Women, Peace, and Security: Tackling Violence Against Women in the Contemporary World?

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It is an honour to be asked to give the Walther Schücking memorial lecture. I think the subject of my lecture – Women, Peace, and Security (WPS) – is apposite for honouring Walther Schücking. Professor Schücking has been remembered as a progressive liberal,[1] a pacifist who placed great trust in the civilising effect of international law, in the 1899/1907 Hague Conventions, and who argued for the benefits of international conciliation, compulsory third party dispute resolution, and a universal and institutional international legal order that recognised a commitment to disarmament. WPS, too, has its origins in the peace movement of before and during World War I, but specifically in what we now call the women's peace movement. This was most famously represented by the Women's Congress of 1915 where around 1,500 women from Europe and North America came together in The Hague to protest the war. It adopted a number of resolutions, many of which resonate with Schücking's vision of the international legal order. For instance, the Women's Congress expressed its belief that 'war is the negation of progress and civilization,' and accordingly 'urge[d] the governments of all nations to come to an agreement to refer future international disputes to arbitration and conciliation' and thus to promote a 'constructive peace' that includes 'a permanent International Court of Justice to settle questions or differences of a justiciable character such as arise on the interpretation of treaty rights or of the law of nations.' The Congress also advocated universal disarmament that it

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[1] Christian Tams, 'Re-Introducing Walther Schücking', 22 *European Journal of International Law* (*EJIL*) (2011) 725.

thought could only be realised through international agreement. It saw in the 'private profits accruing from the great armament factories a powerful hindrance to the abolition of war.'[2] Following the conclusion of the Congress, women delegates visited statesmen across fourteen countries to apprise them of the resolutions and hundreds of copies of the resolutions were mailed out, including in Germany, to politicians, civil society organisations, and private citizens. So it may well be that Schücking was aware of them.

The end of the war saw different fortunes: the women demanded to be part of the drafting process of the peace treaty but were only able to submit their resolutions to Congress delegates and to meet with Woodrow Wilson while Schücking became one of the six German delegates to the Paris Peace Conference and subsequently a Judge at the Permanent Court of International Justice, a status no woman achieved until some seven decades later. The women's peace movement however continued through the work of the Women's International League for Peace and Freedom, which evolved from the Congress. While – as far as I know – not a feminist, Schücking's political activism and his understanding of international lawyers as 'participants in international politics' who have a 'duty not only to report on existing law but to further its development' in the interests of justice[3] is one that is familiar to many feminist international lawyers today.

But to return to WPS. I think this is a subject that is under the radar screen for international lawyers as it is perceived more as a matter for United Nations (UN) or government policy-making than for legal application. But I consider that it is also a legal agenda, rooted in a number of regimes of international law. What I will do in this lecture is to describe the WPS agenda, discuss its status in international law, and then to ask what might women, peace, and security mean for tackling violence and conflict and achieving peace for women in the contemporary world?

At its core, WPS is the agenda set out by the UN Security Council since it adopted Resolution 1325 in 2000, almost exactly 18 years ago, followed by a further seven resolutions in 2008, 2009, 2010, 2013, and 2015. Resolution 1325 was lobbied for by women activists and widely celebrated by them as for the first time in its history the

[2] International Congress of Women at The Hague, *Resolutions adopted by the International Congress of Women*, 1 May 1915, available at http://womhist.alexanderstreet.com/hague/doc1.htm.

[3] Martti Koskenniemi, *Gentle Civilizer of Nations* (2002), at 216.

male dominated and conservative Security Council had devoted a full session to debating women's experiences during and after conflict, drawn attention to the 'inextricable links between gender equality and international peace and security', and, in the words of the preamble to the resolution, had recognised the 'important role of women in the prevention and resolution of conflicts and in peace-building'. By bringing women onto the Security Council agenda it seemed to be an opening of the door to women in the decision-making and operations of the Council, to defining the intersection between gender, peace, and security and possibly to 'idealism' and 'progress' in international law. The resolution was adopted through a combination of civil society activism that had continued in various forms since 1915, and especially since the Fourth World Conference of Women in Beijing in 1995, the support of like-minded States, in particular Namibia, Bangladesh, and the United Kingdom and of UNIFEM, the then United Nations Development Fund for Women.

So what did Resolution 1325 do? Resolution 1325 built upon the longstanding demands of women's organisations and a number of contemporaneous UN agendas.[4] It itself had three main themes: gender balance, gender mainstreaming, and ending impunity for the perpetrators of crimes of sexual violence committed in armed conflict. First, gender balance is about numbers – the call for more women to be included in significant roles. Resolution 1325 urges women's representation and participation in all stages of conflict prevention, management, and resolution, for more women to be appointed as UN special representatives and envoys, and enhancement of the role and contribution of women in UN field-based peacekeeping operations. Second, gender mainstreaming, or taking a 'gender perspective', requires taking account of what the resolution calls the 'special needs of women and girls' in post-conflict processes – repatriation, resettlement, rehabilitation, reintegration, and State-building. It calls for measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution, the electoral system, the police, and the judiciary. Third, 1325 emphasises the responsibility of States for prosecution of those responsible for genocide, crimes against humanity, and war crimes, including sexual and other violence against women and girls, thus asserting accountability and ending impunity for these crimes. Accordingly it rejects amnesty for these crimes.

