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INTERNATIONAL GENDER EQUALITY NORMS AND THEIR FRAGMENTED  
PROTECTION IN CONFLICT

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**ABSTRACT**

Normative and legal developments in the protection of gender equality in conflict have proliferated in recent decades across diverse regimes of public international law. Nevertheless, the ultimate impact of such international norms on domestic conflict-affected settings is unclear. This article sets out to elucidate how international gender equality norms, underpinned by proliferating soft and hard legal sources, and implemented by separate institutions with widely varying powers of monitoring and enforcement, bring traction to women's and girls' rights in conflict-affected settings. While much discussion of fragmentation focuses on conflict between norms – and how to resolve such conflict within the non-hierarchical structure of international law – this article examines gender equality norms as they are operationalized by the institutions of international law charged with their monitoring and enforcement. International Relations literature suggests that, while international institutions are formally empowered through the consent and consensus of participating states, they in fact operate with considerable autonomy, due to their 'expertise' and consequent pedagogic function as 'teachers' of norms to states. The article investigates this thesis through the case study of the prohibition of sexual violence against girl soldiers in the Democratic Republic of the Congo, focusing on institutional activities under international humanitarian law, international criminal law and the United Nations Security Council. The case study reveals that the institutions of international law not only monitor and

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enforce relevant gender equality norms, but they in fact give substance to often-vague international norms through their operational activities in conflict-affected settings, though not necessarily in a consistent or coherent manner. The article concludes that studying international institutions in their operational activities in conflict settings is essential to understanding the impact of international gender equality norms on women's and girls' experiences of conflict.

## INTRODUCTION

In international law, the language of 'norms' is common currency.<sup>1</sup> It is a capacious term, intended to capture a spectrum from 'rules' (paradigmatically, these are legally binding obligations with a clear treaty basis) to 'values' or 'principles' (ideas about appropriate behaviour that have some basis within the increasingly diverse sources of international 'soft law').<sup>2</sup> Norms are often discussed and categorised with reference to their legal status ('binding' or 'non-binding'),<sup>3</sup> their compliance pull ('weak' or 'strong'),<sup>4</sup> their underpinning sources ('hard law' or 'soft law')<sup>5</sup> and also to their place in the 'normative hierarchy' of international law,<sup>6</sup> with *jus cogens*, peremptory norms of international law, as the pinnacle of the hierarchy.

Gender equality has been relatively prominent in post-Cold War international norm-development. From women's political participation and gender mainstreaming to the prohibition of violence against women and girls, gender equality claims find their basis across several international consensus documents and legal instruments. The generality of the term 'norm' means that what it captures is diverse, disparate and often ill-defined, with unclear boundaries and parameters. These blurred boundaries can be useful for

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1 For an overview, see especially Shelton, D. (2001). *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford: Oxford University Press.

2 For example, Koller, D. S. (2008). The Faith of the International Criminal Lawyer. *New York University Journal of International Law and Politics*, 40(4), 1019-1070.

3 Shelton (n 1).

4 Charlesworth, H. (1998). The Unbearable Lightness of Customary International Law. *American Society of International Law Proceedings*, 92, 44.

5 Chinkin, C. (1989). The Challenge of Soft Law: Development and Change in International Law. *International and Comparative Law Quarterly*, 38, 850-866.

6 Shelton, D. (2006). Normative Hierarchy in International Law. *American Journal of International Law*, 100(2), 291-323.

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activists pushing for more expansive interpretations of a particular norm, such as initially bold claims about violence against women constituting torture.<sup>7</sup> Likewise, however, vague norms carry potentially adverse effects, as the same norm being differently interpreted and actioned by different responsible institutions may lead to norm conflict. The precise contours of norms may vary as they manifest across different regimes of international law.

The regulation of gender equality in conflict has travelled a great distance since initial feminist interventions into international law, which identified a ‘masculine world’ of international law reinforced by organisational and normative structures that excluded women from its practice and the lives of women and girls from its areas of concern.<sup>8</sup> States have agreed to limit the lawful conduct of armed conflict – including against female combatants and civilians – under international humanitarian law,<sup>9</sup> and provided for international criminal jurisdiction over individuals bearing greatest responsibility for the most serious violations of these laws perpetrated against women and girls.<sup>10</sup> The extent to which states can limit the human rights of women and girls, even in times of violent conflict, has been negotiated, litigated and interpreted in various instruments, consensus and interpretative documents grouped under international human rights law.<sup>11</sup> Meanwhile, United Nations Security Council responses to threats to international peace and security now recognise – and bring Security Council enforcement procedures – to the threat posed to women and girls by armed conflict.<sup>12</sup> Thus has arisen separate regime activity addressed to regulating women’s rights in conflict.

