

# UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law

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## **Abstract**

*While the Geneva Conventions contain gender-specific provisions, the reality of women's and men's experiences of armed conflict have highlighted gender limitations and conceptual constraints within international humanitarian law. Judgements at the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) ad hoc tribunals have gone some way towards expanding the scope of definitions of sexual violence and rape in conflict. More recent developments in public international law, including the adoption of Security Council Resolutions 1325 and 1820 focused on women, peace and security, have sought to increase the visibility of gender in situations of armed conflict. This paper highlights important developing norms on women, peace and security. Although these norms are significant, they may not be radical enough to expand constructions of gender within international humanitarian law. This leaves existing provisions open to continued scrutiny.*



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Within a peace and security context, essentialized gender roles have often been sustained by international law and policy.<sup>1</sup> While the differing impact of armed conflict on men and women is increasingly acknowledged,<sup>2</sup> constructions of ‘gender’ and gender-specific provisions within international humanitarian law have proved problematic.<sup>3</sup> Advances in women’s human rights and other international instruments, principally Section E of the Beijing Platform for Action, which centres on women and armed conflict,<sup>4</sup> have gone some way towards developing the scope of existing provisions. Despite increased awareness of gender-based violence, however, significant challenges remain.

First, analyses of the gendered dynamics of conflict have largely focused on sexual violence and rape.<sup>5</sup> While women are often the primary target of sexual violence,<sup>6</sup> the wider social impact is intrinsically linked to both genders.<sup>7</sup> Significantly, in non-international armed conflicts, rape has often been committed in orchestrated campaigns of ethnic cleansing that seek to undermine familial structures.<sup>8</sup> For example, in Rwanda, the deliberate impregnation of Tutsi women by Hutus sought to undermine the social fabric of communities.<sup>9</sup> On the one hand, this open acknowledgement of gender-based violence suggests that gender is expressly recognized at a normative level. However, this normative recognition aligns gender directly with women and victimhood, which undermines women’s agency as active participants and distorts discourses by failing to consider women’s broader experience of armed conflict.<sup>10</sup> Indirectly, these narratives censor the diverse ways in which women participate in armed conflict as actors, combatants

- 1 Judith Gardam, ‘A feminist analysis of certain aspects of international humanitarian law’, in *Australian Yearbook of International Law*, Vol. 12, 1992, p. 265.
- 2 Rape is committed by all sides in conflict and there have also been reported cases of sexual violence by UN peacekeepers. See e.g. Christine Chinkin, ‘Rape and sexual abuse of women in conflict’, in *European Journal of International Law*, Vol. 5, 1994, p. 326.
- 3 Judith Gardam, ‘Women and the law of armed conflict: Why the silence?’, in *International and Comparative Law Quarterly*, Vol. 46, 1997, p. 55.
- 4 Fourth World Conference on Women, Declaration and Platform for Action, A/CONF.177/20, 15 September 2005.
- 5 See e.g. *The War within the War: Sexual Violence against Women and Girls in Eastern Congo*, Human Rights Watch, New York, 2002; Megan Bastick, Karin Grim and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector*, DCAF, Geneva, 2007; *Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad*, Human Rights Watch, New York, 2003.
- 6 See e.g. Marie Claire Faray-Kele, ‘Africa: Women – Violence in war and in peace’, 20 March 2008, available at <http://allafrica.com/stories/200803200580.html> (last visited 8 February 2010); Patricia H. Hynes ‘On the battlefield of women’s bodies: An overview of the harm of war to women’, in *Women’s Studies International Forum*, Vol. 27, 2004, pp. 431–445.
- 7 Charlotte Lindsey, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, ICRC, Geneva, 2001, p. 37.
- 8 *Women, Peace and Security*, Canadian Research Institute for the Advancement of Women, Fact Sheet No. 6, 2004.
- 9 Human Rights Watch has documented the widespread use of sexual violence in Rwanda and the impact that the violence continues to have on social relationships. See *Sexual Violence during the Rwandan Genocide and its Aftermath*, Human Rights Watch, New York, 1996.
- 10 Judith Gardam and Hilary Charlesworth, ‘Protection of women in armed conflict’, in *Human Rights Quarterly*, Vol. 22, No. 1, 2000, p. 148.

or peace-builders.<sup>11</sup> Furthermore, both sexual violence discourses and international legal provisions largely fail to consider men's experience of sexual violence in conflict, which sustains a 'male-perpetrator and female-victim paradigm'<sup>12</sup> that is ultimately detrimental to both men and women.

