

The Security Council on women in war: between peacebuilding and humanitarian protection

Alain-Guy Tachou-Sipowo

Alain-Guy Tachou-Sipowo is a PhD student in International Law at Laval University, Canada, and a 2009 John Peters Humphrey Fellow of the Canadian Council on International Law. He was formerly a trainee at the International Criminal Court and the International Criminal Tribunal for Rwanda.

Abstract

Having established that massive human rights violations in armed conflict constitute a threat to peace and that women are the most severely affected by the scourge of war, the Security Council has since 1999 adopted a number of resolutions intended specifically for this group. These instruments contribute to the development of humanitarian law applicable to women and acknowledge the value of active participation by women in peace efforts. The following article first analyses the foundations on which the Council has been able to assume responsibility for protecting women in situations of armed conflict, and then considers the actual protection it provides. It concludes that the Council has had varying success in this role, pointing out that the thematic and declaratory resolutions on which it is largely based are not binding and therefore, they are relatively effective only as regards their provisions committing United Nations bodies. The author proposes that the Council's role could be better accomplished through situational resolutions than through resolutions declaratory of international law.

.....

When created in 1945, the Security Council was not intended as a forum to debate and devise solutions to human rights issues. Nonetheless, it is a body that is rooted in a social and legal structure sensitive to the human condition. Having experienced two world wars which ‘brought untold sorrow to mankind’,¹ the founders of the United Nations proclaimed their ‘faith in fundamental human rights’.² The contribution of women to the war effort had certainly not gone unnoticed.³ The new order established in the aftermath of the war reflected the consequent change in attitude by breaking away from the inequality that had previously characterized male–female relations. In direct line with this profound transformation, the authors of the UN Charter reaffirm in the preamble their faith ‘in the equal rights of men and women’.

However, international human rights law at this early stage was slow to address the particular suffering of women. The 1948 Universal Declaration of Human Rights, in its great concision, refers only to equal rights for men and women with regard to marriage⁴ and to the entitlement of everyone to the rights set forth therein, without distinction on the basis of sex, or other factors.⁵ A similar provision is found in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. Article 3 thereof confirms the equal right of men and women to enjoy all the rights set forth in the Covenant, while Article 7 insists on equal pay for equal work. The International Covenant on Civil and Political Rights likewise stipulates gender equality in the enjoyment of all the rights it contains.⁶ It also protects pregnant women from sentence of death,⁷ reaffirms the equal right to marry,⁸ and bans all gender-based discrimination.⁹

In the international system, the majority of provisions relating to the protection of women are designed to reduce and prohibit the many forms of gender-based discrimination against them. The efforts of the UN and its specialized agencies in this regard – including declarations, recommendations and resolutions – led to the adoption in 1979 of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁰ A committee to monitor its implementation (CEDAW) has been in place since 1982. Using an international investigation and individual complaint procedure, it works to ensure respect for women’s rights.¹¹

1 Preamble to the Charter of the United Nations, signed on 26 June 1945 in San Francisco.

2 *Ibid.*

3 During World War II, women accounted for some 8% of all Soviet armed forces. See Françoise Krill, ‘The protection of women in international humanitarian law’, in *International Review of the Red Cross*, No. 249, 1985, p. 350.

4 Article 16.

5 Article 2.

6 Article 3.

7 Article 6(5).

8 Article 23(2).

9 Articles 2, 4(1), 24(1) and 26.

10 Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180, 18 December 1979. Entry into force: 3 September 1981, in accordance with Article 27.1.

11 Granted more authority by Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly Resolution 54/4, 6 October 1999. See also Sabine Bouet-Devrière, ‘La protection universelle des droits de la femme: vers une efficacité accrue du

Apart from the fight for equal rights, instruments relating to the vulnerability of women have had little success. The UN General Assembly's Declaration on the Elimination of Violence against Women is a case in point. It targets many forms of physical and psychological violence, which are in reality the consequence of persisting gender inequality.¹² The declaration, applicable primarily in peacetime, refers to physical, sexual and psychological violence occurring in the family,¹³ violence occurring within the general community,¹⁴ and violence perpetrated or condoned by the state.¹⁵

This declaration is generally associated with the Convention¹⁶ and Recommendation¹⁷ on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, as well as the earlier UN convention against the exploitation of the prostitution of others.¹⁸ The latter serves to unify treaties drawn up before the UN was created.¹⁹ Since 2000, trafficking in women and children²⁰ has

droit positif international? (Analyse prospective des dispositions du Protocole facultatif à la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes)', in *Revue trimestrielle des droits de l'Homme*, No. 7, 2000, pp. 453–477.

- 12 'Gender equality is yet to be achieved in most states, where it is deemed contrary to the expression of national sovereignty. In such cases, "traditional" mechanisms for the universal protection of human rights reveal the limits of international law in that domain' (ICRC translation of 'la réalisation de l'égalité entre les sexes demeure inachevée dans une majorité d'États où elle se heurte aux manifestations de la souveraineté nationale, face auxquelles les mécanismes "traditionnels" de protection universelle des droits de la personne humaine révèlent les limites du droit international dans ce domaine'). See S. Bouet-Devrière, above note 11, p. 454.
- 13 Such as battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.
- 14 Such as rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution.
- 15 Declaration on the Elimination of Violence against Women, General Assembly of the United Nations, 85th plenary meeting, A/RES/48/104, 20 December 1993, Article 2. For an example of violence perpetrated or condoned by the state, see Inter-American Commission on Human Rights, 'The situation of the rights of women in Ciudad Juárez, Mexico: The right to be free from violence and discrimination', OEA/Ser.L/V/II.117, doc. 44 (7 March 2003); see also William Paul Simmons, 'Remedies for the women of Ciudad Juárez through the Inter-American Court of Human Rights', in *Northwestern University Journal of International Human Rights*, Vol. 4, Issue 3, Spring 2006, pp. 492–517.
- 16 Opened for signature and ratification by General Assembly Resolution 1763 A (XVII), 7 November 1962. Entry into force: 9 December 1964, in accordance with Article 6.
- 17 Adopted by General Assembly Resolution 1818 (XX), 1 November 1965.
- 18 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by General Assembly Resolution 317 (IV), 2 December 1949. Entry into force: 25 July 1951, in accordance with Article 24.
- 19 International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3 December 1948; International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, as amended by the above-mentioned Protocol; International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947; and International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age, as amended by the above-mentioned Protocol.
- 20 A US report from 2005 states that of the 600,000 to 800,000 persons trafficked across international borders each year, the majority are women and children. See US Department of State, *Trafficking in Persons Report*, June 2005, available at <http://www.state.gov/documents/organization/47255.pdf> (last visited 2 February 2010); see also Brian Parsons, 'Significant steps or empty rhetoric? Current efforts by the United States to combat sexual trafficking near military bases', in *Northwestern University Journal of*

been combated by the Protocol Additional to the UN Convention against Transnational Organized Crime.²¹

Whereas international law on the protection of women in peacetime has developed considerably, no specific convention has been adopted in this regard within the law of war. The only instrument to date is a six-point declaration made by the UN General Assembly,²² which expresses the need to provide special protection for civilian women and children, who are the most vulnerable members of the population.²³ The declaration is somewhat limited in scope, as it essentially applies to those ‘finding themselves in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence, or who live in occupied territories’.²⁴ For the protection of women in other types of conflict, therefore, we must turn to more general conventions of humanitarian law.