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7 For an early feminist articulation of this argument, see MacKinnon, C. (1993). On Torture: A Feminist Perspective on Human Rights. In K. Mahoney and P. Mahoney (Eds.), *Human Rights in the Twenty-first Century: A Global Perspective*. Dordrecht and London: Martinus Nijhoff.

8 Charlesworth, H., Chinkin, C., and Wright, S. (1991). Feminist Approaches to International Law. *American Journal of International Law*, 85, 613-645.

9 For an overview, see Krill, F. (1985). The Protection of Women in International Humanitarian Law. *International Review of the Red Cross*, No. 249.

10 Brammertz, S., and Jarvis, M. (Eds.). (2016). *Prosecuting Conflict-Related Sexual Violence at the ICTY*. New York and Oxford: Oxford University Press.

11 See, for example, UN Committee for the Elimination of All Forms of Discrimination against Women (CEDAW), ‘General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’ (18 October 2013) UN Doc CEDAW/C/GC/30.

12 United Nations General Assembly and Security Council, ‘Compendium of the High-Level Review of the United Nations Sanctions’ (New York 2015) UN Doc A/69/941-S/2015/432, 46.

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The relevant laws and norms were developed at different times by different groups of states. They are motivated by divergent priorities and implemented by separate institutions with widely varying powers of monitoring and enforcement. The view of the International Law Commission is that such fragmentation ‘create[s] the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices’.<sup>13</sup> The contemporary domain, with its tapestry of normative and legal commitments across regimes of international law, therefore posits a subtler and more complex set of challenges for feminist analysis than the traditional story of silence and exclusion. The article explores the ways in which international law, fragmented into regimes and applied by diverse institutions, regulates and brings scrutiny to the violation of international gender equality norms in armed conflict.

While feminist analysis of international law has burgeoned across several regimes, specific feminist consideration of fragmentation *per se* has been notably sparser.<sup>14</sup> This article sets out to elucidate how international gender equality norms, underpinned by proliferating soft and hard legal sources in a fragmented international legal system, bring traction to women’s and girls’ rights in conflict-affected settings. The article draws on International Relations and international legal scholarship of gender equality norms to posit international institutions as key actors. International Relations literature suggests that, while international institutions are formally empowered through the consent and consensus of participating states, international institutions in fact operate with considerable autonomy, due to their ‘expertise’ and consequent pedagogic function as ‘teachers’ of norms to states. The article investigates this thesis through the case study of the prohibition of sexual violence against girl soldiers in the Democratic Republic of the Congo (DRC). The article finds that international institutions not only

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13 International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) UN Doc A/CN.4/L.682, paragraph 14.

14 Isolated examples include Heathcote, G. (2016). *Fragmented Feminisms: Critical Feminist Thinking in the Post-Millennium Era*. In A. Reinich (Ed.), *International Law and...Select Proceedings of the European Society of International Law, Volume 5, 2014*. Oxford: Hart Publishing; O'Rourke, C. (2017). *Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions*. *European Journal of International Law*, 28(4), 1019–1045; O'Rourke, C., and Swaine, A. (2018). *CEDAW and the Security Council: Enhancing Women's Rights in Conflict*. *International and Comparative Law Quarterly*, 67(1), 167–199; Ni Aoláin, F. (2012). *International Law, Gender Regimes and Fragmentation: 1325 and Beyond*. In C. M. Bailliet (Ed.), *Non-State Actors, Soft Law and Protective Regimes: From the Margins*. Cambridge: Cambridge University Press.

monitor and enforce relevant gender equality norms, but they in fact give substance to often-vague international norms through their operational activities in conflict-affected settings, though not necessarily in a consistent or coherent manner. The article concludes that studying international institutions in their operational activities in conflict-settings is essential to understanding the impact of international gender equality norms on women's and girls' experiences of conflict.

## **WHY DO INTERNATIONAL LEGAL INSTITUTIONS MATTER? TWO STORIES OF INTERNATIONAL LAW**

A diverse body of scholarship attempts to address the question of how international laws and norms impact domestic conflict-affected settings. Very broadly, a distinction can be drawn within this literature between an emphasis on international law as a set of rules with which states comply, or as a set of norms into which states are socialised.