[4] Christine Chinkin, 'Adoption of 1325 Resolution', in Sara E. Davies and Jacqui True (eds.), *Oxford Handbook on Women, Peace and Security* (2018) 26, at 26.

The subsequent resolutions have complemented 1325. Taken together the eight resolutions recognise that harms experienced by women in armed conflict, especially sexual violence, constitute a threat to international peace and security through their high incidence, through their contribution to the displacement of peoples and refugee flows, and, unless steps are taken to address it post-conflict, through their continuing divisiveness on communities and society. Four themes or pillars are distilled as the core of the women, peace, and security agenda: (i) women's participation and representation in decision-making with respect to conflict, in peace operations and in key positions; (ii) prevention of sexual and gender-based violence in armed conflict and more radically of conflict; (iii) the need to protect women from conflict-related violence, especially sexual violence; (iv) relief and recovery. Thus women's participation and representation are overriding premises while the other pillars highlight the temporality of conflict: prevention – before conflict; protection – during conflict; and relief and recovery – post-conflict.

The WPS agenda entails making visible the reality of what happens to women in conflict, refusing to accept sexual violence as an inevitable by-product of war and recognising it for what it is – a war crime, a crime against humanity, and a cheap and effective tactic of war,[5] causing separation, death, and injury; as such it destroys families and communities and lays those affected by it open to further harms, for instance vulnerability to exploitation and being trafficked. It emphasises the obligations on all parties to conflict to ensure protection against such acts and on States and international institutions to ensure immediate and long term medical and psychological and social assistance, tailored to the specific needs of those affected and challenging the stigma that is so often directed towards the survivors and their children so continuing the adverse consequences down generations. But WPS is also about women's agency, their participation in political life, peace processes, and peacebuilding. We know from studies that when women are involved in peace talks as negotiators and mediators that both the chances of reaching agreement – thus at least stopping the immediate armed violence – and of the sustainability of such an agreement are increased. Further, when involved women impact upon the substance of the agreement. They are more likely to seek the inclusion of provisions for social justice – education, healthcare, access to resources and livelihoods – so that a peace agreement is not just a constitutional reallocation of power but also a social and economic design

[5] United Nations Security Council (UNSC) Res. 1820, 19 June 2008.

for moving forward. Supporting women's empowerment and leadership brings greater opportunities and choices for women and thus for their children, their families, and their communities.

Overall WPS is a human rights agenda encompassing civil, political, economic, social, and cultural rights. It seeks to enhance the guarantee of women's human rights, secure access to justice, eliminate discrimination on the basis of sex and gender, and to promote the empowerment of women. The agenda should thus be read in conjunction with the Convention on the Elimination of All Forms of Discrimination against Women[6] (CEDAW), the UN's blueprint for women's equality, although CEDAW is given little traction throughout the WPS resolutions. And there is a tension between WPS as a human rights agenda as initially perceived of by civil society and as a security agenda located within the Security Council, infused with the dictates of that body's political priorities and assumptions of military solutions. In this sense it is less radical than the resolutions of the 1915 Women's Congress.

Put more broadly the resolutions urge integration of questions of gender throughout the UN system, following the initiative of gender mainstreaming that has been promoted as UN policy following the commitment made at the Fourth World Conference on Women in 1995. Institutional innovations have been progressively introduced. These include: the creation of UN teams of experts to be deployed at conflict zones to assist national authorities and to work with various officials in addressing impunity; placing women protection officers, gender advisors, and gender focal points in peace operations; and the creation of the position of the Secretary-General's Special Representative (SRSG) in sexual violence in armed conflict to report to the Security Council on the incidence of sexual violence in conflict, the steps taken to address it, and to identify and list those 'credibly suspected of committing or being responsible for patterns of rape or sexual violence in situations of armed conflict [...] as a basis for more focused United Nations engagement [...] including, as appropriate, measures in accordance with the procedures of the relevant sanctions committees,'[7] that is raising the possibility of targeted sanctions being instigated against them.

[6] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, 1249 UNTS 13.

[7] UNSC Res. 1960, 16 December 2010.