Second, the prevalence of non-international armed conflict challenges the foundations of international humanitarian law.<sup>13</sup> Although this is a general dilemma, when considered in the light of gendered understandings of armed conflict, the challenges appear even more acute. Provisions are not sophisticated enough to respond to the complex intersection of gender, ethnicity and other aspects of identity, which may be all the more pertinent in non-international armed conflicts as nationality is not the dominant differentiation between parties. More recent developments in public international law, specifically UN Security Council Resolution 1325 on women, peace and security<sup>14</sup> and UN Security Council Resolution (SC Res.) 1820 focusing on sexual violence in conflict,<sup>15</sup> contain empowerment as well as protection clauses, which may help to broaden recognition of women's multiple roles in conflict. The aim of this paper is to critically evaluate whether the process of gender mainstreaming using SC Res. 1325 and SC Res. 1820<sup>16</sup> helps to strengthen constructions of gender within international humanitarian law, giving due consideration to the exploitation of gender stereotypes in armed conflict.

## Gender, armed conflict and international humanitarian law

Legal protections afforded to women in conflict situations have long been criticized as being divorced from the reality of women's experiences.<sup>17</sup> However, the aims of legal provisions echo more general tensions within equality discourses, which stem from the sameness *versus* difference debate. Liberal feminists have striven for equality on the basis of sameness, but this has not always proved radical enough to challenge gender inequality and denies acknowledgement of different social functions, including pregnancy and motherhood.<sup>18</sup> International humanitarian law attempts to balance both general (sameness-based) and special (difference-based) protection measures: women must be 'treated humanely [...] without any adverse

11 Donna Pankhurst, 'The "sex war" and other wars: Towards a feminist approach to peacebuilding', in Haleh Afshar and Deborah Eade (eds), *Development, Women, and War: Feminist Perspectives*, Oxfam GB, Oxford, 2004.

12 Natalia Linos, 'Rethinking gender-based violence during war: Is violence against civilian men a problem worth addressing?', in *Social Science and Medicine*, Vol. 68, 2009, p. 1549.

13 Michael Schmitt, '21st century conflict: Can the law survive?', *Melbourne Journal of International Law*, Vol. 8, No. 2, 2007, pp. 443–476.

14 SC Res. 1325, 31 October 2000.

15 SC Res. 1820, 19 June 2008.

16 In addition to SC Res. 1325 and SC Res. 1820, two additional resolutions on women, peace and security have recently been adopted by the Security Council, namely SC Res. 1888, 30 September 2009, and SC Res. 1889, 5 October 2009.

17 Catherine N. Niarchos, 'Women, war, and rape: Challenges facing the International Tribunal for the former Yugoslavia', in *Human Rights Quarterly*, Vol. 17, No. 4, 1995, p. 654.

18 Rosemarie Putnam Tong, *Feminist Thought: A More Comprehensive Introduction*, Westview Press, Boulder, Colorado, 1998, pp. 2 and 6.

distinction founded on sex',<sup>19</sup> at the same time as being '... treated with all the regard due to their sex'.<sup>20</sup>

Inevitably, in attempting to acknowledge women's difference, many of the protective measures that address the status of women as civilians are based on biological factors. For example, under Article 8(a) of Additional Protocol I, maternity cases are prioritized in medical assistance to the wounded and sick, irrespective of whether military personnel or civilian.<sup>21</sup> Additionally, Article 14 of the Fourth Geneva Convention recognizes expectant mothers and mothers of children under seven as a specific category that may require special protection along with the wounded, sick, children under fifteen and the aged.<sup>22</sup> Indirectly these provisions essentialize women as mothers and care-givers, failing to broach broader issues of how gender-based social constructions often exacerbate social, economic and structural inequalities that heavily influence physical violence and conflict.<sup>23</sup>

Responses to sexual violence also indicate how gender stereotypes have been sustained, particularly the perception of women as victims. A number of key provisions centre on the protection of women rather than prohibition of gender-based atrocities.<sup>24</sup> For example, within the ambit of the Fourth Geneva Convention, female civilians in an occupied territory, internees and refugees must be protected against any attack on their honour, including rape, enforced prostitution, or any form of indecent assault.<sup>25</sup>

Based on moral integrity rather than physical harm or trauma, this provision perpetuates rape as being taboo. In societies where a culture of honour is ingrained, this perception is detrimental to many women. It is suggested that the prevalence of rape is particularly high where the social stigma is strongest,<sup>26</sup> and in an examination of acts of aggression in Croatia, Bosnia and Herzegovina a direct link is drawn between rape during peacetime and rape during conflict:

'War rapes in the former Yugoslavia would not be such an effective weapon of torture and terror if it were not for concepts of honor, shame and sexuality that are attached to women's bodies in peacetime.'<sup>27</sup>

19 Article 12, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

20 Article 14, Geneva Convention (III) Relative to the Treatment of Prisoners of War.

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

22 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

23 Michael Emin Salla, 'Integral peace & power: A Foucauldian perspective', in *Peace and Change*, Vol. 23, No. 3, 1998, p. 315.

