

Women, Peace, and Security

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Overview and Excerpts¹

The last two decades have seen a dramatic transformation in the Security Council's (Council) role in advancing and enforcing international humanitarian law (IHL). The changing nature of armed conflict, the universal acceptance of human rights, the calcification of certain precepts of international law into *jus cogens*, and advances in international law have all redefined the limits of state sovereignty and influenced the modern understanding of the Council's mandate under the United Nations Charter (Charter).

Within this new paradigm, the Council has made protecting civilians in armed conflict central to its duty to maintain international peace and security. As part of this effort, the Council has passed a series of resolutions addressing the impact of armed conflict on women and the use of sexual violence in conflict (Women, Peace and Security Series, WPS Series).² Despite these efforts, the resolutions have failed to achieve one of the Council's main goals – ending sexual violence perpetrated against women in armed conflicts around the world.

The chapter, *Women, Peace and Security*, in the forthcoming publication, Security Council in the Age of Human Rights, 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 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, in order to successfully deter its use.

I. Security Council's Failure to Prevent Sexual Violence in Conflict

States and the UN have absolute duties to “respect and ensure respect for” IHL, including the rights it guarantees to girls and women. These duties are non-derogable and, in many cases, stronger than those under national and international human rights laws. The Council's duty to “ensure respect” requires it to use its strongest powers under Chapter VI of the Charter to enforce the rights of girls and women under IHL. While the Council's actions have been robust, it has failed to fully uphold this duty.

Instead, the WPS Series, in its language and its implementation by states and the UN, fails to leverage the Council's strongest tool to end sexual violence in armed conflict: states' preexisting duties under IHL.

That is, rather than using the legal framework of IHL to strengthen the resolutions on women, peace and security, the Council does not acknowledge IHL in its WPS resolutions.

“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. While this is laudable, this undertaking is not finished, in particular with respect to ongoing sexual violence in armed conflicts globally.”

- Janet Benshoof
President
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The non-derogable IHL obligations that the Council should have invoked in its resolutions on women, peace and security are:

❖ **The duty to ensure application of IHL without discrimination**

Common Article 3's prohibition on "adverse distinction," which is interchangeable with non-discrimination,³ is a foundational principle of IHL. Women have absolute rights to non-discrimination in the application of IHL, which go largely unenforced. Under both IHL and human rights law, non-discrimination takes into account that men and women may require medical treatments specific to their biology, and prohibits only unfavorable or adverse treatment.

❖ **The duty to ensure accountability for grave breaches of IHL**

Central to the obligation under common Article I of the Geneva Conventions to "respect and ensure respect" for IHL is the mandate for states to ensure accountability for grave breaches of IHL, including sexual violence.

❖ **The duty to act in all situations when faced with breaches of IHL**

The non-derogable duty under common Article I to "respect and ensure respect" for IHL imposes duties on both State parties to a conflict, as well as all other Higher Contracting Parties, to act in all situations of breaches of IHL. Accordingly, when the Council has seized itself of an issue – such as sexual violence in armed conflict under the WPS series – it should use all available measures to respond to breaches in all situations.

❖ **The duty to regulate the means and methods of warfare**

There is global consensus that sexual violence has been and is 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 falls under rules governing illegal methods of warfare. However, despite the Council's acknowledgement that sexual violence is 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.

2. Recommendations for the Council to Prevent Sexual Violence in Conflict

In light of the failures of the WPS series to prevent sexual violence in conflict, the Council should undertake the following recommendations to ensure effectiveness of the WPS Series:

❖ **The Council should signal a new chapter in the WPS initiative.**

The Council should make explicit that ongoing, widespread and systemic sexual violence in armed conflict, including its use as an illegal method or tactic 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 available measures under Chapter VII to end sexual violence in armed conflict. Once such a determination is made with regard to sexual violence, the Council can take progressively coercive measures under Chapter VII.

❖ **The Council should restructure the monitoring and implementation of the WPS Series.**

The Council must make clear the duties of States and UN entities to "respect" and "ensure respect" for IHL in all circumstances, and ensure that the rights and protections guaranteed by IHL are fully implemented and enforced. 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.⁴

❖ **The Council must make clear that use of rape as a tactic of war is prohibited and triggers intransgressable duties on states and the UN to take all measures possible to end its use.**

As part of this effort, the Council should require States, at a minimum, to amend 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. Lastly, the Council should expand the Secretary-General's reporting mandate under Resolution 1960 to include a list of parties, even those not on the Council's agenda, who are using sexual violence in order to guide Council engagement.⁵

❖ **The Council should ensure multisectoral response to victims in accordance with IHL.**

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."⁶ This requirement must be read in conjunction with the non-discrimination mandates of IHL – which requires that girls and women victims of 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. Therefore, the Council should require Member States to conform to the nondiscriminatory mandates of IHL.

Furthermore, this highlights the fact that women are "often forced to carry out unwanted pregnancies resulting from rape, or undergo dangerous abortion."⁷ 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."⁸ 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.

❖ **The Council should establish a permanent Working Group on women, peace, and security.**

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.⁹ The Working Group's mandate should include making recommendations on measures to ensure accountability and redress for violations of WPS mandates, such as the adoption and renewal of sanctions, even where a sanctions regime does exist, and recommendations to refer situations to the International Criminal Court. 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 EU, 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 existing criminal justice mechanisms, which could take years to provide reparations. The 2004 report of the International Commission of Inquiry on Darfur, headed by M. Cherif Bassiouni, makes a clear and compelling case why, in particular for victims of rape, the Security Council should set up compensation commissions that are delinked from criminal justice measures.¹⁰ Accordingly, the Working Group should be able to recommend to the Council when states must establish reparations funds for victims of sexual violence in war.

3. 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 laudable, this undertaking is not finished. The *jus cogens* nature of the prohibition on sexual violence in conflict imposes a duty on the Council to take all effective measures available to it under the Charter. Pursuant to this duty, the Council must invoke IHL in the exercise of its powers to demand strong actions from all States and the UN to end sexual violence as a tactic of war and secure the rights of women and girls worldwide.

¹Janet Benshoof is President and Founder of the Global Justice Center, a non-governmental organization which focuses on human rights through the rule of law. This document excerpts her forthcoming publication, *Women, Peace and Security, in The Security Council in the Age of Human Rights*, published by Perseus, (Forthcoming July 2014).

² See S/RES/1325; S/RES/1820; S/RES/1888; S/RES/1889; S/RES/1960; S/RES/2106; S/RES/2122.

³ CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 308, Volume I: Rules (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), Rule 88, Adverse Distinction. It is worth noting that 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 (CEDAW).

⁴ See e.g., S/RES/814; S/RES/918; S/RES/1576.

⁵ See Janet Benshoof, *The Other Red Line: The Use of Rape as an Unlawful Tactic of War*, GLOBAL POLICY, Vol. 5, Issue 5, May 2014, p. 146.

⁶ S/2013/149, ¶130(b).

⁷ *Ibid.*, ¶12.

⁸ *Ibid.*

⁹ 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/>.

¹⁰ International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General – Pursuant to Security Council Resolution 1564 of 18 September 2004*, Jan. 25, 2005, ¶¶ 590-603.