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INTERNATIONAL HUMAN RIGHTS, CRIMINAL LAW AND THE WOMEN, PEACE AND SECURITY AGENDA

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12/2018

This paper[1] reflects upon the interplay between international human rights law and criminal law – both national and international – through the international legal regimes that have evolved for combating gender-based violence against women, in peacetime and in conflict, and human trafficking, especially of women and girls. The different trajectories of these two legal regimes are newly associated through the UN Security Council's recognition that sexual violence against women as a tactic of war and human trafficking in conflict constitute threats to international peace and security and accordingly come within the Council's responsibility for the maintenance of international peace and security.

The interplay between different international legal regimes has generated considerable debate since the International Court of Justice identified the concept of a "self-contained" regime.[2] One aspect was the concern in the late 1990s and the early years of this century about what was called the fragmentation of international law, an apprehension that the proliferation of specialised regimes would undermine the coherence of the discipline.[3] Prominent among such specialised regimes were precisely human rights law and international criminal law. But there was much less concern expressed about the fluidity of, the institutional and substantive overlap between, and the dissolution of conceptual boundaries separating, such legal regimes. Further, their very nature entails a blurring of the boundaries between national and international law. Accordingly, the paper considers the convergence of legal regimes and the ensuing erosion of clear delineation between them. Another – and related – aspect is to ask what is meant by a human rights treaty, or more broadly what makes a human rights agenda? These last questions were originally sparked by my involvement as scientific advisor to the Council of Europe drafting committee for what might well be called Europe's most recent human rights treaty: the Convention on Preventing and Combating Violence against Women and Domestic Violence.[4] But the Convention was from the outset conceived of as simultaneously a criminal law treaty and a human rights treaty, and many state delegates to the negotiations were from either the Department of Justice or the Department of Gender Equality/Human Rights. Throughout the negotiations, it became apparent that they did not always speak the same language, or share assumptions about the very nature of the proposed treaty, demonstrating a disciplinary divide that is replicated at the international institutional level.

The further spark to my thinking about these issues is my current position as Director of a Centre for Women Peace and Security (WPS). WPS is a Security Council agenda that is generally dated from the Council's adoption of Resolution 1325 in 2000. In the words of that Resolution, it is an agenda committed to recognising "the important role of women in the prevention and resolution of conflicts and in peace-building",[5] to bringing a gender perspective to peacekeeping operations and to "an understanding [that] the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security."[6] Its civil society proponents – mainly women activists – sought inclusion of the experiences of women in war in the security space and celebrated the adoption of Resolution 1325 as setting a new standard

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for the Security Council, UN member states and the UN system as a whole. However, as Dianne Otto has commented, it was perhaps not then appreciated that there might be a price to pay,[7] that although Resolution 1325 was in the words of a 2015 Global Study on its implementation, "conceived of and lobbied for as a human rights resolution that would promote the rights of women in conflict situations"[8] its location in the Security Council also made it a security issue. The tension between these two positions is something I will return to.

I begin with a brief survey of the interplay between human rights law and criminal law – with also an appearance by international humanitarian law (IHL) – in the evolution of international legal regulation of human trafficking, especially of women and girls, and of violence against women and girls. These, for a long time, followed separate tracks, although they are linked, not least by the factors that contribute to both: poverty, sex and gender-based discrimination, inequalities, unequal access to economic and social rights including education, employment and health care. Fleeing from gender-based violence makes women vulnerable to trafficking, while trafficking in women is one manifestation of gender-based violence.[9] Both are incidents of patriarchy and of historically unequal power relations between men and women, and are "crucial social mechanisms by which women are forced into a subordinate position compared with men".[10]

HUMAN TRAFFICKING AND VIOLENCE AGAINST WOMEN AND GIRLS: CRIMINAL LAW OR HUMAN RIGHTS?