24 J. Gardam, above note 3, p. 57.

25 Fourth Geneva Convention, Article 27.

26 Heather Milner and Brita Schmidt, 'Rape as a weapon of war', in *British Council Newsletter*, October 1999, pp. 10–11, available at <http://www.britishcouncil.org/gendernetwork19.pdf> (last visited 8 February 2010).

27 Maria B. Ulujic, 'Embodiment of terror: Gendered violence in peacetime and wartime in Croatia and Bosnia-Herzegovina', in *Medical Anthropology Quarterly*, Vol. 1, No. 12, March 1998, p. 32.

Furthermore, while Article 76 of Additional Protocol I does not reiterate the same concept of honour, women are deemed an 'object of special respect'.<sup>28</sup> As Gardam suggests, the nature of these provisions has little to do with women's experience of sexual violence, instead pertaining to a concept of honour that is socially constructed and sustained by dominant masculinities.<sup>29</sup> In the former Yugoslavia many rapes involved gang rape or sexual torture, and in some instances sexual assaults between family members were forced upon them.<sup>30</sup> Underlying these acts, targeted at women, is the exploitation of a misogynist masculinity stereotype.<sup>31</sup> It would be a misnomer to suggest that this exploitation does not have negative repercussions for men as well as women. For example, male on male rape is used to humiliate and emasculate enemy soldiers.<sup>32</sup>

While the World Health Organization (WHO) recognizes that women are particularly susceptible to sexual violence, male rape may also be under-reported because of the stigma attached to sexual violence against men.<sup>33</sup> International humanitarian law does not address male rape directly; it focuses primarily on rape as an act against a woman's honour, and therefore as an act that can only be carried out by men against women. The concept of rape in international humanitarian law is based not on aggression, but instead underpinned by a conception of women as property and a spoil of war.<sup>34</sup>

In non-international armed conflicts the intersection between sexual violence and gender with other aspects of identity is inherently complex. As recognized by the International Committee of the Red Cross (ICRC), the application of international humanitarian law to intra-state conflict is particularly challenging.<sup>35</sup> Gardam suggests that Article 1(4) of Additional Protocol I effectively elevates self-determination wars to international status.<sup>36</sup> Although applying the *jus in bello* of international armed conflict to liberation wars is not the same as legitimizing them under *jus ad bellum*, Gardam cautions that within Article 44(3) of Additional Protocol I combatants are not required to carry arms openly at all times, thus placing women and children civilians at increased risk of being used as shields until the very point of attack.<sup>37</sup>

At the same time, a shift away from a more stringent principle of distinction in self-determination and liberation conflicts could paradoxically serve to benefit unarmed women combatants during the post-conflict period. Although it

28 Protocol I, Art. 76(1).

29 J. Gardam, above note 3, p. 57.

30 C.N. Niarchos, above note 17, p. 657.

31 *Ibid.*, p. 658.

32 N. Linos, above note 12, p. 1549.

33 *Ibid.*, p. 1549.

34 C.N. Niarchos, above note 17, p. 660.

35 C. Lindsey, above note 7, p. 26.

36 J. Gardam, above note 1, p. 271.

37 *Ibid.*, pp. 274 and 276. Article 44(3) of Protocol I states '... he shall retain his status as a combatant, provided that in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'.

is, strictly speaking, applicable only to international armed conflicts, the principle of distinction between combatant and non-combatant also has repercussions for non-international armed conflicts. At present, Disarmament, Demobilization and Reintegration (DDR) processes in the post-conflict period following non-international armed conflicts tend to overlook women members of armed groups, as they are less likely to carry arms. A typical DDR process may include HIV/AIDS testing, skills training and some monetary compensation in exchange for a weapon,<sup>38</sup> and recognition of women combatants, irrespective of whether they carry arms openly or not, may allow for their greater inclusion in DDR processes. While consideration of the post-conflict period may be beyond the scope of *jus in bello* and seemingly irrelevant, the transition lines between conflict and peace are even more tenuous in non-international armed conflicts and struggles for self-determination. More recent developments in public international law suggest that armed conflict and its significant impact on women, during and after armed conflicts, is increasingly recognized.