In the United Kingdom (UK) there is an additional dimension as WPS has become entwined with another contemporary foreign policy agenda, the Prevention of Sexual Violence in Armed Conflict Initiative (PSVI) championed by former UK Foreign Minister Lord Hague and the Special Envoy for the UN High Commissioner for Refugees Angelina Jolie. Women, Peace, and Security is both wider and narrower than PSVI. On the one hand, the four pillars of WPS make it wider in scope than PSVI; on the other hand it is women-specific while PSVI is a gender-neutral initiative. Its focus on prevention of and tackling impunity for sexual violence is with respect to all victims, men and boys and those targeted because of their actual or perceived sexual or gender identity, as well as women. There are strikingly few textual references to males in most of the WPS resolutions. They are a ghost-like presence as assumed perpetrators of sexual violence and, somewhat ironically, as the military protectors of women. They are explicitly addressed in the context of the different needs of women and men combatants in disarmament and demobilisation programmes. It seemed that this might be changing in that the Security Council's Resolution 2106 (2013) emphasised for the first time the need to 'recognise that men and boys are victims of this crime'. This somewhat laconic assertion was followed by mention of other categories of victim: 'those who are forced to witness or perpetrate this violence against their family of community members.' Resolution 2106 references the commitments made in the Declaration on Preventing Sexual Violence in Conflict adopted by the then G8 foreign ministers in London on 11 April 2013, one of the major landmarks of PSVI, and thus reflects PSVI's broader spread in this regard. Resolution 2242 (2015), the most recent WPS resolution, is silent again as to crimes of sexual violence committed against men and boys and refers to them only 'as partners in promoting women's participation in the prevention and resolution of armed conflict, peacebuilding and post-conflict situations.' Although the role of men and boys in the text of the Security Council resolutions is thus circumscribed (and that of LGBTQI persons has no mention) a broader understanding assumes that the WPS agenda cannot be progressed without taking account of the gendered nature of conflict, that conflict is a social enterprise and like all social interactions is constructed by and constructs and perpetuates social understandings of masculinity, femininity, and of gender outside and beyond this restrictive binary. Even though the nature of conflict is changing this remains true. The question is whether constructed social roles are also changing and how unpacking gender inclusivity can help us to understand this and the implications for policy and practice.

We are learning a great deal about conflict-related gender-based and sexual violence but there is still a great deal we don't know about its commission against women and girls, men and boys, and LGBTQI persons – its incidence, causes, and patterns. What is clear is that these different victims should not all be addressed together and that one size does not fit all. Greater attention must be given to the diverse ways in which sex and gender-based violence targets and impacts different people with differing consequences thereby demanding tailored, context-specific responses and programmes.

WPS is thus a broad agenda seeking to bring women's experiences of conflict into the security space of the Council. So what is its status in international law? Its language is that of international relations (international security), good governance (participation), humanitarianism ('special needs'), and development (empowerment, leadership) rather than that of law. The focus is on shaping policy and on enhancing and making more coherent the interactions between international agencies in pursuing peace operations. But does it also create legally binding obligations? Could it even be said to be a special regime, or at least an emergent special regime of international law, like human rights law, international humanitarian law, or the law of the sea with its own institutional framework, language, processes, and ethos?

There are some obvious starting points. First, the resolutions do not of course come within the sources of law set out in Article 38(1) Statute of the International Court of Justice. There is no WPS treaty and the resolutions are not country-specific UN Chapter VII resolutions deciding upon measures and subject to Articles 24 and 25 UN Charter. Rather they are what have come to be called thematic resolutions, presumably adopted under Chapter VI of the Charter, although this is not spelled out, and are thus not formally binding upon member States. The WPS resolutions join a host of other thematic resolutions on such issues as HIV/AIDS, children in armed conflict, protection of civilians, and youth and peace and security that provide for institutional responses and urge State actions. There is some crossover between these thematic resolutions but not in any consistent way and perhaps their very number militates against any claim for legal status.

However, a second starting point is that where they reiterate States' obligations under already existing international law they are binding as such. There are three separate legal regimes that address aspects of WPS creating what is now a sizeable

body of law. I will mention briefly some pertinent aspects of existing law, noting that international law in this context has concentrated on States' obligations with respect to prevention and prosecution of sexual violence.

The first – and oldest legal regime dating back to the 19th century – to address sexual violence in armed conflict is international humanitarian law. Prior to World War One the Hague Regulations made a coded allusion to sexual violence by requiring that 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.'[8] In the aftermath of that war and following from their vehement protests 'against the odious wrongs of which women are the victims in time of war' at The Hague in 1915, women's organisations lobbied and petitioned the Paris Peace Conference for the inclusion of rape in any prosecutions that might take place.[9] While the general principle was accepted, relevant trials did not eventuate. Following World War Two, the UN War Crimes Commission endorsed sexual crimes of violence as international crimes and trials of rape, attempted rape, and enforced prostitution took place in national courts across Europe and Asia in the late 1940s.[10] And in 1949 the Fourth Geneva Convention's[11] Article 27 stated that 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.' However these crimes were not explicitly included as grave breaches and thus subject to criminalisation within domestic law and subject to universal jurisdiction, although they could be read into acts 'wilfully causing great suffering or serious injury to body or health'. Additional Protocol I's Article 76 largely repeated Article 27[12] while Protocol II prohibited 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of

[8] Art. 46 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1907, 205 CTS 277.

[9] William A. Schabas, 'International Prosecution of Sexual and Gender-based Crimes Perpetrated during the First World War', in Martin Böse, Michael Bohlander, André Klip, and Otto Lagodny (eds.), *Justice Without Borders: Essays in Honour of Wolfgang Schomburg* (2018) 395, at 395.

[10] Dan Plesch, *Human Rights after Hitler* (2017), at 14.