The first set of rules designed to protect women in war appears in the Lieber Code.²⁵ Article 47 provides for the punishment of those responsible for the rape of inhabitants of a hostile country. Despite all the atrocities of World War II, however, not one person was charged with this crime. The Charter of the International Military Tribunal for the Far East’s criminalization of ‘violations of laws and customs of war’²⁶ as war crimes and ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population’²⁷ as crimes against humanity could have made way for the prosecution of rape. Yet the Tribunal failed to try Japanese soldiers for their violence against the ‘comfort women’.²⁸

To redeem the memory of the victims and survivors of those crimes, a 1998 UN Report on Contemporary Forms of Slavery seized the opportunity, for the first time, to establish the liability of the Japanese government for ‘Comfort Women Stations’ created during the war.²⁹ A symbolic judgement passed by the

International Human Rights, Vol. 4, issue 3, Spring 2006, pp. 567–589. According to the International Organization for Migration, over 500,000 women are victims of trafficking in Europe. See Corene Rathgeber, ‘The victimization of women through human trafficking: An aftermath of war?’, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10, Nos 2–3, 2002, p. 152.

21 Protocol Additional to the UN Convention against Transnational Organized Crime and Aimed at Preventing, Suppressing and Punishing Trafficking in Persons, Especially Women and Children, 2000. There is a close link between the phenomenon of trafficking in persons becoming more complex (particularly in women and children) and armed conflict. See C. Rathgeber, above note 20.

22 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, proclaimed by General Assembly Resolution 3318 (XXIX), 14 December 1974.

23 *Ibid.*, point 1.

24 *Ibid.*, point 6.

25 Judith Gardam, ‘Women, human rights and international humanitarian law’, in *International Review of the Red Cross*, No. 324, 1998, at p. 423.

26 International Military Tribunal for the Far East (IMTFE) Charter, Article 5(b).

27 *Ibid.*, Article 5(c).

28 Kelly Askin, ‘Comfort women: Shifting shame and stigma from victims to victimizers’, in *International Criminal Law Review*, Vol. 1, Nos 1–2, 2001, pp. 5–32.

29 Commission on Human Rights, *Contemporary Forms of Slavery: systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Ms Gay J. McDougall, Special Rapporteur, Appendix: An analysis of the legal liability of the Government of Japan for ‘comfort women

Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (a people's tribunal organized by women's rights organizations) held the same view.³⁰ The 2001 final judgement found the Japanese Emperor Hirohito, along with other leaders, responsible as superiors and recommended measures of compensation to survivors.³¹

In the judgements rendered at the Nuremberg trials, the terrible atrocities endured by women were ignored. Although rape was classified as a war crime in the charters of the national courts set up to try Nazi offences, they never carried out any prosecutions on that basis.³² The rape of Berlin, for which the Soviet liberating forces are held responsible, likewise went unpunished.³³

International humanitarian law as developed in the Geneva Conventions is much more far-reaching in its protection of women. This protection was still in its early stages in the 1929 Convention relative to the Treatment of Prisoners of War, where the only objective in that regard was to ensure different treatment adapted to the needs of female prisoners of war.³⁴ In the 1949 Geneva Conventions it was extended to about 19 provisions that are specifically relevant to women;³⁵ together with the 1977 Additional Protocols, there are now some 30 such provisions in all. However, these are subject to two major criticisms. Firstly, they fail to emphasize the gender specificity of the suffering endured by women.³⁶ Secondly, as a result, the gravity of offences against women is not sufficiently recognized.

Indeed, by stipulating the need to protect mothers (more specifically, expectant and nursing mothers), most of the provisions in the Geneva Conventions that relate to women are designed to protect children.³⁷ The other provisions refer to women's vulnerability to sexual violence. It can be argued, however, that the difficulties experienced by women in wartime are not confined to their roles as

stations' established during the Second World War, UN Doc E/CN.4/Sub.2/1998/13, 22 June 1998, available at <http://www.unhcr.ch/huridocda/huridoca.nsf/0/3d25270b5fa3ea998025665f0032f220?OpenDocument> (last visited 2 February 2009).

30 Christine Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', Editorial, in *American Journal of International Law*, Vol. 95, No. 2, 2001, p. 337.

31 *Ibid.*, p. 338.

32 J. Gardam, above note 25.

33 Fiona de Londras, 'Prosecuting sexual violence in the *ad hoc* International Criminal Tribunals for Rwanda and the former Yugoslavia', in *University College Dublin Working Papers in Law, Criminology and Socio-Legal Studies Research Paper*, No. 06, 2009, p. 2.

34 Article 3 states that 'Women shall be treated with all consideration due to their sex.' Article 4 states that 'Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them.' See also F. Krill, above note 3.

35 J. Gardam, above note 25.

36 There are, however, some provisions that state that women shall be treated without any adverse distinction, in particular for reasons of sex, and that they shall in all cases benefit from treatment as favourable as that granted to men. See Article 12 of the First and Second Conventions; Article 16 of the Third Convention; Article 27 of the Fourth Convention; Article 75 of Additional Protocol I; Article 4 of Additional Protocol II; and Article 14 of the Third Convention. It can therefore be concluded that women are entitled to all the rights of the conventions. For more on this issue, see F. Krill, above note 3.

37 Jean de Preux, 'Special protection of women and children', in *International Review of the Red Cross*, No. 248, 1985, pp. 292–302.

mothers and victims of sexual violence.³⁸ Besides being thus limited in scope, the protection offered also does not go far enough. Article 27(2) of the Fourth Convention half-heartedly states that, ‘Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault’. Outrages upon women’s personal dignity are not expressly included among the offences defined as grave breaches of international humanitarian law to which criminal liability is attached – the gravity of such crimes is consequently ignored.³⁹

Violations of humanitarian law have different legal consequences depending on their gravity. Grave breaches must be incorporated in national legislation as criminal offences and prosecuted through mechanisms of universal jurisdiction. All States Parties have the duty to search for and prosecute suspected perpetrators of a grave breach, regardless of their nationality or that of the victim, or alternatively to extradite suspects to states willing to prosecute them. For other violations, the Conventions simply stipulate that ‘[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article’.⁴⁰ Additional Protocols I⁴¹ and II⁴² did not progress much further in protecting women in situations of armed conflict. Article 76 of Protocol I largely reiterates Article 27 of the Fourth Convention, prohibiting any attack on the honour of women. Protocol II, in Article 4 laying down fundamental guarantees in times of civil war, does prohibit ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’, but there is no explicit acknowledgement of the gravity of these acts which would qualify them as international crimes. The Protocols are limited in their recognition of other specific rights for women, simply reaffirming those requiring their accommodation, when interned or detained, in quarters separate from those of men.