Human trafficking has a deep and complex legal history. It came earlier onto the international agenda than violence against women, indeed well before even the creation of the League of Nations, through a number of treaties campaigned for by a mix of early women's movements and moral activists concerned to uphold the "virtue of white women".[11] These early treaties were not in contemporary terms either human rights or criminal law treaties. They focused on exploitative prostitution and exclusively on cross-border prostitution. In the words of one commentator on the four anti-trafficking treaties in the pre-UN era: "the export of immorality across borders had to be stopped."[12] The major themes of these early treaties have been summarised (and simplified) as protection of victims and their welfare through education and training, exchange of information and criminalisation of procurement of women for prostitution abroad, while, as Anne Gallagher describes it, carefully preserving state authority to regulate prostitution internally. There was a precursor to the human rights reporting process in that the 1921 International Convention for the Suppression of the Traffic in Women and Children provided for annual reporting and for an Advisory Committee of the League on the Traffic of Women and Children.

These various treaties were consolidated in 1949 into the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[13] The Convention has a criminal law focus, requiring punishment of those involved in procurement, exploitation of prostitution, running or managing a brothel, providing for extradition for such offences, and checking "the traffic in persons of either sex for the purpose of prostitution." There is a welfare angle in response to the fact that prostitution and trafficking for that purpose "endanger the welfare of the individual, the family and the community"[14] and some human rights language in that prostitution – whether within a state's borders or involving cross-border activity – and trafficking for the purpose of prostitution are called "incompatible with the dignity and worth of the human person".[15] The former – prostitution – is subject to international regulation although it falls squarely within the internal affairs of the state. But the

1 This paper was first presented as the Third Hilding Eek Memorial Lecture at the University of Stockholm on 18 September 2017.

2 *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (Merits) 1980 ICJ Reports 3, para 86.

3 The topic was considered by the International Law Commission; see Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/CN.4/L.702, 18 July 2006.

4 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), ETS No. 210, 11 May 2011.

5 Security Council Resolution 1325 (2000), S/RES/1325, preamble.

6 Ibid.

7 Dianne Otto, "Women, Peace and Security: A Critical Analysis of the Security Council's Vision", *LSE Women, Peace and Security Working Paper* Series 1 (2016), http://www.lse.ac.uk/women-peace-security/assets/documents/2016/wps1Otto.pdf

8 Radhika Coomaraswamy et al., *Preventing Conflict, Transforming Justice, Securing the Peace A Global Study on the Implementation of United Nations Security Council Resolution 1325* (New York: UN Women, 2015), 15.

9 Declaration on the Elimination of Violence against Women, United Nations General Assembly, Resolution 48/104, 20 December 1993, article 2 (b).

10 Declaration on the Elimination of Violence against Women, United Nations General Assembly, Resolution 48/104, 20 December 1993, preamble.

11 Anne Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010), 55.

12 Ibid., at 57.

13 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, United Nations General Assembly, Resolution 317 (IV), 2 December 1949.

14 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, United Nations General Assembly, Resolution 317 (IV), 2 December 1949, preamble.

15 Ibid.

human rights commitment is limited. In the words of the Special Rapporteur on violence against women, its causes and consequences, the 1949 Convention has "proved ineffective in protecting the rights of trafficked women and combating trafficking. [It] does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the 'evils of prostitution'."[16]

Human trafficking is implicitly prohibited by the Universal Declaration of Human Rights and the human rights Covenants through such articles as those on the prohibition of slavery and servitude, free and full consent to marriage and the right to free choice of employment.[17] Human trafficking enters directly and explicitly (but without definition) into a human rights treaty through the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 30 years after the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. CEDAW, article 6 states that: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". Importantly this encompasses "all forms of trafficking" not just that for the purposes of prostitution, although exploitation of prostitution remains. But this is strange language for a human rights treaty; it is not an equality provision like every other substantive article of CEDAW, nor is it an assertion of women's rights, nor a straight-forward requirement of criminal law. Interestingly the CEDAW Committee has not adopted a General Recommendation on the subject, nor considered an individual communication on trafficking through to the merits.[18] In human rights terms, CEDAW is followed by article 35 of the Convention on the Rights of the Child, which provides that states must "take all appropriate … measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form".