[11] Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949, 75 UNTS 287.

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, 1125 UNTS 3.

indecent assault.'[13] It is striking that in the Declaration on ending sexual violence in armed conflict adopted by the G8 as part of the UK's PSVI Ministers recalled that 'rape and other forms of serious sexual violence in armed conflict [...] constitute grave breaches of the Geneva Conventions' with the ensuing obligation to seek for and prosecute, or hand over for prosecution, any alleged perpetrator.[14] They added their goal that '[t]here should be no safe haven for perpetrators of sexual violence in armed conflict.' However international humanitarian law is essentially a code of conduct for armed forces – it is technical and detailed. It assumes enemy forces facing each other in battle and does not cover violations committed by forces from a victim's own side, or of violence outside the framework of international or non-international armed conflict. Nor do the Geneva Conventions encompass other conflict-affected gender-based and sexual violence, for instance that committed by civilians during conflict, or such violence committed in the supposed post-conflict time but which is still affected by conflict, nor that committed against people who have fled the conflict zone and are in flight or placed in internally displaced person or refugee camps.

International criminal law has been developed significantly in this regard, notably through the prosecution policies, trials, and punishment of perpetrators by the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, and the various hybrid courts such as the Special Court for Sierra Leone, and those in Timor Leste and Cambodia. It can now be asserted that where the other elements for crimes against humanity or war crimes are present:

- Rape can constitute a freestanding crime against humanity and a war crime;
- Rape can constitute torture as a crime against humanity and a war crime, when it comes within the definition of torture;
- Rape and other forms of sexual violence can constitute genocide when committed with intent to destroy in whole or in part a national, ethnical, racial, or religious group;

[13] Article 4(2)(e) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1977, 1125 UNTS 609.

[14] Foreign and Commonwealth Office, *Declaration on Preventing Sexual Violence in Conflict*, 11 April 2013, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185008/G8_PSVI_Declaration_-_FINAL.pdf.

- Rape and other forms of sexual violence can constitute persecution and enslavement as crimes against humanity;
- Sexual violence can constitute crimes of outrages on personal dignity and inhumane treatment.

Under the 1998 Rome Statute of the International Criminal Court (ICC) rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation, and any other form of sexual violence of comparable gravity are spelled out as war crimes in both international and non-international armed conflict and as crimes against humanity. Gender-based persecution is also a crime against humanity. The tribunals and the ICC Elements of Crimes have been important in providing legal definitions for crimes such as rape, sexual slavery, and forced marriage. Further clarification of the crimes of forced marriage and pregnancy may eventuate from the *Ongwen* case involving the situation in Uganda, which is currently being heard by the ICC on charges that include forced marriage as an inhumane act and, for the first time in an international criminal court, forced pregnancy as a crime against humanity and war crime.[15] In another development the International Law Commission (ILC) has adopted a set of draft articles on crimes against humanity that incorporates many of the relevant gender provisions of the Rome Statute.[16] While this potentially addresses the lack of a convention on crimes against humanity, the ILC's draft fails to take account of advances in gender and gender crimes in the twenty years since the negotiation of the Rome Statute.

However the ICC jurisprudence has not developed in the way it was hoped, a position worsened by the acquittal by the ICC Appeal Chamber in June of this year on all charges against Jean-Pierre Bemba, which had been the first and to date only case where there had been a conviction for crimes of sexual violence.[17] Many key concepts remain contested, including for instance what constitutes sexual violence. A

[15] In International Criminal Court (ICC), Pre-Trial Chamber II, *Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of Charges, 23 March 2016, ICC-02/04-01/15-422-Red, at paras. 96-101, the Pre-Trial Chamber held that the 'essence of the crime of forced pregnancy is in unlawfully placing the victim in a position in which she cannot choose whether to continue the pregnancy.'

[16] International Law Commission (ILC), Report of the International Law Commission, 69th Session, 1 May-2 June and 3 July-4 August 2017, UN Doc. A/72/10, Chapter IV.C.

[17] ICC, Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', 8 June 2018, ICC-01/05-01/08-3636-Red.

broad reading of this is important as it allows for inclusion in international criminal law of crimes of sexual and gender-based in addition to rape. But this is not necessarily the position. For instance the ICC Pre-Trial Chamber in the case involving post-election violence in Kenya considered that forced circumcision and penile amputation did not constitute sexual violence. The Chamber accepted this violence as inhumane treatment but explained its view that 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence.' On the facts before it the Chamber determined the violence to have been ethnically rather than sexually motivated and 'intended to demonstrate cultural superiority of one tribe over the other.'[18]

Legal uncertainties and the 'extreme instability of sexual violence in international criminal law' alongside the reality that indictments and prosecutions are few and the vast majority of perpetrators do not face trial or punishment mean that international criminal law is not on its own an adequate tool for tackling conflict-related gender-based and sexual violence.