Progressive judgements at the International Criminal Tribunal for Rwanda (ICTR)<sup>39</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>40</sup> have impacted on the long-standing Geneva Conventions by enhancing provisions on gender-based violence. For example, the landmark *Akayesu* judgement<sup>41</sup> of the ICTR deemed rape to be a crime against humanity,<sup>42</sup> as well as recognizing it as a ‘form of aggression’.<sup>43</sup> The judgement also affirmed that rape could potentially be classified as an act of genocide,<sup>44</sup> where it constitutes an ‘act committed with intent to destroy in whole or part a national, ethnical, racial or religious group’.<sup>45</sup> Under Article 2(2)(d) of the ICTR’s Statute, which refers to the deliberate ‘[imposition of] measures intended to prevent births within the group’,<sup>46</sup> rape is considered to be a weapon of war. Within the judgement, reference is made to the way in which rape is employed to undermine the social fabric of ethnic and racial groups:

In patriarchal societies, where membership of a group is determined by the identity of a father, an example of a measure intended to prevent births

38 Working group session on DDR, Promoting Women’s Participation in Peace and Security Processes: Operationalizing UN Security Council Resolution 1325, conference held at Joan B. Kroc Institute for Peace & Justice, University of San Diego, 18–20 November 2004.

39 Statute of the International Criminal Tribunal for Rwanda, in *International Legal Materials*, Vol. 33, 1995, p. 1598.

40 Statute of the International Criminal Tribunal for the former Yugoslavia, *International Legal Materials*, Vol. 32, 1993, p. 1525.

41 *Prosecutor v. Jean Paul Akayesu*, International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T 2 September 1998.

42 *Ibid.*, para. 585. As noted by the judgement, rape is classified as a crime against humanity under Article 3(g) of the Statute of the International Criminal Tribunal for Rwanda.

43 *Ibid.*, para. 687.

44 *Ibid.*, para. 731.

45 *Ibid.*, para. 494.

46 *Ibid.* In paragraph 494 the requirements for genocide are outlined. Under Article 2(3)(a) of the ICTR Statute (above note 39), Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 are adopted *verbatim*.

within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group with the intent to have her give birth to a child who will consequently not belong to its mother's group.<sup>47</sup>

Significantly, the *Akayesu* judgement situates rape as a crime causing serious bodily and mental harm, reorienting previous conceptions of rape as a moral crime against a woman's honour. Despite this important shift, the ICTR's approach to rape as a 'weapon of war' has been called into question by critics such as Buss, who note that recognition of rape as an act of genocide may create a high threshold or bar, against which all levels of sexual violence will be measured.<sup>48</sup> Certainly the prosecution of individual acts of rape has been lacking, and cases of male rape have also received limited scrutiny.<sup>49</sup> This could accordingly result in a lack of legal redress for individual acts of rape and sexual violence which are not part of a wider or systemic attack, leading Buss to suggest that there is both a 'hyper-visibility and un-visibility of sexual violence'.<sup>50</sup>

It is clear that legal provisions alone will not enforce the prosecution of sexual violence, but the language of law plays an important role in constructing understandings of gender-based violence in conflict. While the language of the Geneva Conventions appears outdated, the remit of their provisions on rape may have greater applicability to individual acts of rape. Equally, the legal definitions and decisions coming out of the ICTR may not be sophisticated enough to respond to all elements of sexual violence in conflict. However, the perception of rape as a weapon of war is nevertheless important, as it helps to establish rape as a crime of harm rather than of honour, an aspect that seems to be overlooked in Buss' analysis. Particularly in non-international armed conflicts, however, if rape is targeted at a specific group of women on the basis of ethnicity or another aspect of identity, the current focus on harm to the group may still result in rape having connotations of a crime against the honour of the group.

The full impact of this judgement at the international level may take some time to materialize, but provisions contained within the Rome Statute of the International Criminal Court (ICC) suggest that a precedent has been set. For example, under Article 7(1)(g) of the Rome Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity is recognized as a crime against humanity.<sup>51</sup> Additionally, sexual mutilation,<sup>52</sup> which often accompanied rape in Rwanda, could

47 *Ibid.*, para. 507.

48 Doris E. Buss, 'Rethinking rape as a weapon of war', in *Feminist Legal Studies*, Vol. 17, No. 2, August 2009, p. 149.

49 *Ibid.*, p. 151.

50 *Ibid.*, p. 153.

51 Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 17 July 1998, Article 7(1)(g).