In the 1990s, the trafficking narrative begins to merge with that of the international legal story relating to combating violence against women and girls. Like trafficking, violence against women was not at first seen as self-evidently a human rights issue. As is well known, CEDAW has no provision directly relating to violence against women: its equality framework necessitating a male comparator excluded from its ambit violence that occurs to women because they are women. It entered the international arena as a social matter of crime prevention and criminal justice, as for instance in the General Assembly's first resolution on domestic violence in 1985. That resolution recognised that "abuse and battery in the family are critical problems that have serious physical and psychological effects on individual family members" and that they need to be examined through the lenses of "crime prevention and criminal justice in the context of socio-economic circumstances."[19] The UN Committee on Crime Prevention and Control had also identified violence against family members as an important issue for it to address. Violence against women was primarily perceived of as the deviant behaviour of an individual rather than as a public matter sustained and acquiesced in by the organisational structures of society. Other lenses through which violence against women was viewed were those of health, social welfare or harmful traditional practices such as female genital mutilation, thus de-linking it from the structural inequalities inherent in existing gender relations. A collective shift in mind-set was needed to bring violence against women within the framework of international human rights law incurring state obligations and state responsibility for failure to respect, protect and fulfil those obligations. The key moment for that shift was the 1992 adoption by the CEDAW Committee of its ground breaking General Recommendation No. 19 that asserted violence against women to be an act of discrimination within the terms of article 1 of the Convention and hence a violation of the Convention. However General Recommendation No. 19 added little to article 6 of CEDAW apart from noting that poverty and unemployment increase opportunities for trafficking in women, and that there are diverse and new forms of sexual exploitation in addition to what it termed "established forms of trafficking", such as sex tourism, domestic labour and organised marriages of women from developing countries to foreign nationals.

The World Conference on Human Rights took place in Vienna the following year – 1993. It has been widely claimed that women were the biggest winners at Vienna. Through the efforts of women activists, supported by academic commentary, and with the support of like-minded states, the Conference upheld gender-based violence as "incompatible with the dignity and worth of the human person" and stressed "the importance of working towards [its] elimination … in public and private life" as well as the elimination of "exploitation and trafficking in women".[20] Another linkage was now coming to the fore, that with armed conflict. These normative developments were taking place against the backdrop of

16 *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44*, E/CN.4/2000/68, 29 February 2000, para 22.

17 See *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/32/41, 3 May 2016 for the international legal framework against trafficking in human beings.

18 Although no state has made a reservation to article 6, some aspects are controversial and the Committee has provided inconsistent interpretations through its concluding observations to states parties' reports; Janie Chuang, "Article 6", in *The UN Convention on the Elimination of All Forms of Discrimination against Women A Commentary*, ed. Marsha Freeman, Christine Chinkin and Beate Rudolf (Oxford: Oxford University Press, 2012) 169, 173.

19 UN General Assembly, Resolution 40/31, Implementation of the World Programme of Action concerning Disabled Persons and United Nations Decade of Disabled Persons, A/RES/40/31, 29 November 1985.

20 Vienna Declaration and Programme of Action, 25 June 1993, II, para 38.

Acceptance of violence against women in armed conflict as a violation of human rights as well as of IHL disrupts the traditional divide between the two legal regimes. It supports the notion of a continuum of violence against women linking that which occurs in ordinary everyday life – peacetime – and that taking place in armed conflict, thereby reinforcing states' obligations with respect to elimination of violence against women in public and private.

the media coverage of the widespread sexual violence that was committed in the wars associated with the break-up of the former Yugoslavia, in particular Bosnia. In General Recommendation No. 19 the CEDAW Committee had referenced the impact of armed conflict on prostitution, trafficking in women and sexual assault of women and the need for "specific protective and punitive measures." Vienna is stronger with its assertion that "[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery and forced pregnancy, require a particularly effective response."[21] Thus at Vienna exploitation and trafficking of women were delinked from prostitution, which had no mention except in the context of child prostitution, and were brought squarely into the framework of human rights.