The third pertinent body of law is international human rights law. WPS is a human rights initiative and Resolution 1325 was conceived of and lobbied for as a 'human rights resolution that would promote the rights of women in conflict situations'.[19] The CEDAW Committee – the monitoring Committee for the UN Convention on Elimination of Discrimination against Women – has taken this up and has supplemented the WPS agenda through its General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations. Adopted on the same day as another WPS resolution, Resolution 2122 in 2013,[20] General Recommendation No. 30 is placed squarely within the framework of international human rights law and offers a more complex picture of the diverse effects of conflict on women's lives than does the Security Council. It addresses the root or structural

[18] ICC, Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, at para. 266. In the event all charges were withdrawn.

[19] UN Women, *Preventing Conflict, Transforming Justice, Securing the Peace – A Global Study on the Implementation of United Nations Security Council Resolution 1325* (2015), available at http://wps.unwomen.org/pdf/en/GlobalStudy_EN_Web.pdf, at 15.

[20] UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation No. 30, UN Doc. CEDAW/C/GC/30, 18 October 2013.

causes of armed conflict in human rights terms, repeating that violence against women is a form of discrimination[21] and that conflict exacerbates existing gender inequalities. Power imbalances and harmful gender norms are recognised as factors creating disproportionate risks for women. As a form of discrimination under the Convention, violence against women and girls leads to multiple other human rights violations, including those relating to inadequate delivery of economic and social rights: healthcare, education, and social services. Even when affirming the importance of women's human rights, the Security Council makes no reference to women's economic and social rights, categorising medical, legal, psychosocial, and livelihood matters in the language of 'services', rather than in that of rights. Unlike the Council the CEDAW Committee draws no hard distinction between conflict and post-conflict, observing that this transition is often not linear and can involve lengthy cycles of cessation of conflict and then slippage back into conflict, a transition that can exacerbate violence against women. In this Recommendation and its more recent General Recommendation No. 35[22] the CEDAW Committee clearly implicates both State and non-State actors and, in line with general international law, sets out clearly the responsibility of States for the acts or omissions of both. States are responsible for preventing and punishing acts or omissions that constitute gender-based violence against women by their own organs and agents, and those acting on their behalf whose acts are attributable to the State, and paying reparations. States are also responsible for the acts of non-State actors through failure to exercise due diligence to prevent, protect against, investigate, prosecute, and punish offenders and pay reparations to victims of gender-based violence. The Committee recommends that reparation measures seek to rectify structural inequalities whereas the Security Council focuses on reparation for violations of individual rights, an approach that undermines the transformative potential of reparations.

In General Recommendation No. 30 the CEDAW Committee asserted that 'all the areas of concern addressed in those [WPS] resolutions find expression in the substantive provisions of the Convention' and that accordingly 'their implementation must be premised on a model of substantive equality and cover all rights enshrined in

[21] CEDAW Committee, General Recommendation No. 19: Violence against women, UN Doc. A/47/38, 1992, first spelled out that 'Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'

[22] CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35, 26 July 2017.

the Convention', essentially that WPS can only be applied in the framework of the Women's Convention. On this basis, and on that of the Committee's questioning States on their actions with respect to implementation of Resolution 1325, it can be argued that WPS can be taken into account in interpreting the Convention in accordance with Article 31 Vienna Convention on the Law of Treaties.[23]

But there are aspects of WPS that are not encompassed by these bodies of law. Another approach is to consider whether the principles of WPS that are not already entrenched as existing international law could be said to constitute customary international law. The starting point must be that of the ILC in its Draft Conclusions on Customary International Law that '[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.'[24] So the question must be whether a Security Council resolution, or series of Security Council resolutions, can generate rules of customary international law.

It is interesting that a great deal more scholarly attention has been paid to the normative effect of General Assembly resolutions than to that of Security Council resolutions, whether as evidence of State practice or, following the *Nicaragua* case,[25] as *opinio juris*. Is the International Court's position on how multilateral treaties can generate customary international law relevant, or are the various statements with respect to this process through General Assembly resolutions more appropriate? Of course the Security Council cannot claim the 'virtually universal participation'[26] of the General Assembly but the rotating membership of the ten non-permanent members over the 18 years since Resolution 1325 has ensured broad-based and regional representation in the Council debates on acceptance of WPS resolutions. Sir Michael Wood, ILC special rapporteur for its work on customary international law, has suggested that the Council through its actions or inaction might 'stimulate develop-

[23] E.g., CEDAW Committee, Concluding observations on the initial report of the State of Palestine, UN Doc. CEDAW/C/PSE/CO/1, 25 July 2018, and Concluding observations on the eighth periodic report of Cyprus, UN Doc. CEDAW/C/CYP/CO/8, 25 July 2018.

[24] ILC, 'Draft conclusions on identification of customary international law, with commentaries, 2018', in Report of the ILC (2018), UN Doc. A/73/10, 2018, at para. 65.

[25] International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 392, at para. 183 et seq.

[26] ILC, Draft conclusions, *supra* note 24, at 147.

ments in general international law' and that it as well as member States may 'develop law through practice'. Does the fact of the serial buildup of the resolutions over a long period of time (now eighteen years) enhance their claim to normativity? There is clearly an accumulative effect but, as the ILC commentary notes, a non-binding resolution does not become binding simply through repetition. However can there be an argument that the repetition demonstrates the required legal intent for *opinio juris*? Or is it just reiteration of what is evidently a political agenda?