52 Human Rights Watch, above note 9.



be construed as falling within the remit of Article 6, given the resulting long-term health implications that could impede the ability to reproduce.<sup>53</sup>

Judgements at the ICTY have adopted a similar stance towards the prosecution of rape. In *Kunarac*, sexual enslavement was classified as a crime against humanity or a war crime under Article 27 of the Fourth Geneva Convention,<sup>54</sup> with the further specification that rape occurs in all situations where consent is not given ‘freely’ or ‘voluntarily’, thus expanding the definition of rape given in *Akayesu*.<sup>55</sup> Despite these positive developments, there is no indication that existing provisions on rape in armed conflict will be improved. In the mid-nineties the ICRC declared that rape constituted a grave breach under the Fourth Convention’s Article 147, though at the time Niarchos raised concern that this broader interpretation lacked weight without any explicit amendment to include rape as a grave breach.<sup>56</sup> Although there is now widespread recognition of sexual violence in conflict, existing gender-specific provisions remain inadequate.

## Mainstreaming gender in international humanitarian law

Equality policy initiatives, particularly gender mainstreaming, offer scope for the integration of gender into international humanitarian law and policy. The principal aim of gender mainstreaming is to achieve gender equality by implementing gender as a central component at all levels within the UN system and beyond.<sup>57</sup> The process also evaluates the impact, on men and women, of all policies at all stages of design, implementation and monitoring. In contrast to other equality initiatives, premised on equal treatment and non-discrimination, gender mainstreaming is primarily designed to target equality of outcome rather than equality of opportunity. It is not immediately obvious why mainstreaming has been employed so readily in a peace and security context; however, the UN Decade for Women affirmed the relationship between equality, peace and development.<sup>58</sup>

In addition, the Beijing Platform for Action consolidated the concept of gender mainstreaming and highlighted women’s experience of armed conflict as a critical area of concern.<sup>59</sup> Both SC Res. 1325 and SC Res. 1820, relating to women,

53 Under Article 6 of the ICC Statute, there is scope for rape or crimes of sexual violence to be included under a number of provisions defining what is deemed to be an act of genocide: ‘(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group’.

54 Kelly D. Askin, ‘Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunals: Current status’, in *American Journal of International Law*, Vol. 93, No. 1, 1999, p. 120.

55 Rosalind Dixon, ‘Rape as a crime in international humanitarian law: Where to from here?’, in *European Journal of International Law*, Vol. 13, No. 3, 2002, p. 700.

56 C.N. Niarchos, above note 17, p. 675.

57 ‘Report of the Economic and Social Council for the year 1997’, A/52/3/Rev.1, 18 September 1997, p. 24.

58 Gender-specific women’s concerns were increasingly acknowledged following the UN First World Conference on Women, held in Mexico in 1975, which produced the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace, 1975, E/CONF66/34.

59 Beijing Platform for Action, above note 4, para. 131.



peace and security, have increasingly been used as gender mainstreaming tools and may help to develop key norms on women and armed conflict, thus enhancing understandings of gender in international humanitarian law.

Adopted in October 2000, SC Res. 1325 is the first Security Council resolution to focus specifically on women's experience of armed conflict. SC Res. 1325 aims to empower women at all levels of decision-making in conflict prevention, conflict resolution and peace-building, in addition to reducing gender-based violence. Rather than marginalizing women's experiences, it appears to bring gender-specific concerns within mainstream peace and security policy considerations. Substantively, the framework of SC Res. 1325 includes a preamble and eighteen clauses. First, the preamble recalls a number of Security Council resolutions that have addressed both the position of children and armed conflict<sup>60</sup> and the protection of civilians in armed conflict.<sup>61</sup> Significantly, the role of women in conflict prevention, resolution and peace-building is reaffirmed.<sup>62</sup> Gender mainstreaming is only specifically identified in relation to peacekeeping missions.<sup>63</sup>

When referred to in practice SC Res. 1325 often appears to be considered as an independent framework, without clear recognition of how the resolution is interlinked with existing conventions. Although not creating any substantive rights as such, SC Res. 1325 does make reference to existing obligations under the Geneva Conventions of 1949<sup>64</sup> and the Additional Protocols of 1977;<sup>65</sup> the Refugee Convention of 1951<sup>66</sup> and the Protocol thereto of 1967;<sup>67</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>68</sup> and the Optional Protocol thereto of 1999;<sup>69</sup> the Convention on the Rights of the Child 1989<sup>70</sup> and the two Optional Protocols thereto of 2000;<sup>71</sup> and relevant provisions of the ICC Statute.<sup>72</sup> An illustration of the relevance of substantive legal provisions can be seen in the protection of women and children as civilians, which is a key component of international humanitarian

60 See SC Res. 1261, 25 August 1999, on children and armed conflict, and SC Res. 1314, 11 August 2000, also on children and armed conflict.

61 See SC Res. 1265, 17 September 1999, and SC Res. 1296, 19 April 2000, which both consider the protection of civilians in armed conflict.

62 SC Res. 1325, preambular para. 5.

63 *Ibid.* See e.g. Clause 5 regarding the incorporation of a gender perspective into peacekeeping operations.