The acceptance of violence against women in armed conflict as a violation of human rights as well as of IHL disrupts the traditional divide between the two legal regimes. It supports the notion of a continuum of violence against women linking that which occurs in ordinary everyday life – peacetime – and that taking place in armed conflict, thereby reinforcing states' obligations with respect to elimination of violence against women in public and private. Wartime violence however is elevated; article 5 of the Statute for the International Criminal Tribunal for the former Yugoslavia, adopted by the UN Security Council the same year, included for the first time rape as a crime against humanity within the jurisdiction of an international criminal court. The concept of a crime against humanity was not decoupled from conflict until the Rome Statute of the International Criminal Court, another 5 years later.

Having come together at Vienna and again in 1995 at the Fourth World Conference on Women in Beijing, when trafficking in women and girls was recognised as a form of sex and gender-based violence against women,[22] the trafficking story and the violence against women story to some extent again separate. Regulation of trafficking was furthered by the UN Crime Commission, rather than by the Human Rights Commission, with the drafting of the 2000 Palermo Protocol to the Convention on Transnational Organised Crime to "prevent and combat trafficking in persons, paying particular attention to women and children".[23] There is some acknowledgment of human rights as the one of the purposes of the Protocol is "to protect and assist the victims of such trafficking, with full respect for their human rights". Nevertheless the crime control emphasis (furthered by the first international definition of the trafficking) caused concerns that this would diminish the attention and commitment due to the human rights of victims. In a deliberate attempt to avoid this and to keep human rights in the foreground of the picture, the UN Office of the High Commissioner for Human Rights (OHCHR) produced its Recommended Principles and Guidelines on Human Rights and Human Trafficking that were presented to the Economic and Social Council of the UN (ECOSOC) as an addendum to a report from the High Commissioner. The Guidelines put the human rights of trafficked persons "at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide

21 Ibid.

22 Beijing Declaration and Platform for Action, September 1995, paras 99 and 113.

23 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations General Assembly, Resolution 55/25, 15 November 2000.

redress to victims" but this still falls short of an outright assertion that trafficking per se constitutes a violation of women's human rights, a stance that is found in the 2005 Council of Europe Convention on Trafficking: "trafficking in human beings constitutes a violation of human rights",[24] and is echoed by the Special Rapporteur on trafficking in persons, especially women and children: "Trafficking in persons, especially women and children, is a gross human rights violation."[25] Such an understanding incurs the state obligation "to investigate allegations of trafficking and prosecute traffickers" under general human rights law; within Europe this has been affirmed by the European Court of Human Rights since the ground-breaking case of Rantsev v Russia and Cyprus in 2010.[26] Human rights institutions have thus been unwilling to leave regulation of trafficking solely in the domain of criminal law – the mandate of the Special Rapporteur on trafficking as a special procedure of the UN Human Rights Council is a further indication of this, as is the inclusion of the issue within the mandate of the Special Rapporteur on violence against women. However state action in implementation of the Palermo Protocol has veered away from human rights. In the words of Ratna Kapur, it has "triggered a vast network of laws designed to regulate cross-border movement through law and order regimes and criminal justice" reflecting "an increasing obsession with national security, law and order, and border protection in the context of globalisation and free market ideology" that lead to scepticism as to whether it has resolved trafficking or served women's human rights.[27] One might add that this has also entailed a large expenditure, which is way above that expended on responding to other forms of violence against women.