Here it might be instructive to consider briefly how WPS came onto the international agenda and the reiteration of its key principles in other instruments. Resolution 1325 was the outcome of long term civil society lobbying going back, as I previously stated, to at least 1915. The key principles of Resolution 1325 were adopted in the Declaration and Platform for Action of the Global Summit on Women in Beijing in 1995 and the five year follow-up Declaration. Final documents of a Global Summit (or intergovernmental conference in the language of the ILC) are also not legally binding but their activities 'may have value in providing evidence of existing or emerging law and may contribute to the development of a rule of customary international law'.[27] James Crawford has observed that '[t]he "final act" or other statement of conclusions of a conference of States may be a form of multilateral treaty, but, even if it is an instrument recording decisions not adopted unanimously, the result may constitute cogent evidence of the state of the law on the subject.' Representatives of 189 States participated at Beijing and the Declaration and Platform for Action were adopted unanimously. Aspects of WPS, notably the pillars relating to prevention of and protection against sexual violence in armed conflict, have also been developed through a range of other non-binding instruments for instance the previously mentioned G8 Declaration on Preventing Sexual Violence in Conflict and the subsequent Declaration of Commitment to End Sexual Violence in Conflict.[28] The former was described by William Hague as a 'historic agreement' by 'some of the world's largest economies and most powerful nations.' The commitments it contained were formally recognised in Security Council Resolution 2106 in 2013. The latter was launched by

[27] *Ibid*.

[28] Foreign and Commonwealth Office, *A Declaration of Commitment to End Sexual Violence in Conflict*, 24 September 2013, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/274724/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT.pdf.

the UK at the start of the 68th session of the General Assembly and is now endorsed by over two thirds of all member States of the UN.

What is beyond doubt is that the WPS agenda has generated widespread State, institutional, and civil society practice. So first I will take a brief look at State practice. The ILC Draft Conclusions include as evidence of State practice 'conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.'[29] There is evidence of such conduct in the integration of WPS into national policy through National Action Plans or NAPs. As of November 2018, 78 States have introduced NAPs including the United States, UK, Germany, and States from all continents. They include currently conflict-affected States (for example, Ukraine, South Sudan), post-conflict States (for example, Bosnia, Nepal, Liberia), and States not involved in conflict (for example, Belgium, Austria). This spread means that NAPs have been adopted by a range of States 'whose interests [are] specially affected'.[30] In many countries the NAP is incorporated into government and across government departments, for instance in the UK across the Foreign and Commonwealth Office, the Ministry of Defence, and the Department for International Development. There is a minister for WPS and the WPS is a priority under 2015 National Security Strategy. In 2017 the United States enacted the Women, Peace, and Security Act. There is also action at the regional level. The European Union (EU) adopted its Comprehensive Approach on Women, Peace and Security in October 2016 that is made *mandatory for all EU external actions*. In 2017 the EU representative announced at the Security Council open debate on women, peace, and security that it was working for the same goal: 'the full and effective implementation of the Women, Peace and Security agenda. We have a standing priority to implement the global normative framework, from UNSCR 1325 to UNSCR 2242'. In 2018, the EU is 'in the final stages of adopting our new European Union policy – the European Union strategic approach on women and peace and security.'[31] In July 2016 the African Union Commission conducted a regional review on the Implementation of the Women, Peace, and Security Agenda in Africa. It highlighted the need 'to recommit

[29] ILC, Draft conclusions, *supra* note 24, Draft Conclusion 6 (2).

[30] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, 3, at para. 73.

[31] UNSC, Verbatim Record of the 8382nd meeting with an open debate on Women and Peace and Security, UN Doc. S/PV.8382, 25 October 2018.

to the work that must continue at a national level, and reiterates the critical role of regional organiations in accelerating the implementation of the women, peace, and security agenda on the continent.'[32] The African Union has also appointed Ms Bineta Diop as its Special Envoy on Women, Peace, and Security. In the Association of Southeast Asian Nations too heads of State have affirmed their commitment to the WPS agenda.

There has also been impact on the structures and activities of military operations. North Atlantic Treaty Organization (NATO) States and their partners have acted since 2007 to promote the role of women in peace and security, including creating the post of the NATO Secretary General's Special Representative for Women, Peace, and Security. Integration of gender perspectives into military training and operations has become policy in a number of States. Finland for example has explained that it is 'working to increase the proportion of women in international operations, especially in operational tasks and leading positions.'[33] While there are feminist concerns about the increased participation of women in military activities there is undoubtedly changed State practice in this regard.