38 J. Gardam, above note 25, p. 424; see also Vesna Nikolić-Ristanović, ‘War and post-war victimization of women’, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10, Nos 2–3, 2002, p. 141; and Charlotte Lindsey, ‘Women and war: An overview’, in *International Review of the Red Cross*, No. 839, 2000, pp. 561–579.

39 The following offences are listed as grave breaches: ‘wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.

40 GC I, Art. 49; GC II Art. 50; GC III, Art. 129; GC IV, Art. 146.

41 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Entry into force: 7 December 1978, in accordance with Article 95.

42 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Entry into force: 7 December 1978, in accordance with Article 23.

Humanitarian law has been repeatedly criticized by civil society organizations for its inadequate protection of women. Calls have even been made for some reformulation of the Geneva Conventions. It is within international human rights law, however, that their demands have been met. Though not fully satisfactory, the provisions within that body of law do at least help prevent the worst atrocities against women within the context of war. The World Conference on Human Rights, held in Vienna in June 1993, confirmed for example that '[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law'. The follow-up to this conference on women in war is worthy of consideration here.

In December that same year, the UN General Assembly proclaimed the Declaration on the Elimination of Violence against Women. The following year, the UN Commission on Human Rights established a mandate on the issue of violence against women, appointing Ms Radhika Coomaraswamy as the Special Rapporteur. Her report emphasized the need to revise existing international humanitarian conventions in order 'to incorporate developing norms on violence against women during armed conflict'.⁴³ The sexual and physical integrity of women has, however, always had an important place in discussions on women's rights within the United Nations. In 1995, with this recommendation in mind, the former Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated a more in-depth study of the issue, entrusting Ms Linda Chavez with a mandate on 'systematic rape, sexual slavery and slavery-like practices during periods of armed conflict'.⁴⁴

Despite these efforts, and notwithstanding encouragement from the 1995 Conference in Beijing to pursue them (women and war featured as one of the 12 points on its Platform for Action), the international community has never adopted any significant instrument in this area. Indeed, humanitarian law efforts have consistently disregarded the far-reaching nature of the problems faced in situations of war by girls⁴⁵ and women. For example, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict raises the minimum age of recruitment from 15 to 18 years, yet remains silent about the plight of girl soldiers; and although the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography addresses sexual violence, it fails to tie the sexual abuse of girls to their roles in armed combat.⁴⁶ These issues are in fact governed by soft law, but it has distinct limitations, for reports, declarations and action plans are not legally binding normative

43 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, UN document E/CN.4/1998/54, 26 January 1998.

44 Preliminary report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, Ms Linda Chavez, UN Doc. E/CN.4/Sub.2/1996/26, 16 July 1996.

45 Abigail Leibig, 'Girl child soldiers in Northern Uganda: Do current legal frameworks offer sufficient protection?', in *Northwestern University Journal of International Human Rights*, Vol. 3, April 2005, para. 4.

46 *Ibid.*, para. 7.

instruments. They merely draw international attention to the special treatment required by women in war.

In reality, demanding more rights does not increase the likelihood that they will be respected. The international community's focus on sexual violence is understandable, however, given the systematic use of rape as a weapon of war. It is precisely because of the implications for international security of that systematic use that the Security Council has taken up the issue of women as victims of armed conflict.

The factual and legal foundations of the role of the Security Council

The growing international awareness of the atrocities suffered by women in war has coincided with the worldwide establishment of a responsibility to protect, through the intermediary of the Security Council.

Factual foundation: the inhumanity of armed conflict for women

The purpose of international human rights law is to protect women in peacetime. This does not mean that some of its principles cease to apply in times of war. On the contrary, they may well complement international humanitarian law. The Geneva branch of humanitarian law affords protection to civilians and to armed forces personnel no longer participating in the hostilities. Rather than attributing the shortcomings of international humanitarian law to a change in the nature of conflicts, there would be more reason to think that it was developed without taking the complexity of war into full account. The suffering women endure today is nothing new. The phenomenon of 'comfort women' predates the adoption of the 1949 Conventions. The weakness of humanitarian law in addressing women's difficulties is the result of deliberate oversight, or perhaps of purely fortuitous ignorance.

The reform efforts of 1977 were not, however, wholly satisfactory. They were praiseworthy in that they clearly defined the obligations of parties to an international conflict (Protocol I) and fleshed out Article 3 common to all four Geneva Conventions (Protocol II), but they once again stopped short at the problems of women in war. Yet it is well known that the intensification of violence against civilians, as a typical method of warfare, is more marked among women and girls owing to their vulnerability.⁴⁷ While men and boys are often forced into combat or killed in ethnic cleansing campaigns, the suffering of women is compounded by manifold abuses, facilitated by their gender and ranging from forced recruitment or conscription to rape or slavery in military camps and even murder.

47 Amnesty International, *Lives blown apart – crimes against women in times of conflict: Stop violence against women*, Public Report, 8 December 2004, AI Index No. ACT 77/075/2004.

Sexual violence has been by far the most frequently deplored abuse occurring during armed conflict.⁴⁸ It is generally perpetrated by all warring factions, as is the case in Colombia,⁴⁹ for it is a crime that achieves a number of objectives. The harm to the honour and dignity of the victim, though considered the main consequence of sexual violence, is certainly not the only one. Often systematic rape leads to or is accompanied by forced marriage and pregnancy, with the intent of changing the ethnic make-up of the population. It is in this context that sexual violence against women is now considered a 'weapon of war'.⁵⁰ It becomes a method of warfare '[w]hen used systematically to torture, injure, extract information, degrade, threaten, intimidate or punish in relation to an armed conflict'.⁵¹

In other circumstances, for instance in the event known as the 'Rape of Nanking' and the case of the 'comfort women' during World War II, the systematic violations of women's rights were not directly linked to the war objectives. Those women were used solely to gratify Japanese soldiers and kept in secret camps unknown to the enemy and to the public. They nonetheless served military aims, for they were used to motivate and reward combatants. In that sense, they involuntarily played a significant part in the war effort.

A brief review of armed conflicts reveals that such systematic violence against women cannot be traced back only to the wars of the early 1990s. Almost 200,000 women and girls were abducted and forced into sexual slavery by the Imperial Japanese Army during World War II.⁵² More recent conflicts have seen a steady increase in violence against women. It is estimated that at least 5000 Kuwaiti women were raped by Iraqi soldiers during the 1990 invasion of Kuwait,⁵³ while a special UN report published shortly after the Rwandan genocide showed that during the fighting, sexual violence against women from the age of 13 to 65 was the rule and its absence the exception.⁵⁴ The Rwandan government reported 15,700 rapes, and 2000 to 5000 resultant pregnancies, whereas the Special Rapporteur – taking into account a margin of error and the possible unreliability of statistics, as well as unreported cases – put the figure closer to between 250,000 and 500,000 rapes.⁵⁵ This is an astounding figure in comparison with the genocide's total estimated death toll of 800,000. In the war that raged in the Democratic Republic of the Congo, which is still not definitively resolved, around 100,000

48 A. Leibig, above note 45, para. 2.

49 Amnesty International, above note 47.

50 F. De Londras, above note 33, p. 3.

51 International Committee of the Red Cross (ICRC), *Addressing the needs of women affected by armed conflict: An ICRC guidance document*, ICRC, Geneva, 2004, p. 25; see also K. Askin, above note 28, p. 7.