64 E.g. Fourth Geneva Convention, above note 22.

65 E.g. Protocol I, above note 21, and Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

66 Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150.

67 Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

68 Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13.

69 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, GA. Res. 54/4, 15 October 1999.

70 Convention on the Rights of the Child, 20 November 1989, GA. Res. 44/25.

71 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, A/RES/54/263 of 25 May 2000, and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, A/RES/54/263 of 25 May 2000.

72 SC Res. 1325, above note 14, Clause 9.

law.<sup>73</sup> In the resolution's Clause 10, relating to gender-specific protective measures, the Security Council:

*calls on* all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.<sup>74</sup>

This provision suggests that recognition of gender-specific harms forms an integral component of the gender mainstreaming process by enabling appropriate policy responses to be developed. For instance, levels of gender-based violence that occur before, during and after conflict could provide a gender-specific indicator, allowing an assessment of the success of the gender mainstreaming process in reducing these harms in practice. However, the framework of SC Res. 1325 does not provide any clear indication of how a gender mainstreaming process using, for example, gender-based violence indicators, should operate in a peace and security context. Given that the link between gender-based harms and the gender mainstreaming process is not made explicit, but is dependent on different actors' interpretations, gender-specific issues may be seen as inimical rather than central to the gender mainstreaming process.

Clause 10 of SC Res. 1325 recognizes the proliferation of gender-based atrocities in situations of conflict. As other human rights conventions, including CEDAW, do not directly address armed conflict, the resolution's remit enhances rights-based treaty provisions. Additionally, Clause 11 reinforces recognition of sexual violence and rape as crimes against humanity and war crimes, thereby further supporting protection measures under the Geneva Conventions, and it is clear that these connections need to be strengthened:

*Emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual violence against women and girls, and in this regard *stresses* the need to exclude these crimes, where feasible from amnesty provisions.<sup>75</sup>

While there is scope to advocate the increased protection of women and girls under Clause 8(a), which calls for all actors involved in peace negotiations and agreements to consider the 'special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction',<sup>76</sup> the conceptualization of conflict that triggers SC Res. 1325 fails to provide a means of addressing interpersonal violence. Although SC Res. 1325

73 United Nations 'Women, peace and security' study submitted pursuant to Security Council Resolution 1325 (2000), New York: United Nations, 2002, para. 116. This is also evidenced in an annotated guide to SC Res. 1325 which fleshes out the provisions of the framework, 'UNIFEM Security Council Resolution 1325: Annotated and explained', UNIFEM, 22 September 2006, available at <http://www.un.org/np/reports/UNIFEM/2006/2006-9-22-UNIFEM-sec-council-report-eng.pdf> (last visited 8 February 2010).

74 SC Res. 1325, above note 14.

75 *Ibid.*, Clause 11.

76 *Ibid.*, Clause 8(a).

can go some way to address violations, it is questionable whether it is able to permeate the private dichotomy.<sup>77</sup> While this may not be its intended function, the resolution is not sophisticated enough to respond to structural and less overt forms of violence. As a result, a narrow construction of peace and security based on the negative peace paradigm, which centres on the cessation of direct violence, is maintained. Reinforcing the public sphere bias of international legal instruments, SC Res. 1325 does not engage with the way in which structural forms of violence often exacerbate gender inequalities.

First, the very nature of SC Res. 1325's reference in Clause 10 to 'situations of armed conflict' is ambiguous. Given that asymmetrical warfare is increasingly prevalent, state actors may be displaced by non-state actors as the chief protagonists of war. Reference to the Geneva Conventions and their Additional Protocols in Clause 9<sup>78</sup> suggests that the resolution is applicable to both international and non-international armed conflict. However, without further guidance as to exactly how non-state actors are defined, there is no guarantee that non-state actors will include private individuals other than those involved in armed militias and irregular armies. While the punishment of individuals for rape in armed conflict is not dependent on their membership of an armed group, as Buss highlights in her analysis of responses to rape at the ICTR, the prosecution of individuals for acts of rape or sexual violence already appears limited.<sup>79</sup> Moreover, instances of intra-personal violence often increase both during and after conflict,<sup>80</sup> which suggests a correlation between violence in conflict and peace, but SC Res. 1325 does not broach this dilemma.

Although SC Res. 1325 appears to strengthen norms on women, peace and security, the framework has regularly been criticized for failing to include benchmarks and targets.<sup>81</sup> Experiences to date suggest that, if used at all, SC Res. 1325 is employed by policy makers in relation to peacekeeping operations and DDR processes. This narrow application risks shortfalls in implementation by overlooking the resolution's provisions on access to decision-making and violence against women, which are equally important to the overall structure of SC Res. 1325.