There is also institutional practice. Sir Michael Wood has recorded his view that 'the practice of international (intergovernmental) organizations as such, in certain cases, may contribute to the creation, or expression, of customary international law.'[34] James Crawford too similarly noted that although '[t]he activities of international organizations do not feature in the sources of international law enumerated in Article 38 of the Statute of the International Court. [...] they are well placed to contribute to its development. This is due primarily to the capacity for international organizations to express collectively the practice of member States.' Relevant institutional practice includes the creation of UN gender architecture (UN Women); new mandates (the SRSG on sexual violence in armed conflict; the inclusion of gender advisors and women protection officers in peace operations); military training

[32] African Union Commission, *Implementation of the Women, Peace, and Security Agenda in Africa* (2016), available at https://www.peacewomen.org/resource/african-union-commission-implementation-women-peace-and-security-agenda-africa.

[33] Ministry of Foreign Affairs of Finland, *Women, Peace and Security: Finland's National Action Plan 2018-2021*, 12 March 2018, available at http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160747/03_18_Women_Peace_Security.pdf?sequence=1&isAllowed=y, at 39.

[34] ILC, Fourth report on identification of customary international law, UN Doc. A/CN.4/695, 8 March 2016, at para. 20.

programmes on WPS; the formation of an informal expert group of the Security Council following Resolution 2242 to enable Council members to have enhanced understanding about the context of countries on its agenda including with respect to women; a commitment in Resolution 2242 to ensuring that the 'relevant expert groups for sanctions committees have the necessary gender expertise' and to expand civil society briefings to the Council. At the 2018 Security Council open debate on Women, Peace, and Security several speakers commented favourably on the increased participation of speakers from civil society over the past few years and highlighted the importance of this continuing. There is a Non-Governmental Organisation Working Group on WPS and in many areas civil society actively promotes WPS and challenges governments to stand by the commitments made in their NAPs. In the State-centric framework of international law civil society actions have of course never counted for the creation of custom, but are nevertheless relevant for the pressure they assert over governments thereby influencing practice.

So there is thus a great deal of statewide activity and even more language in support of WPS and it seems difficult to conclude that all this activity does not entail some commitment to legal obligation. However it is important to remember the caution expressed by the ILC in the Commentaries to the Draft Conclusions on Customary International Law that 'ascertaining acceptance as law (*opinio juris*) from such resolutions must be done "with all due caution"' as is denoted by the word 'may'. In each case, a careful assessment of all relevant factors is required in order to verify whether indeed the States concerned intended to acknowledge the existence of a rule of customary international law. There are many considerations weighing against such a conclusion including the considerable failure of uniform and consistent implementation and effectiveness:

- Sexual violence in armed conflict is if anything increasing. In 2018, the SRSG on sexual violence in armed conflict reported on nineteen countries where 'verifiable information' exists as to its prevalence. Despite some successes, as reported by the SRSG, the culture of impunity persists.
- Women's participation in peace processes remains lamentably low; the Secretary-General reported in October 2018 that 'between 1990 and 2017,

women constituted only 2 per cent of mediators, 8 per cent of negotiators and 5 percent of witnesses and signatories in all major peace processes.'[35]

- Women's participation in peace operations also remains minimal. The Secretary-General has described women's participation in peace operations as an 'essential measurement' of WPS commitments. Numbers of women in the field are small: 'representation of women among military troops and police officers at 4 and 10 per cent, respectively, as at December 2017. As at July 2018, 3 of 16 (19 per cent) police components were headed by women and there was only one woman military Force Commander.'[36]
- Relief and recovery are seen as humanitarian not legal imperatives.
- There is no dedicated enforcement machinery or State reporting mechanism provided for within the resolutions, nor is there any Security Council institution comparable to the Sanctions Committee or Counter-terrorism Committee.
- States remain unwilling to make concrete commitments. In its analysis of the 2018 Security Council open debate on the implementation of Resolution 1325 Peace Women found that '[w]hile 49 (60%) of 81 representatives shared their broad commitments to implementing the WPS Agenda, only 16 (20%) of the 81 representatives shared concrete action steps for the upcoming year.'[37]

The gap between words and deeds, between rhetoric and action is reminiscent of the argument that different tests might be applied for determining custom in the context of human rights law-making – where there is also often such a disconnect – as argued by such jurists as Oscar Schachter and Christian Tomuschat and more recently by Judge Cançado Trindade. From a positivist international legal perspective I feel I must conclude that while the prohibition of sexual violence in armed conflict

[35] UNSC, Report of the Secretary-General on women and peace and security, UN Doc. S/2018/900, 9 October 2018, at para. 25.

[36] *Ibid*., at para. 12.

[37] Peace Women, *Security Council open debate on women, peace and security, October 2018*, 25 October 2018, available at https://www.peacewomen.org/security-council/security-council-open-debate-women-peace-and-security-october-2018.

and of violence against women outside conflict have attained that status,[38] WPS as a whole remains as policy rather than law. But I also think that this exposes the inadequacies of contemporary international law-making and a reluctance to perceive an emerging specialised legal regime. Like Walther Schücking I have a 'quest for the *lex ferenda*.'[39]

I have very briefly outlined some aspects of the WPS agenda, its content and its status under international law. But questions about that status should not obscure its function so I will conclude by considering briefly what WPS might mean if tackling violence against women before, during and post-conflict was taken seriously in the contemporary world and how that might contribute to sustainable peace. So what might WPS mean for three of its stakeholders – the UN, governments, and academics as a component of civil society?