52 K. Askin, above note 28, p. 13.

53 Christine Chinkin, 'Rape and sexual abuse of women in international law', in *European Journal of International Law*, Vol. 5, No. 1, 1994, p. 327.

54 United Nations Economic and Social Council, 'Report on the situation of human rights in Rwanda', submitted by Mr René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Resolution S-3/1, 25 May 1994, E/CN.4/1996/68, paras 16 to 20.

55 See Françoise Nduwimana, *The Right to Survive: Sexual Violence, Women and HIV/AIDS*, International Centre for Human Rights and Democratic Development, 2004, available at http://www.dd-rd.ca/site/_PDF/publications/women/hivAIDS.pdf (last visited 21 October 2009).

women were victims of sexual violence between 1998 and 2003.⁵⁶ There are reports of suffering on a similar scale in the conflicts in Liberia, Timor-Leste, Indonesia, the former Yugoslavia, Sudan and Afghanistan.⁵⁷ In the conflict in northern Uganda, 20 to 30% of the child soldiers recruited and abducted are girls.⁵⁸ According to Human Rights Watch, 100% of those who eventually escape the grip of the Lord's Resistance Army have a sexually transmitted disease.⁵⁹

Debates on the effectiveness of humanitarian law have resulted in new approaches towards the treatment of women, and the ICRC has conducted a number of studies to stress that women feel the impact of war in many different ways.⁶⁰ By intervening in the human rights field, however, the Security Council can offer more comprehensive protection for women in war, since it can repress violations affecting them and promote their rights during peacekeeping operations. Let us now look at the foundations of the Council's competence in this regard in international law.

Legal foundation: establishing a responsibility to protect

While the Council's role in implementing international law is unquestioned given the weight of the authority conferred on it by the UN Charter, its human rights role is a major innovation. Since the end of the Cold War and the fall of the Berlin Wall, the focus in international security has shifted towards the resolution of internal and transnational conflicts, in which violence against civilians predominates. The Gulf War, as an example of an inter-state conflict, did give rise to the United Nations Compensation Fund, but the fact that claims must be submitted through governments diminished its potential utility for victims of armed conflicts. Since the Security Council has been freed from the 'veto straitjacket'⁶¹ (in that permanent members have less recourse to it), and above all has been marked by the failures in the former Yugoslavia and Rwanda, it has included human suffering on its agenda. The continuous expansion of its powers clearly poses a problem in terms of a democratic deficit,⁶² but this is now rectified by the near complete consensus on

56 Naomi Cahn, 'Beyond retribution and impunity: Responding to the war crimes of sexual violence', in *Stanford Journal of Civil Rights and Civil Liberties*, Vol. 1, Issue 1, 2005, p. 217.

57 Meghan Clarke, 'Sexual violence against women during armed conflict: An analysis of international law', in *University of British Columbia International Law Journal*, Vol. 1, No. 1, 2008, p. 2.

58 Women's Commission for Refugee Women and Children, *Against All Odds: Surviving the War on Adolescents*, Research Study, May–July 2001, p. 17. See also A. Leibig, above note 45, para. 18.

59 Uganda Human Rights Commission, Annual Report, January 2001–September 2002, p. 55.

60 *Women and War*, ICRC, Geneva, 2008; Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, ICRC, Geneva, 2001; see also *Addressing the Needs of Women Affected by Armed Conflict: An ICRC Guidance Document*, ICRC, Geneva, 2004.

61 The 'camisole du veto', as Josiane Tercinet terms it in 'Le pouvoir normatif du Conseil de sécurité: Le Conseil de sécurité peut-il légiférer?', in *Revue belge de droit international*, No. 2, 2004, p. 528.

62 *Ibid.* For more on the question of the legislative functions of international organizations, see Joe Verhoeven, 'Les activités normatives et quasi normatives des organisations internationales', in René-Jean Dupuy (ed.), *Manuel sur les organisations internationales*, Martinus Nijhoff, Dordrecht, 1998, pp. 414–415. Only available in French.

its responsibility to protect. After much prevarication about the controversial principle of humanitarian intervention and the relationship between peace-keeping and strengthening democracy, the rule of law and fundamental freedoms,⁶³ a consensus was eventually reached during the 2005 World Summit. In a final declaration, seemingly admitting failure of the project to reform the UN system, Member State governments adopted a historic position, appointing the Security Council as the last resort for victims of armed conflict. They announced that they were:

‘prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.⁶⁴

Hence when all diplomatic means have been exhausted and the traditional system for protecting the individual – based on state responsibility and international co-operation – has failed, the responsibility to protect rests with the Security Council. This implies that in many cases the only possible means of ending the atrocities will be to resort to force. However, as we have seen in practice, the Council has complete freedom to choose its means of action. Chapter VII has indeed been used to justify intervention in conflicts where international crimes were being committed,⁶⁵ but the Council also likes to see itself as a legislator and advocate of human rights in war. In this sense, it has always been mindful of the suffering of women.

The twofold objective of intervention by the Security Council

The Council’s intervention with regard to women’s rights during armed conflict helps to strengthen international humanitarian law and to promote women as stakeholders in the peace process.

63 For more on this subject, see the Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809; *Official Records of the Security Council, Fifty-fifth Year, Supplement for July, August and September 2000*, document S/2000/809; *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (last visited 2 February 2010). See also *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, available at <http://www.un.org/secureworld> (last visited 2 February 2010). At its 63rd session, the UN General Assembly welcomed the Secretary General’s Report on the Responsibility to Protect (A/63/677) and decided to examine the issue further (General Assembly Resolution A/RES/63/308, 7 October 2009).

64 2005 World Summit Outcome, Resolution A/RES/60/1, p. 30, para. 139, available at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf> (last visited 2 February 2010).

65 Such was the case in Sierra Leone, Liberia, the Democratic Republic of the Congo, and Haiti.

Reinforcing humanitarian law

The inadequacy of provisions to suppress violence against women has long been the main weakness of international law for their protection. The Committee on the Elimination of Discrimination against Women (CEDAW) has nevertheless helped to move the debate forward within its mandate to promote implementation of the 1979 Convention. As the convention had failed to address violence against women,⁶⁶ the Committee adopted a general recommendation on that subject in 1992,⁶⁷ which inspired the Declaration on the Elimination of Violence against Women made by the UN General Assembly in the following year. According to the Committee's recommendation, gender-based violence constitutes a form of discrimination when directed against a person specifically because of his or her gender.⁶⁸ By turning its attention to the situation of women in war, the Committee is helping to reinforce humanitarian law. The steadily growing violence against women in this context calls for specific protective and punitive measures.⁶⁹ These would comprise access to health care, rehabilitation and counselling services for all victims, and appropriate legal measures, including civil remedies and penal sanctions, against violators of women's rights.⁷⁰

The recommendation does not fully compensate for the gaps in the Geneva Conventions, but it does acknowledge that sexual crimes against women are sufficiently serious to warrant penal sanctions. The 1999 Optional Protocol to the 1979 Convention also reflects this standpoint.⁷¹ It officially entered into force in 2001, introducing two major changes. The first enables female victims of discrimination to make a formal complaint to the Committee. The second, more importantly, gives the Committee the competence to conduct investigations in the territory of State Parties in the event of grave and systematic violations of women's rights.