Significantly, some civil society actors have cautioned that any further follow-up resolutions could detract from the framework of SC Res. 1325.<sup>82</sup> Despite these concerns, in June 2008 the Security Council debated and passed a new US-sponsored resolution on women, peace and security, SC Res. 1820, focused

77 Merav Datan, *Women, peace and security: A feminist analysis of Security Council Resolution 1325*, LLM Research Paper Laws 582, Law Faculty, Victoria University of Wellington, 2004.

78 SC Res. 1325, above note 14, Clause 9.

79 D.E. Buss, above note 48, p. 151.

80 Louise du Toit, paper presented at the Law, Time and Reconciliation workshop, University of Glasgow, 17–18 May 2004, and her article 'Feminism and the ethics of reconciliation', in *Eurozine*, March 2007, available at <http://www.eurozine.com/articles/2007-03-16-dutoit-en.html> (last visited 8 February 2010). Du Toit points to the increased levels of rape and sexual violence in the post-Truth and Reconciliation Commission period in South Africa.

81 Amy Barrow, ' "[It's] like a rubber band": Assessing SC Res. 1325 as a gender mainstreaming process', in *International Journal of Law in Context*, Cambridge University Press, Vol. 5, No. 1, March 2009, p. 57.

82 Personal communication, received 19 May 2007.

principally on sexual violence in armed conflict. In its preamble, it reaffirms the importance of ending impunity for all forms of violence against women and girl civilians both during and after armed conflicts, especially sexual violence, and in so doing aims to bridge the gap between international humanitarian law and international human rights law. This link is reinforced by recognition that the use of rape as a weapon of war and other sexual violence may continue beyond the cessation of armed conflict.

The framework of SC Res. 1820 strengthens understandings of sexual violence in armed conflict beyond the limited remit of existing gender-based provisions under the Geneva Conventions. For example, Clause 1 not only recognizes systematic use of sexual violence against civilian populations, but also pinpoints how it can ‘significantly exacerbate situations of armed conflict’ and stresses the importance of prevention.<sup>83</sup> In this respect, Clause 3 sets out a range of measures to enhance the protection of civilians, with particular reference to women and girls. These measures include military training on the prohibition of all forms of sexual violence, and disciplinary action against those security forces who commit acts of rape or sexual violence. The evacuation of women and children under imminent threat of sexual violence to safety is also stipulated, which demonstrates a shift towards preventative rather than reactionary measures, thus helping to expand norms on conflict prevention.

Prior to the adoption of SC Res. 1820, advocates of SC Res. 1325 criticized the substantive aims of the resolution for doing more harm than good:

[SC Res. 1820] provides watered down versions of the issues, and undermines what we have. For example: [Clause] 4 states that ‘sexual violence “can” constitute a war crime; a crime against humanity, or a constitutive act with respect to genocide.’ But sexual violence is already recognised as such in international law. The word ‘can’ undermines this.<sup>84</sup>

Alternatively, by diversifying conceptions of sexual violence to include both individual and systemic attacks and thus overcoming limitations in both the Geneva Conventions and the ICTR judgements, the inclusion of the word ‘can’ may help to alleviate concerns that the threshold for the prosecution of sexual violence in conflict is set too high. While this semantic shift may appear minor, the introduction of a series of Security Council resolutions focused on sexual violence, including SC Res. 1820, may weaken rather than strengthen SC Res. 1325 by diluting the crystallization of important norms on women, peace and security, which are aimed at both empowering and protecting women.

SC Res. 1325 is often perceived as a landmark precisely because it aims to support the transition of women from victims to actors. For example, its Clause 1, focused on the subject of decision-making, ‘*Urges* Member States to ensure increased representation of women at all decision-making levels in national, regional

83 SC Res. 1820, above note 15, para. 1.

84 Personal communication, received 13 June 2008.

and international institutions and mechanisms for the prevention, management, and resolution of conflict'.<sup>85</sup> On the surface, these provisions may appear 'tokenistic', but given the initial resistance to SC Res. 1325 by States Parties, the inclusion of empowerment clauses is significant. To a certain extent, the language of SC Res. 1325 attempts to displace the exploitation of gender stereotypes and helps to develop norms on women's participation in conflict prevention, conflict resolution and peace-building processes.