For the UN: what it should mean is a fulfillment of its own commitments, something that despite the rhetoric remains sadly lacking. Shortcomings include the failure to ensure consistent and meaningful participation of women in activities carried out under UN auspices. This includes not only in peace processes and peace operations but also in key roles such as special envoys, special representatives of the Secretary-General in conflict-affected areas, leaders of Commissions of Inquiry, heads of peace operations in the field (in 2014 a woman was appointed head of a peacekeeping force for the first time – in Cyprus), senior personnel in UN Headquarters and throughout key departments such as the Department of Peacekeeping Operations and the Peace-Building Support Office. This is an often repeated commitment and is supported by evidence that inclusivity has a beneficial effect on tackling violence and securing peace. Although progress remains slow, the Secretary-General's commitment to achieving system-wide gender parity is welcome. Recent appointments are important, including Bintou Keita as the first woman Assistant Secretary-General for Peacekeeping Operations, Jane Connors as first UN rights advocate for victims of sexual exploitation and in March 2018 the first ever female head of the Department of Political Affairs. It also implicates building on the institutional innovations introduced in 2015 in Resolution 2242, for instance with respect to the Informal Experts Group on

[38] This is the view of the CEDAW Committee in its General Recommendation No. 35, see *supra* note 22.

[39] Jost Delbrück, 'Law's Frontier – Walther Schücking and the Quest for the Lex Ferenda', 22 EJIL (2011) 801.

WPS, to Security Council on-site missions taking into account gender considerations and the rights of women through open and transparent consultation with local and international women's groups, and inviting civil society representatives to brief the Council on country specific issues. WPS should be included in all country specific mandates, not as a box-ticking exercise but in a contextual and purposeful way.

These are – or should be – relatively simple things to put into action and could also be a significant step towards addressing one of the critiques of WPS: its heavily top down and privileged nature that fails to take into account that tackling violence and conflict requires local knowledge, expertise, and commitment. The Security Council holds the highest place in the UN hierarchy; its decisions with respect to international peace and security are made by diplomats in New York, far removed from the women whose lives will be affected by them. In seeking to implement such 'top down' decisions there is a danger of losing sight of local institutions and actors especially at the peacebuilding stage, and thus of making erroneous assumptions, failing to benefit from the local knowledge and expertise available or, worse, disrupting local efforts.

Of course the UN comprises governments and it is their responses that are key and their words are not matched by actions. In particular, actual long term and adequate financial commitment has been disappointing. While the number of NAPs is increasing providing for local implementation and translating the global issues into a domestic context, many fail to include allocation of responsibilities, sustained commitment to budgeting, measures for evaluation and monitoring, or integration across all other domestic policies. WPS is too easily seen institutionally and substantively as a separate compartmentalised agenda distinct from human rights, gender equality, or the sustainable development goals instead of as integral to the success of those other agendas, and vice versa. This also loses the opportunities for coherent and integrated monitoring at the international level, for instance through all the human rights mechanisms.

This leads into more structural issues. Governments' responses to WPS have been perhaps too comfortable: it is easy to condemn sexual violence in armed conflict, to urge more prosecutions, even to accept the need for wider participation of women in conflict management and resolution and to offer technical, legal expert assistance and training. These are important but such innovations do not require structural change or tackling the difficult questions. Less weight is given to the WPS pillar for preven-

tion of conflict; that is to the need to challenge structural bases of harms such as the impact of militarism and militarisation, the continuing legal arms trade, the inequalities fostered by neo-liberal economic globalisation, and the continuum of violence against women that moves from the home through to armed conflict. These harms are accentuated when the same practices are normalised and repeated post-conflict. The Secretary-General has made prevention of conflict central to his stewardship. WPS should be integral to his undertaking.

And for academics: I think we have three roles. The first is to keep the WPS agenda alive, through theory and practice to enhance its normative status and even to be instrumental in shaping it as a specialist regime that is grounded in, but goes beyond, the existing legal regimes discussed above. Second is to provide evidence-based research to inform policy and to facilitate knowledge exchange. Third is to challenge the normative and conceptual ambiguities in the very wording of 'peace' and 'security'. It is to recall that although international law has been seen as a discipline for promoting peace it has no definition of peace. It is also to resist the assumption that peace – and security – are achieved through military action and that WPS can be co-opted into other political agendas. The most evident concern here is the asserted linkage in Security Council Resolution 2242 between WPS and the counter-terrorism and counter-extremism policy frameworks, a linkage that has both opportunities and dangers. It creates the opportunity for ensuring continued policy attention to WPS but at the cost of its instrumentalisation and further securitisation, diverting funding and co-opting women as sources of information and informants, thereby risking a backlash against women's rights defenders and heightening insecurity.

In a lecture honouring the pacifist Walther Schücking it is appropriate to ask how these three stakeholders – the UN, governments, and academia – can play different roles in keeping WPS connected to its civil society origins and its transformative potential for peace. But not a gender-neutral peace but rather a feminist peace.