Action by the Committee on the Elimination of Discrimination against Women is nonetheless limited, for although its mandate has been considerably extended, the authority of its decisions is undermined by the inherent weakness of international law, in particular the lack of enforceability. Similarly, as responsibility for compliance with human rights obligations is assigned to each individual state, penal sanctions are bound to fail in the absence of judicial mechanisms powerful enough to impose them. Moreover, state structures very often break down during

66 Besides context-specific provisions (applicable either in peacetime or in war), the only provisions of the convention that seem to allude to a prohibition of violence against women are Article 2, abolishing all customs which constitute discrimination against women, and Article 6, suppressing trafficking and exploitation of prostitution, considered as sexual violence in wartime. See M. Clarke, above note 57, pp. 4–5.

67 Committee on the Elimination of Discrimination against Women, 'Violence against women', General Recommendation No. 19, 29 January 1992, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> (last visited 3 December 2009).

68 *Ibid.*, para. 6.

69 *Ibid.*, para. 16.

70 *Ibid.*, para. 24.

71 See Optional Protocol, above note 11.

armed conflict. *Ad hoc* interventions on the part of the Security Council became an option when it established international criminal tribunals.

In the terms of their founding resolutions, the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) are subsidiary bodies of the Council. Their creation confirmed its ability to exercise executive and legislative as well as judicial functions. The importance of its role in the advancement and protection of women's rights can no longer be ignored, for the two *ad hoc* Tribunals have established a jurisprudence that reinforces humanitarian law and also shows that the suffering inflicted on women is primarily of a sexual nature. They thus achieve two goals in that respect: sexual violence against women now constitutes a crime, and that crime is defined in international law.

By criminalizing such conduct, the jurisprudence of the *ad hoc* Tribunals has given a broader meaning in international law to the concept of violence against women in armed conflict.⁷² The qualification of sexual violence as a grave breach of international humanitarian law amounts to a revision of the Geneva Conventions. The Tribunals have the power to prosecute persons committing grave breaches of the Geneva Conventions,⁷³ but also violations of the laws or customs of war,⁷⁴ genocide⁷⁵ and crimes against humanity.⁷⁶ As the seriousness of violence against women is not acknowledged by the 1949 Geneva Conventions, which do not include it in their list of grave breaches, such acts are mostly prosecuted as war crimes, acts of genocide or crimes against humanity.⁷⁷ However, the notion of 'laws and customs of war' is generally considered to be 'a catch-all provision'⁷⁸ whose vague terms⁷⁹ allow for the inclusion of a number of humanitarian commitments.⁸⁰ The ICTY has thus interpreted it as banning sexual violence, including rape, against civilian populations.⁸¹ It is consequently established that

72 F. De Londras, above note 33, p. 4.

73 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), Art. 2.

74 *Ibid.*, Art. 3.

75 *Ibid.*, Art. 4.

76 *Ibid.*, Art. 5.

77 M. Clarke, above note 57, p. 8.

78 *Ibid.*

79 Kelly Askin, 'Prosecuting wartime rape and other gender-related crimes under international law: Extraordinary advances, enduring obstacles', in *Berkeley Journal of International Law*, Vol. 21, 2003, p. 309.

80 In the *Duško Tadić* case, the Appeals Chamber declared that 'it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law'. The Appeals Chamber concluded that Article 3 'functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal'. See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Decision on the Defence Motion), 2 October 1995, paras 89 and 91, confirmed in ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, paras 125 and 136.

81 ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgement (Trial Chamber II), 22 February 2001, para. 406. The Trial Chamber states in para. 408 that: 'rape,

violence against women is likewise prohibited by the law of armed conflict as a grave breach warranting prosecution by an international tribunal. It is questionable whether states can in such cases actually exercise universal jurisdiction without a relevant treaty-based provision. Sexual violence can, however, be prosecuted under universal jurisdiction as a crime of genocide when it is deemed to ‘caus[e] serious bodily or mental harm to members of the group’ with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.⁸² The definition of crimes against humanity already contained a provision explicitly prohibiting rape directed against a civilian population,⁸³ but the problem of applying it remained. This task was to be assumed, for the first time, by a body with international jurisdiction.

The concept of violence against women in the jurisdiction of the *ad hoc* Tribunals is at times restrictive (penalizing only rape) and at other times broad (penalizing sexual violence in general). It is not easy to broaden the concept, for sexual violence comes in many forms that tend to overlap and it is difficult to make a clear legal distinction between them.⁸⁴ For example, rape and sexual slavery can be perpetrated separately, concurrently or consecutively.⁸⁵

In *Kunarac et al.*, the ICTY punished rape as a crime against humanity, in accordance with its Statute. As a war crime, the act has been sanctioned on the charge of torture, inhuman treatment, and wilfully causing great suffering or serious injury to body or health.⁸⁶ The ICTY understands torture and outrages upon personal dignity as being violations of the laws or customs of war, including crimes of sexual violence committed against detainees.⁸⁷ The Trial Chambers have therefore concluded on several occasions that rape and other forms of sexual violence, including forced public nudity, cause severe physical or mental pain and amount to outrages upon personal dignity,⁸⁸ and also that rape or sexual violence can be equivalent to torture for others besides the victim, particularly if the acts are committed in their presence.⁸⁹

torture and outrages upon personal dignity, no doubt constituting serious violations of common Article 3, entail criminal responsibility under customary international law’; See also ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion, *ibid.*, para. 134; confirmed in ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 174; and also ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement (Trial Chamber), 3 March 2000, para. 134; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement (Trial Chamber), 10 December 1998, para. 173.

82 ICTY Statute, Art. 4.2(b).

83 *Ibid.*, Art. 5(g).

84 K. Askin, above note 28, p. 10.

85 *Ibid.*

86 ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement (Trial Chamber I), 2001; ICTY, *Prosecutor v. Rajić*, Case No. IT-95-12-S, Judgement (Trial Chamber I), 2006; see also International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement (Trial Chamber II), 21 May 1999.

87 ICTY, *Kvočka et al.*, above note 86, para. 121.

88 *Ibid.*, para. 170; ICTY, *Furundžija*, above note 81, para. 272; ICTY, *Kunarac*, above note 81, paras 766 to 774.