ISTANBUL CONVENTION: CRIMINAL LAW AND HUMAN RIGHTS

Turning back to combating violence against women, normative development has progressed at the UN level, notably through the jurisprudence of the CEDAW Committee under the CEDAW Optional Protocol, and the recent update of its 1992 General Recommendation No. 19, General Recommendation No. 35 adopted on 26 July 2017, and through the work of the Special Rapporteur on violence against women, a mandate approved in 1993 following the Vienna World Conference on Human Rights. At the regional level, the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) is widely regarded as "state of the art". It draws upon the language and practice of these international bodies as well as the emergent jurisprudence on violence against women of the European Court of Human Rights.[28] However, unlike the Palermo Protocol, the Istanbul Convention was drafted deliberately as a human rights treaty as well as a criminal law treaty. This designation required consideration of what should be in a human rights treaty, as opposed to concentrating solely on the human rights of survivors. In its human rights capacity, it asserts that "'violence against women' is understood as a violation of human rights and a form of discrimination against women" (Istanbul Convention, article 3 (a)). It emphasises substantive equality between women and men as an immediate state obligation and condemns all forms of discrimination against women, thereby setting out the legal link between gender equality and preventing violence against women and girls. Further, in article 4 it provides that it must be applied to all victims without discrimination on a wide range of grounds, including disability, health and – for the first time in an international treaty – on the basis of sexual orientation and gender identity. It spells out that no culture, custom, religion or tradition can be considered as a justification for acts of violence within the Convention. Most importantly the Convention spells out the essential state responsibility for human rights: states' negative obligation to refrain from any act of violence by its agents and the positive obligation to exercise due diligence to prevent and protect against violence against women committed by non-state actors, to prosecute and punish perpetrators and to provide reparations for victims (Istanbul Convention, article 5). It also recognises women's agency and the importance of measures for the empowerment of women. In drafting it was agreed that there should be an independent expert mechanism for monitoring progress in implementation and to develop jurisprudence around its provisions, apparently now a hallmark of a human rights treaty. The model for an expert body to monitor compliance with the Istanbul Convention – GREVIO[29] – was that set up under the Council of Europe trafficking treaty – GRETA.[30] The Palermo Protocol in contrast provides for no such

24 Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, preamble.

25 *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Maria Grazia Giammarinaro, A/HRC/29/38, 31 May 2015, para 7.

26 Application no. 25965/04, 7 January 2010.

27 Ratna Kapur, "Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India", *Melbourne Journal of International Law* 14 (2) (2013), 317, 334.

28 See Council of Europe, Fact Sheet, Violence against Women, June 2017, http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf

29 Istanbul Convention, article 66.1: "The Group of Experts on Action against Violence against Women and Domestic Violence (hereinafter referred to as 'GREVIO') shall monitor the implementation of this Convention by the Parties."

30 Council of Europe Convention on Action against Trafficking in Human Beings, article 38.1: "The Group of experts on action against trafficking in human beings (hereinafter referred to as 'GRETA'), shall monitor the implementation of this Convention by the Parties."

independent mechanism; its parent body, the Convention on Transnational Organised Crime provides only for a Conference of States Parties, a more traditional international law (as opposed to human rights) monitoring device.

But Istanbul is also a criminal law treaty. Unless it falls within the categories of war crimes, crimes against humanity or genocide, gender-based violence against women is not per se an international crime. Thus the Convention had to identify specific actions within the rubric of violence against women and provide for their criminalisation and prosecution at the domestic level,[31] requiring a specificity of language with respect to the substance of criminal law and procedure that is in stark contrast to the more open ended language of human rights treaties. The latter are worded at a high level of abstraction with imprecise and indeterminate language. They do not prescribe states' behaviour in any consistent form, but rather provide for differing levels of commitment depending upon the context. There are gaps that must be fleshed out. The language allows states a considerable discretion, or margin of appreciation in how they fulfil their obligations. They must retain their relevance in changing political, social and economic circumstances, even as they become ever more dated. In sum a human rights treaty must be a "dynamic instrument that accommodates the development of international law."[32] Criminal law, in contrast, requires the certainty that allows people to know what behaviour is proscribed and precision for application by law enforcement bodies and prosecution of alleged offenders. Treaty obligations for domestic criminal law enforcement means that crimes must be listed, defined and their elements spelled out. During the negotiations for the Istanbul Convention arguments were made that some proposed crimes of violence against women were better understood as instances of social misbehaviour that should not be subject to criminal sanction, for instance stalking and harassment, or proposed definitions were rejected on the grounds that they were too indeterminate to be brought before a criminal court. And while human rights assumes universal application criminal law provisions had to be adaptable to both civil law and common law systems of criminal law and procedure. Criminal prosecution requires a court with prescriptive and enforcement jurisdiction that must be in accordance with international law principles of jurisdiction. Crimes of violence against women within the terms of the Istanbul Convention are made subject to territorial jurisdiction and to jurisdiction based on the nationality or habitual residence of the alleged offender in a state party; unlike the Council of Europe Convention on Action against Trafficking in Human Beings there is no provision for jurisdiction where the offence is committed against a national, so–called passive personality. There is provision for jurisdiction to be established over an alleged offender who is present in the country where that person is not extradited to another party "solely on the basis of her or his nationality." (Istanbul Convention, article 44). However there are no detailed provisions with respect to extradition as in the UN Convention against Transnational Organised Crime.