There is growing recognition that women play a number of roles in conflict, particularly within irregular armies and militia groups during non-international armed conflicts. For example, Coulter considers the role of armed women fighters as members of the armed forces in Sierra Leone, who are often perceived as abnormal transgressors stepping beyond the acceptable boundaries of feminine behaviour.<sup>86</sup> Even within irregular armies women are frequently exposed to more egalitarian political roles. A good illustration here is the experience of women guerrillas in El Salvador who were provided with means of contraception, thus gaining autonomy over their own reproductive capacity and sexuality.<sup>87</sup> Other commentators observe the way in which spaces open up for women's organizing and activism during the post-conflict period.<sup>88</sup> While women's participation in informal peace processes is often encouraged,<sup>89</sup> it is particularly difficult for women to gain access to formal decision-making processes. For example, in Iraq many women's organizations have been forced underground by threats of violence and intimidation.<sup>90</sup> These examples illustrate the importance of women's agency and represent an important departure from the 'women as victims' paradigm. This is not to suggest that the prevention of sexual violence in conflict should not be a major priority, but the adoption of further Security Council resolutions that sustain focus on sexual violence may invariably stall the development of laws and policies which recognize women's multiple roles in conflict.

## Conclusion

Underpinning the Geneva Conventions is a 'male as perpetrator, female as victim paradigm' that serves to exploit gender stereotypes in conflict. Although gender-specific provisions are contained within international humanitarian law, the

85 SC Res. 1325, above note 14, Clause 1.

86 Chris Coulter, 'Female fighters in the Sierra Leone war: Challenging the assumptions?', in *Feminist Review*, Vol. 88, No. 1, April 2008, pp. 62 and 63.

87 Ana Cristina Ibáñez, 'El Salvador: War and Untold Stories – Women guerrillas', in Caroline O.N. Moser and Fiona C. Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*, Zed Books, London and New York, 2001, pp. 117–130.

88 See e.g. Nadjé Al-Ali and Nicola Pratt, 'Women's organising and the conflict in Iraq since 2003', in *Feminist Review*, Vol. 88, No. 1, April 2008, pp. 74–85.

89 See e.g. analysis of the Sudanese Women's Voice for Peace organization in Dorothea Hilhorst and Mathijs van Leeuwen, 'Grounding local peace organisations: A case study of Southern Sudan', in *Journal of Modern African Studies*, Vol. 43, No. 4, 2005, pp. 537–563.

90 N. Al-Ali and N. Pratt, above note 88, p. 81.

exploitation of women as victims has been sustained, if not reinforced in practice. ‘Vaguely termed’ language, which focuses on concepts such as honour and dignity, means that the ‘sexual nature of the crime [of rape] is indeterminable’.<sup>91</sup> Judgements at the ICTR and ICTY have gone some way to reorient conceptions of rape as a crime against a woman’s honour to rape as a crime causing serious bodily and mental harm. Nevertheless, perceptions of gender in armed conflict continue to be aligned with women and victimhood, and concerns have been raised that individual acts of rape against men and women will be overlooked in situations where rape is utilized as a ‘weapon of war’.

Recent resolutions stemming from the Security Council, such as SC Res. 1325, have attempted to empower as well as protect women. While SC Res. 1325 has increasingly been used to mainstream gender in security sector reform, current approaches to gender mainstreaming appear to echo liberal feminist approaches to gender equality. Integrationist gender mainstreaming policies are to be credited for considering women’s experiences, but ultimately an approach that ‘adds women and stirs’ fails to challenge how existing legal provisions, combined with gender-blind international institutions, have disempowered women and exacerbated the exploitation of gender stereotypes. In the case of SC Res. 1325, stronger links need to be established with substantive legal provisions, including the Geneva Conventions and respective Protocols, the CEDAW and the Rome Statute of the International Criminal Court.

Additional Security Council resolutions on women, peace and security, among them SC Res. 1820, do help to expand norms on conflict prevention – including the evacuation of women and girls susceptible to sexual violence – an element that may appear beyond the scope of international humanitarian law. Nevertheless, the complexity of non-international armed conflicts, which engage multiple non-state actors and militia groups, means that the scope of international humanitarian law needs to evolve or risk faltering. However, provisions contained in SC Res. 1820 also fail to move away from the ‘woman as victims’ paradigm and thus reinforce many of those same conceptual constraints present in international humanitarian law. Furthermore, SC Res. 1820 risks diluting SC Res. 1325’s attempts to empower women in conflict prevention, resolution and peace-building processes.

It is clear that the relationship between gender and international humanitarian law is problematic. Without any amendment to the Geneva Conventions, the adoption of alternative legal instruments that broach gender in a more sophisticated way and support existing international humanitarian law provisions becomes increasingly important. As evidenced by the shortcomings of SC Res. 1325 and SC Res. 1820, the language of Security Council resolutions, though well-intentioned, is limited in how it can aid constructions of gender in armed conflict. Constructions of gender within international humanitarian law are thus constrained without any radical form of redress.

91 K.D. Askin, above note 54, p. 700.