89 ICTY, *Kvočka et al.*, above note 86, para. 149.

This definition of rape nonetheless provoked controversy, which the *Kunarac* case seems now to have settled. The first definition appeared in the *Akayesu* case, in which the ICTR classified rape as ‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.⁹⁰ In the *Furundžija* case the ICTY confirmed this definition, dividing it into two parts:

1. the sexual penetration, however slight:
 - a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b) of the mouth of the victim by the penis of the perpetrator;
2. by coercion or force or threat of force against the victim or a third person.⁹¹

Criticized for insisting that the proof of rape lies in the use of force, the formulation in the *Akayesu* and *Furundžija* cases was amended by *Kunarac*, defining rape as a violation of the sexual autonomy of the victim and qualifying any sexual act as rape if:

1. the sexual activity is accompanied by force or threat of force to the victim or a third party;
2. the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
3. the sexual activity occurs without the consent of the victim.⁹²

Subsequent debates were centred on the notion of consent. In the *Gacumbitsi* case,⁹³ the ICTR Appeals Chamber was called upon to determine whether the burden of proof falls on the Prosecution, namely to prove absence of consent, or on the Defence to prove the contrary. In spite of the provisions designed to protect rape victims concerning evidence of the crime,⁹⁴ the Chamber accepted that the absence of consent remained an element of crime that must be proved by the Prosecution.⁹⁵ However, this requirement is significantly eased by the Chamber’s acknowledgement that absence of consent can be inferred from the

90 ICTR, *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 688.

91 ICTY, *Furundžija*, above note 81, para. 185.

92 ICTY, *Kunarac*, above note 81, para. 442, repeated in ICTY, *Kvočka et al.*, above note 86, para. 177.

93 ICTR, *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement (Appeals Chamber), 7 July 2006.

94 Rule 96 of the Rules of Procedure and Evidence provides that when submitting evidence in cases of sexual assault: ‘(i) ... no corroboration of the victim’s testimony shall be required; (ii) consent shall not be allowed as a defence if the victim: (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear. (iii) Before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (iv) prior sexual conduct of the victim shall not be admitted in evidence or as defence’.

95 Maxime Didat, Joanna Spanoudis, ‘Chronique de jurisprudence du Tribunal pénal international pour le Rwanda (2006)’, in *Revue belge de droit international*, No. 1, 2007, p. 238. Only available in French.

circumstances surrounding the crime, i.e. the context of genocide or the victim's captivity.⁹⁶ The same applies if the Prosecution can establish that the accused was aware that the coercive circumstances in which the rape took place undermined the possibility of genuine consent on the part of the victim.⁹⁷

Unlike rape, which is a crime under Article 5 of the ICTY Statute, other acts of sexual violence have become criminal offences through the jurisprudence of the Tribunal and are not laid down as such in its Statute. The Tribunal will, however, shortly establish its competence vis-à-vis such offences by including sexual violence in Article 3 as a violation of the laws or customs of war. The ICTR Statute, on the other hand, provides for the prosecution of both rape and sexual violence as a violation of Article 3 common to all four Geneva Conventions and of Protocol II on the protection of civilians in non-international conflict.⁹⁸ It is therefore only natural that the ICTR was the first to formulate a definition of sexual violence, stating that it was 'any act of a sexual nature which is committed on a person under circumstances which are coercive'.⁹⁹ In light of the Statute of the International Criminal Court, the ICTY regards sexual violence as a concept that extends beyond rape to encompass sexual slavery and any other assault of a sexual nature.¹⁰⁰

Promotion of women's rights

The questioning of the Security Council's capacity to assume a normative function is reflected in the promotion of women's rights. Serges Sur states '[t]he Council ... has always preferred acting and making decisions on a case-by-case basis, rather than formulating declaratory norms'.¹⁰¹ The Council has now begun issuing international regulations in support of this preference – which either reinforce existing regulations or place new obligations on states – and in so doing is clearly going beyond the bounds of the specific situation defined in Article 39 of the Charter. This approach, meanwhile consolidated by persuasive practice, runs counter to the exceptional nature of the authority granted to it by Chapter VII.¹⁰²

96 *Ibid.*

97 ICTR, *Gacumbitsi*, above note 93, para. 157.

98 Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), Art. 4.

99 ICTR, *Akayesu*, above note 90, para. 688.

100 ICTY, *Kvočka et al.*, above note 86, para. 180. Footnote 343 states that: 'Sexual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other similar forms of violence'. Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998, at Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi).

101 ICRC translation of 'Le Conseil [...] a toujours préféré les actions et les décisions ponctuelles à la formulation de normes déclaratoires', Serges Sur, 'Conclusions', in *Le Chapitre VII de la Charte des Nations Unies: Colloque de Rennes*, Société française pour le droit international (ed.), Pedone, Paris, 1995, p. 314. Only available in French.

102 For more on this debate, see Jared Schott, 'Chapter VII as exception: Security Council action and the regulative ideal of emergency', in *Northwestern University Journal of International Human Rights*, Vol. 6, 2007, p. 24.

In this way, the Council has over the past decade been adopting so-called thematic or declaratory resolutions which, being non-restrictive and non-binding, are no more than pale imitations of international conventions,¹⁰³ and often the most disregarded ones at that. The human implications of armed conflict have been by far the Council's foremost concern. To date, the following issues have been examined: children in situations of conflict; the protection of civilians during hostilities; HIV/AIDS and international peacekeeping operations; and the protection of UN staff, associates and humanitarian workers, journalists, war correspondents and the media in wartime. The Council has also issued two thematic resolutions on women, peace and security.¹⁰⁴

Before the first resolution on women, peace and war, of 31 October 2000, the Council adopted a resolution on 17 September 1999 more generally addressing the protection of civilians in war.¹⁰⁵ In this resolution, the Council was already evidencing a grave preoccupation with the status of women in war and formulating various recommendations; it expressed its concern at the fact that the vast majority of victims in conflicts are civilians, particularly women, children and other vulnerable groups, and acknowledged the direct impact of conflict on women. The solutions proposed are no less than declarations of international law.

The Council, for instance, points out the importance of widely disseminating international law on the protection of civilians, and of relevant training for civilian police, armed forces, and members of the judicial and legal professions, civil society and personnel of international and regional organizations.¹⁰⁶ It consequently encourages an acknowledgement of the need for gender-specific humanitarian aid and recognition of the violence women suffer. The Council also favours incorporating special protection provisions for vulnerable groups, including women and children, into peacekeeping mandates.¹⁰⁷ United Nations personnel involved in peacemaking, peacekeeping and peacebuilding activities should therefore have appropriate training.¹⁰⁸ The Council calls upon States to ratify instruments of international humanitarian, human rights and refugee law.¹⁰⁹ Additionally, all parties to conflict are bound to comply with their obligations under those bodies of law¹¹⁰ and states are bound to prosecute in the case of non-compliance.¹¹¹ In Resolution 1265 (1999) the Council provides, for the first time, for the possibility of intervening in situations of armed conflict where civilians are

103 Josiane Tercinet, 'Le Conseil de sécurité et la sécurité humaine', in J.F. Rioux (ed), *La sécurité humaine: une nouvelle conception des relations internationales*, L'Harmattan, Paris, 2001, p. 159. Only available in French.

104 Security Council, S/RES/1325 (2000), 31 October 2000; S/RES/1820 (2008), 19 June 2008.

105 Security Council Resolution 1265 (1999), 17 September 1999. Over the past ten years, the general theme of the protection of civilians in armed conflict has been dealt with in the following Security Council Resolutions: 1296 (2000); 1674 (2006); 1738 (2006) and 1894 (2009).

106 Security Council Resolution 1265 (1999), preamble.

107 *Ibid.*, para. 13.