The Istanbul Convention does not purport to address violence against women in armed conflict, and is regarded as complementary to the principles of IHL and international criminal law.[33] Nevertheless, since the forms of violence it covers do not cease during armed conflict or occupation, it is spelled out that the Convention is applicable in situations of armed conflict as well as in times of peace (article 2.3). The international human rights institutions, however, including the UN Human Rights Council and the treaty bodies, have brought IHL directly within their scope, for instance in mandating fact-finding missions. As an example, I was a member of a fact-finding mission on the Gaza conflict of 2008-9 that was mandated "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations".[34] While perhaps substituting for the continued

31 The adoption of the Council of Europe Convention on Action against Trafficking in Human Beings in 2005 meant that trafficking was not included among the listed crimes of violence against women in the Istanbul Convention.

32 Committee on the Elimination of Discrimination against Women, General Recommendation No. 28, on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para 1.

33 Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, Explanatory Report 51.

non-use of the International Fact-Finding Commission provided for under Protocol I to the Geneva Conventions, it might be questioned where the UN Human Rights Council acquires the competence to bring IHL into its terms of reference. By doing so, it risks blurring the conceptual and practical distinctions between the two legal regimes, not to mention the potential for human rights lawyers to get IHL wrong. Any conclusions about the commission of war crimes or crimes against humanity also necessarily raise issues of international criminal law. This conjunction of legal regimes is implicitly welcomed by the International Law Commission (ILC) Special Rapporteur on crimes against humanity. In his third report, Sean Murphy observes that:

"Human rights treaty bodies will often identify situations of crimes against humanity and provide recommendations for response, when the crimes against humanity intersect with the subject matter of the treaty. For example, when receiving reports from States parties, the Human Rights Committee addresses violations of the International Covenant for Civil and Political Rights such as violations of the right to life or the right not to be subjected to torture, which include circumstances where those violations rise to the level of crimes against humanity. Thus, while the mandates of the Human Rights Committee and other subsidiary bodies do not specifically include monitoring crimes against humanity, these bodies can identify and recommend appropriate State responses to crimes against humanity."[35]

Of course, crimes against humanity have now been decoupled from armed conflict and are not technically part of IHL, but in many instances the "circumstances where those violations rise to the level of crimes against humanity" will be association with conflict, and the ILC Special Rapporteur certainly accepts the preliminary work of the human rights bodies in identifying the commission of international crimes.

