat to peace under the Charter.

The Council has failed in the WPS Series to utilize one of its strongest tools: the preexisting obligations of states and the UN under international law to act when faced with serious breaches of *jus cogens* and gross violations of IHL. This has undermined, rather than enhanced, states' *erga omnes* duties to "ensure respect" for IHL. Further, the Council's failure to ensure that implementation of the WPS Series clearly identifies where the IHL legal framework applies has buried the rights of women victims of sexual violence in armed conflict. Remedying this, even under only its Chapter VI recommendatory powers, would be a significant step toward accomplishing some of the goals of the WPS Series. However, doing so would not be enough. The Council's Chapter VI recommendatory powers are structurally insufficient for the Council to effectively address situations such as the ongoing use of sexual violence in armed conflicts globally, which is a threat to international peace and security.

After thirteen years, the WPS has neither deterred nor abated the use of sexual violence against women in armed conflicts worldwide. This presents a serious challenge to the Council's effectiveness and legitimacy. By not taking measures commensurate with the gravity of the *jus cogens* crimes being perpetrated against women in armed conflicts, the WPS Series undermines rather than "ensures" respect for IHL and Charter values.

What next? The international law imperatives discussed in this chapter must be incorporated into the Council's next steps to address sexual violence in armed conflicts. The Council must confront the byzantine implementation schemes set forth in the WPS Series and radically restructure them to ensure respect for IHL.

First and foremost, the Council should signal a new chapter in the WPS initiative, by making explicit that ongoing, widespread, and systemic sexual violence in armed conflict, including its use as an illegal means or method of warfare, constitutes a threat to peace. This will clearly announce to all violator states, not just those on the agenda, that the Council intends to take all necessary measures under Chapter VII to end sexual violence in armed conflict. The thematic nature of the WPS Series does not preclude the Council's ability to determine that the use of sexual violence in armed conflict is *per se* a threat to peace.<sup>143</sup> For example, the Council made such a determination when it passed Resolution 1540, a thematic resolution addressing "non-proliferation of weapons of mass destruction." Once such a determination is made with regard to sexual violence, the Council can take progressively more coercive measures under Chapter VII.

Next, the Council must make clear the duties of states and UN entities to "respect" and "ensure respect" for IHL in all circumstances, and that conflating IHL with other legal regimes violates this obligation. This requires a radical restructuring by the Council of the monitoring and implementation of the WPS Series to ensure that UN entities and states ensure and advance IHL rights where applicable. Furthermore, to help remediate the failure of the WPS Series to distinguish women's rights under IHL, the Council can separate measures taken under Chapter VI and Chapter VII, as it has done in the past.<sup>144</sup> This is not to diminish the binding effect of WPS resolutions, or parts of them, under Article 25 of the Charter. However, in light of the history of WPS implementation efforts, it is particularly critical that the Council distinguish those measures seeking to avert threats to peace or restore peace, including ending the use of sexual violence in armed conflict.

Further, the Council must make clear that use of rape as a weapon of war is prohibited and triggers intransgressible duties on states and the UN to take all measures possible to end the use of rape as an unlawful weapon, including, at a minimum, amending their national laws to include sexual violence along with other unlawful means or methods of warfare, such as starvation, under IHL. Additionally, the Council must affirm the rights of women victims of sexual violence used in this manner to the same rights to accountability, cessation, and reparations as victims of other unlawful means or methods. Additionally, the Council should expand the Secretary-General's reporting mandate under Resolution 1960 to include a list of parties who are using sexual violence as a prohibited means or method of warfare, in order to guide Council engagement.

Additionally, the 2013 Secretary-General's Report on sexual violence in conflict reminds member states of the need "[t]o ensure that multisectoral assistance and services are tailored to the specific needs of girls and boys."<sup>145</sup> Recognizing this, the Council should call on all member states to ensure that girls and women victims of

<sup>143</sup> See S/RES/1540.

<sup>144</sup> See, e.g., S/RES/814; S/RES/918; S/RES/1576.

<sup>145</sup> A/67/792-S/2013/149, ¶ 130(b).

sexual violence in conflict have access to the full range of medical, legal, and psychological services, and that such services are provided without discrimination and in accordance with IHL and international human rights law. Furthermore, the 2013 Report highlights the fact that, because of the lack of availability of safe abortion services, women are “often forced to carry out unwanted pregnancies resulting from rape, or undergo dangerous abortion.”<sup>146</sup> It thus recommends that “access to safe emergency contraception and services for termination of pregnancies resulting from rape should be an integral component of multisectoral response.”<sup>147</sup> In line with this recommendation, the Council should remind states of their obligations to ensure the provision of safe abortion and emergency contraception as a component of any multisectoral response to sexual violence in conflict.

Further, the Secretary-General’s study pursuant to Resolution 1325 found that “intentional spread of sexually transmitted infections (STIs), including human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS), are elements of contemporary conflict” and that “rape has also been used to willfully transmit HIV.”<sup>148</sup> Given the gravity of this finding, the Council should require investigation and reporting of any such use of rape, so the Council may assess violations of the biological weapons convention.

To effectively secure compliance with WPS mandates, the Council should establish a permanent Working Group, as it has done under its thematic efforts on children and armed conflict.<sup>149</sup> The Working Group’s mandate should include making recommendations on measures to ensure accountability and redress for violations of WPS mandates. This should include the adoption and renewal of sanctions, even where a sanctions regime does exist, and recommendations to refer situations to the ICC. This will provide an essential guide for states and UN entities to respect and ensure respect for IHL in the WPS Series.

The Working Group should also make recommendations for Council action where lack of access impedes monitoring and implementation of WPS mandates. One critical function of the Working Group, without making any legal determinations, should be to provide an ongoing list of states in armed conflict where, most likely, IHL applies. Both the Secretary-General and key international organizations, such as the European Union, have identified that defining the universe of states governed by IHL is key to effective enforcement of IHL.

The Council must delink reparations for women raped in conflict who are entitled to immediate compensation from other accountability measures, which may, if they happen at all, take years. Accordingly, the Working Group should be

<sup>146</sup> A/67/792-S/2013/149, ¶ 12.

<sup>147</sup> A/67/792-S/2013/149, ¶ 12.

<sup>148</sup> Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325, ¶¶ 7, 60.

<sup>149</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Role of the Security Council Working Group on Children and Armed Conflict*, available at <http://childrenandarmedconflict.un.org/our-work/role-of-the-security-council-working-group/>.

able to recommend to the Council when states must establish reparations funds for women victims of sexual violence in war. The international law imperative for the Council to set up International Compensation Commission for violations of IHL was part of the experts' report to the Council on Darfur in 2004.<sup>150</sup>

The recommendations set forth in this chapter are by no means comprehensive, but do provide a starting point for discussions as to how the Council can more effectively bring about an end to sexual violence against girls and women in armed conflict.

#### CONCLUSION

The Council's WPS Series is a historic undertaking. For the first time, the Council took steps to address the impact of conflict on women. Although this is laudable, this undertaking is not finished, in particular with respect to ongoing sexual violence in armed conflicts globally. As the Council has seized itself of this issue, the *jus cogens* nature of the violation imposes on the Council a duty to take all effective measures available to it under the Charter. The Council must exercise its powers under Chapter VII to demand strong actions from states, the UN, and conflict states to secure the rights of women victims under IHL, stop the use of sexual violence as a tactic of war, and set the proper standard for states and UN entities to accord women victims of conflict their rights under the IHL regime.

<sup>150</sup> UN Security Council, Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, S/2005/60, Jan. 25, 2005, ¶¶ 590–603.