108 *Ibid.*, para. 14.

109 *Ibid.*, para. 5.

110 *Ibid.*, para. 4.

111 *Ibid.*, para. 9.

being targeted or humanitarian assistance to civilians is being deliberately obstructed.¹¹²

In Resolution 1325 (2000), the Security Council highlights that the threat to women in war is distinct from that facing the civilian population as a whole, as it had previously done in the case of children.¹¹³ This resolution expands on the provisions relating to women contained within Resolution 1265 (1999). It points out that women are being increasingly targeted during armed conflict and stresses the importance of full respect for international law relative to protecting women from gender-based violence – particularly rape and other forms of sexual abuse – and all other forms of violence in situations of armed conflict, and calls upon states to take special measures to protect women.¹¹⁴ The resolution stipulates that those crimes cannot be included in any amnesty provision,¹¹⁵ and that states have a responsibility to prosecute any perpetrators of such acts. In the same resolution, the Council also urges that the gender-specificity of needs be taken into account in mine clearance and mine awareness programmes,¹¹⁶ disarmament, demobilization and reintegration;¹¹⁷ it calls for men and women to be equally represented among peacekeeping operations personnel, and for all to receive training on gender issues. Similarly, it states that a gender perspective should be adopted when negotiating peace agreements.¹¹⁸ The resolution breaks new ground not only in the area of protection, but also in promoting women both as the solution to their own suffering and as active and valuable participants in the restoration of peace and security. The measures set forth by the Council to this end are the following:

1. increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict;
2. increased participation of women at decision-making levels in conflict resolution and peace processes;
3. the appointment of more women as special representatives and envoys to pursue good offices on behalf of the UN Secretary-General, and the creation of a roster of female candidates for this role;
4. expansion of the role and contribution of women in United Nations field-based operations, and especially among military observers, civilian police, human rights and humanitarian personnel;
5. incorporation of a gender perspective and gender component into peacekeeping operations;

112 *Ibid.*, para. 10.

113 UN Security Council Resolutions on Children and armed conflicts: 1261 (1999); 1314 (2000); 1379 (2001); 1460 (2003); 1539 (2004); 1612 (2005); 1882 (2009).

114 Resolution 1325 (2000), preamble and paras 9–10.

115 *Ibid.*, para. 11.

116 *Ibid.*, preamble.

117 *Ibid.*, para. 13.

118 *Ibid.*, para. 8.

6. training by and guidelines for Member States on the rights and particular needs of women, as well as on the importance of involving women in all peacekeeping and peacebuilding measures.¹¹⁹

The implementation of these recommendations relating to the promotion of women as agents of peace has been the subject of a comprehensive assessment by the Security Council. Resolution 1889 (2009) reports a mixed result. It welcomes some achievements such as the efforts of States to implement Resolution 1325 (2000) at the national level through action plans,¹²⁰ the efforts of the Secretary-General to boost more women to senior United Nations positions, and the establishment of a United Nations Steering Committee on Resolution 1325 (2000).¹²¹ However, the Council remained concerned about the under-representation of women at all stages of peace processes, and the persistence of obstacles to their participation, such as violence and intimidation, insecurity and lack of rule of law, cultural discrimination and stigmatization, lack of access to education, marginalization and lack of funds for efforts to rehabilitate women.¹²²

Resolution 1820 (2008) on women, peace and security – although expressing concern about the general situation of women in war and the obstacles to their participation in the promotion of peace – puts the main emphasis on rape and other acts of sexual violence against them during conflict. The resolution thus acknowledges that since 2000 violence against women has intensified in the majority of conflicts worldwide. This phenomenon is especially prevalent in Africa, in the bloody conflicts of the DRC, Uganda, the Central African Republic, Sierra Leone, Liberia and Sudan/Darfur. The Council recognizes that women and girls are particularly targeted by sexual violence ‘including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group’.¹²³ It furthermore stresses that sexual violence against women can exacerbate armed conflicts and may impede the restoration of peace, and reaffirms its readiness to adopt appropriate measures to address widespread or systematic sexual violence on a case-by-case basis.¹²⁴ Resolution 1820 (2008) recommends both short- and long-term action to be taken.

In the short term, the Council can condemn all forms of sexual violence committed in armed conflict,¹²⁵ demand their immediate cessation,¹²⁶ and take targeted measures against parties to conflicts who commit these crimes.¹²⁷ Longer-term measures include promoting activities to prevent and address rape and sexual

119 *Ibid.*, paras 1–6.

120 Resolution 1889 (2009), 5 October 2009, p. 1.

121 *Ibid.*, p. 2–3.

122 *Ibid.*, p. 2.

123 Resolution 1820 (2008), 19 June 2008, preamble.

124 *Ibid.*, para. 1.

125 *Ibid.*, preamble.

126 *Ibid.*, para. 2.

127 *Ibid.*, para. 5.

violence, protective action by states in accordance with their obligations, and punishment of the perpetrators of sexual crimes.

The responsibility for promoting a response to rape and sexual violence rests largely with the UN Secretariat and those agencies intervening in conflict zones, whose personnel must be trained in preventing, recognizing and responding to sexual violence. This applies particularly to peacekeeping operations personnel,¹²⁸ given the zero-tolerance policy established by the UN Secretariat vis-à-vis the sexual exploitation and abuse of civilians during such operations.¹²⁹ With regard to promotion, the Secretary-General is requested to develop guidelines and strategies to enhance the ability of peacekeeping operations to protect women and girls from all forms of sexual violence.¹³⁰

The protective measures formulated by the Council are intended to be more concrete. It places a number of specific obligations on parties to conflict, such as enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting military personnel during recruitment to take into account past actions of rape and other forms of sexual violence, evacuating women and children under imminent threat of sexual violence to safety,¹³¹ and protecting women and girls in and around refugee camps.¹³² The Council also urges Member States to provide medical care and follow-up to victims of outrages upon their personal dignity.¹³³

Regarding the suppression of sexual violence against women, the Council's proposals reaffirm the exclusion of such acts from amnesty provisions, in recognition of the gravity of such acts and their inclusion as crimes in the statutes of the *ad hoc* Tribunals and the International Criminal Court. Member States must ensure that all victims of sexual violence have equal protection under the law and equal access to a justice system that takes account of their suffering.¹³⁴ According to the Council, it is important to react to these crimes not only for the sake of justice, but also for sustainable peace, truth and national reconciliation.¹³⁵

The limited impact of Security Council intervention

It is necessary to analyse the impact of the Security Council's sudden entry into women's rights matters, taking account of the fact that its resolutions are addressed to parties to armed conflict or to UN bodies.

128 *Ibid.*, para. 6.

129 *Ibid.*, para. 7.

130 *Ibid.*, para. 9.

131 *Ibid.*, para. 3.

132 *Ibid.*, para. 10.

133 *Ibid.*, para. 13.

134 *Ibid.*, para. 4.