VIOLENCE AGAINST WOMEN, TRAFFICKING AND WPS

In 2000 – the same year as the adoption of the Palermo Protocol – a new actor entered the scene with respect to violence against women in armed conflict: the UN Security Council, through its introduction of the Women, Peace and Security (WPS) agenda. The first operative paragraph, and thus emphasis, of its Resolution 1325 is on women's participation in all stages of conflict prevention, management and resolution, on gender mainstreaming and "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". This is a wide formulation of violence against women and girls. Resolution 1325 also reminds states of their existing obligations under IHL, CEDAW, the Children's Convention, and to bear in mind the Rome Statute. But eight years later, the next Resolution, 1820, is more restrictive. Its preamble refers to the resolve "to eliminate all forms of violence against women and girls", but the operative part of the resolution refers only to sexual, not "all forms" or even "gender-based", violence so that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security". It goes on to affirm that "effective steps to prevent and respond to such acts of sexual violence [ie, those committed as a tactic of war] can significantly contribute to the maintenance of international peace and security". While important in its rejection of sexual violence in conflict as an inevitable by-product of war and as recognition of what it often is – a cheap and effective tactic of war that can constitute a war crime, crime against humanity and even genocide – this formula is limiting. The repeated focus only on sexual violence against women downplays other abuses, including sexual violence against men and boys, and other forms of gender-based violence against women and girls. It also discounts the incidence of wartime sexual violence that is not a tactic of war such as opportunistic violence or that committed by civilians, thereby minimising the likelihood of their being addressed in post-conflict reconstruction. It also portrays gender-based and sexual violence in conflict as exceptional rather than as rooted in gender inequality and as occurring in a continuum from that committed outside conflict in so-called "peacetime".[36] It assumes that conflict is different in kind from other situations of violence such as "ethnic and communal violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime", yet we know that all these situations result in serious violations of women's rights.[37] Such violence casts women solely in terms of their sexual identities and sustains the essentialist image of women as victims, upholding the binary of women in need of protection from the "evil" of sexual violence and men (especially international and militarised men) as their designated protectors, thereby sustaining rather than challenging gender

34 United Nations Human Rights Council, Resolution S-9/1, A/HRC/S-9/L.1, 12 January 2009.

35 Sean D. Murphy, *Third report on crimes against humanity*, United Nations International Law Commission, A/CN.4/704, 23 January 2017, para 220.

36 Cynthia Cockburn, "The Continuum of Violence: A Gender Perspective on War and Peace", in *Sites of Violence: Gender and Conflict Zones*, ed. Wenona Giles and Jennifer Hyndman (University of California Press, 2004).

37 Committee on the Elimination of Discrimination against Women, General Recommendation No. 30, on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 1 November 2013.

38 On gender stereotypes see Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).

Resources made available for fighting violence in the form of extremism does not extend to these victims of violence who face the consequences of financial austerity and often inadequate access to justice. The effect is to reinforce violence in conflict, especially when perpetrated by terrorist or extremist groups, as different, necessitating the heavy weight security apparatus to address it. By presenting manifestations of violence in armed conflict narrowly as security issues, the Security Council restricts any broader understanding relating to human rights, in particular economic and social rights, although these are deeply implicated in both gender-based violence against women and trafficking. Nor in the context of WPS has the Security Council given commensurate attention to structural issues such as state terror, inequalities, militarisation, economic neo-liberalism or arms trading,[49] which are understood by civil society as obstacles to effectively combating violence against women and human trafficking.

Building upon the earlier campaign for recognition of gender-based violence against women as a violation of human rights, it was clear to the civil society advocates in 2000 and to the authors of the Global Study in 2015 that WPS is such an agenda. Similarly, human rights institutions have lobbied for an understanding of human trafficking within a human rights framework that goes beyond taking into account the human rights of victims in criminal processes with respect to perpetrators and even beyond ensuring assistance to trafficked persons. By integrating these into the Security Council's primary responsibility for the maintenance of international peace and security – thereby securitising human rights – the weakening of the human rights lens was probably inevitable, with the further risks of subjugation and co-option by the programmes for P/CVE. But the ultimate goal of combating violence against women and human trafficking in conflict – the vision of a sustainable, gendered peace – must not be forgotten, nor that the feminist transformative agenda is core to its achievement.

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Despite being a form of violence in conflict and a human rights abuse, trafficking has not figured in the eight WPS resolutions and despite recognising that trafficking in persons in conflict and post-conflict can be associated with sexual violence in conflict, the Security Council did not link its trafficking resolution to the WPS agenda.

This is paper 12/2018 in the LSE Women, Peace and Security Working Paper Series.

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