135 *Ibid.*

Resolutions addressed to parties to armed conflict

An intervention can be *ad hoc* and confined to a particular context, as is generally the case when the Council responds to a threat to the peace, breach of the peace or act of aggression. In the cases of the former Yugoslavia and Rwanda – where massive human rights violations, including systematic and widespread rape and sexual violence, were deemed to be affecting international peace and security – the Council set up prosecution mechanisms, the ICTY and ICTR. Since it acted under Chapter VII of the UN Charter, its decisions were binding and enforceable; this established the authority of the judgements handed down by its subsidiary bodies. For the first time ever, those bodies imposed international sanctions on perpetrators of sexual crimes against women during conflict. These judgements have left a remarkable legacy, for the ICC, along with the international criminal courts created after the ICTR and the ICTY, reflect the advances accomplished: rape and other forms of sexual violence are now punished as international crimes, and are excluded from all amnesty agreements. In this sense, the Council could quite rightly be considered as having aroused the law of armed conflict from the latent state it had been in since its codification. The Council has done much to render its implementation more viable and the law itself better adapted to the atrocities of war, in which the use of rape and other forms of sexual violence as a method of warfare had hitherto been trivialized.

On the other hand, when the Council goes beyond the bounds of Chapter VII and adopts resolutions declaratory of international law, the impact of its intervention is somewhat limited, for thematic resolutions do not impose the same binding obligations as those of decisions made in response to a threat to the peace or international security. Yet their value should not be underestimated. The very position of the Security Council in the world order is in itself an inducement to give renewed meaning to the international obligations imposed by treaties and conventions on belligerents with regard to women's rights. Nevertheless, it should be recognized that the Council's authority has not changed the behaviour of the parties to conflicts regarding crimes of sexual violence. The recent review of Resolution 1820 (2008) by the Council in its Resolution 1888 (2009) is far from promising. The Council found absence of progress regarding situations of sexual violence in armed conflict, and recognized the ineffectiveness of its resolutions to curb the violence.¹³⁶

Resolutions addressed to UN bodies

The effectiveness within the UN system of the 2000 and 2008 resolutions on women, peace and security is indisputable. United Nations peacekeeping operations and subsidiary bodies are now gender-mainstreamed, which means there is increased participation of women in peacemaking and peacebuilding

¹³⁶ Resolution 1888 (2009), 30 September 2009, p. 1.

processes. There is also a greater capacity for understanding the psychological effects suffered by victims of sexual violence during conflict, which is the function of the ‘gender’ sections of peacekeeping operations. The UN Mission in the Democratic Republic of the Congo (MONUC) was required to take exceptional measures in light of the sheer scale of the use of sexual violence. In the context of DRC peace initiatives a separate UN task force was set up to address violence against women. Co-ordinated by the UN Development Fund for Women and composed of UN agencies, the Congolese Ministry of Gender, Family and Children and 16 civil society organizations, the mandate of this task force is to combat sexual violence and impunity.¹³⁷ The main stumbling blocks to full compliance with the said resolutions on women are those provisions addressed to parties to conflict and states. That is why a follow-up mechanism is necessary.

The Council remains focused on this need in relation to the issue of women, peace and international security. The 2000 resolution did not formally provide for follow-up, asking only for a review of the situation of women to be included in the Secretary-General’s report to the Council. It also invited the Secretary-General to conduct a study on the impact of armed conflict on women and children. The 2008 resolution, on the other hand, requested him to submit a report by 30 June 2009 on the implementation of the recommendations made by the Council. It was to include, *inter alia*, information on situations of armed conflict in which sexual violence had been widely or systematically employed against civilians; analysis of the prevalence and trends of sexual violence in situations of armed conflict; and proposals for strategies to minimize the susceptibility of women and girls to such violence.¹³⁸

The Secretary-General met this request on 15 July 2009 and submitted a 24-page report to the Security Council. His study was confined to conflicts during the past 20 years in which sexual violence had been widely or systematically employed against civilians, with implications for international peace and security.¹³⁹ The main recommendations made by the Secretary-General urge the Security Council to pay greater attention to ongoing conflicts where sexual violence is being widely employed against civilians.¹⁴⁰

The Council’s resolutions under Chapter VII of the Charter could consequently also indicate appropriate measures of prevention and protection. Similarly, the Council is invited to mandate its sanctions committees to pay particular attention to individuals and parties who perpetrate sexual crimes during conflict. The report furthermore recommends that a commission of inquiry, supported by the Office of the United Nations High Commissioner for Human Rights, be established to investigate and report on human rights violations, with a dedicated

137 United Nations Office for the Coordination of Humanitarian Affairs, *Rapport hebdomadaire RDC-Centre/Ouest*, 26 October to 1 November 2007. Only available in French.

138 Resolution 1820 (2008), 19 June 2008, para. 15.

139 Report of the Secretary-General pursuant to Security Council Resolution 1820, S/2009/362, 20 August 2009.

140 *Ibid.*, para. 56.

focus on sexual violence in ongoing conflict situations in the DRC, Sudan and Chad. Lastly, the Secretary-General proposes that a mechanism be established at institutional level to act upon sexual violence allegations, that a multi-agency approach be adopted in the UN Action against Sexual Violence in Conflict, and that the remit of the Council's working groups on this issue be broadened.

Resolutions 1888 (2009) and 1889 (2009) have addressed some of these recommendations, and Resolutions 1325 (2000) and 1820 (2008) now have well-developed monitoring mechanisms. The Council has specifically encouraged the Peacebuilding Commission and Peacebuilding Support Office to continue to promote gender equality and women's empowerment¹⁴¹ and requested a report of the Secretary-General on the participation of women in peacebuilding.¹⁴² It also welcomed the establishment of a post of special advisor to the Secretary-General on the implementation of Resolution 1325 (2000)¹⁴³ and requested the appointment of a Special Representative of the Secretary-General on sexual violence in armed conflict.¹⁴⁴ The Secretary-General was called upon to deploy a team of experts to assist States in strengthening the rule of law in situations where sexual violence is a particular concern.¹⁴⁵ The Council also requested that the Secretary-General develop proposals on ensuring monitoring and reporting,¹⁴⁶ and report on the implementation of Resolutions 1820 and 1888 on an annual basis.¹⁴⁷

Conclusion

The intervention of the Security Council in matters of human security reflects the shift in international security concerns from the state to the individual. Essentially the only body granted legitimate authority to resort to force in international relations, the Council is no longer acting solely in the field of *jus ad bellum*, but is intervening more and more in that of *jus in bello*, and thus in the protection of civilians. The increasingly widespread use of violence against women in recent conflicts has impelled the Council to adopt so-called declaratory resolutions that reinforce existing international mechanisms and institutionalize new practices, in particular gender mainstreaming and a zero-tolerance policy towards sexual exploitation or abuse of civilians during peacekeeping operations. In view of the magnitude of the suffering endured by women and its implications for peacebuilding, a Security Council special committee modelled on the Council's Working Group on Children and Armed Conflict (which highlights the scale of the child soldier phenomenon) would clearly be welcome.

141 Resolution 1889 (2009), para. 14.

142 *Ibid.*, para. 19.

143 Resolution 1888 (2009), p. 3.

144 *Ibid.*, para. 4.

145 *Ibid.*, para. 8.

146 *Ibid.*, para. 26.

147 *Ibid.*, para. 27.