### *Story One: A Set of Rules with which States Must Comply*

There is active debate amongst feminist internationalists about what international law stands for.<sup>15</sup> Some read international law principally as a set of rules to which states commit and with which states must comply. At last, it seems, after decades of neglect, there is a clear body of treaty law, jurisprudence, Security Council resolutions and soft law for a principle that women's rights and equality must be protected by states, including in the specific context of armed conflict. It points to a way around the problems of recalcitrant or regressive states, who must now, according to international law, respect and advance women's rights in conflict.

Doctrinal developments on women's rights in armed conflict have arguably been most concerted in the area of broadening and deepening definitions of harm. Thus, the thematic issue of women's rights in conflict first entered the international domain as a subsidiary issue of the global problem of violence against women. The normative traction of the issue in the immediate post-Cold War years was most pronounced within

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15 On feminist internationalism and international law, see generally Charlesworth, H. (2000). Martha Nussbaum's Feminist Internationalism. *Ethics*, 111, 64-78.

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the international human rights system. In 1992, the CEDAW Committee adopted its landmark General Recommendation Number 19, addressing violence against women as a violation of women's human rights.<sup>16</sup> In 1993, violence against women emerged as the central policy concern of the Vienna World Conference on Human Rights.<sup>17</sup> The appointment of a Special Rapporteur on Violence Against Women by the Commission on Human Rights in 1994 consolidated these earlier developments to firmly establish ending violence against women as a human rights priority.<sup>18</sup> Importantly, while these developments did not principally concern violence against women in conflict-settings, each included reference to specific manifestations of violence against women in conflict.<sup>19</sup>

Developments under international human rights law formed the crucial backdrop to the recognition of gender crimes under the nascent canon of international criminal law in the 1990s.<sup>20</sup> An important milestone in the international community's awareness of the gender-specific impact of conflict on women is found in the Report of the Commission of Experts established by the UN Security Council to document war crimes, crimes against humanity and evidence of genocide occurring in the former Yugoslavia,<sup>21</sup> that ultimately led to the Security Council's establishment of the International Criminal Tribunal of former Yugoslavia.<sup>22</sup> Both the scale and prominence of rape and sexual violence in the Report brought unprecedented international attention to the phenomenon, as well as an emergent focus (which has endured) on ending impunity for such violence. The ad hoc tribunals established by the Security Council to prosecute

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16 UN Committee for the Elimination of All Forms of Discrimination against Women (CEDAW), 'General Recommendation No. 19 on violence against women' (1992) UN Doc. A/47/38.

17 Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc. A/CONF.157/23, paragraph 38.

18 United Nations Commission on Human Rights, Resolution 1994/45 to appoint a Special Rapporteur on violence against women, including its causes and consequences, adopted on 4 March 1994.

19 For example, *ibid*, paragraph 3.

20 'Recent steps within the international community to ensure that women's rights are recognised as human rights and to enhance the accountability of governments for violence against women are as much an integral part of the overall counter-attack on the war against women as are the more publicised and dramatic responses to events in the former Yugoslavia.' Chinkin, C. (1994). Rape and Sexual Abuse of Women in International Law. *European Journal of International Law*, 5, 326-341, 341.

21 Final Report of the Commission Of Experts Established Pursuant to Security Council Resolution 780 (1992) UN Doc. S/1994/674.

22 United Nations Security Council Resolution 827 (1993).

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international crimes perpetrated in conflicts in the former Yugoslavia and Rwanda produced a series of landmark cases recognising sexual- and gender-based offences as constitutive of the most egregious crimes under international criminal law.<sup>23</sup> This focus on ending impunity achieved its legal high watermark with documented feminist successes in the criminalization of sexual and gender-based violence throughout the 1998 Rome Statute.<sup>24</sup>

Developments led by the UN General Assembly proved critical to broadening the emergent focus from violence against women in armed conflict to the more expansive thematic area of women's rights in armed conflict. The Fourth World Conference on Women and the resulting Beijing Declaration and Platform for Action convened by the General Assembly in 1995 was a critically important milestone. One of the twelve identified 'critical areas of concern' to emerge as consensus areas of priority for the Beijing Platform for Action was 'women and armed conflict'.<sup>25</sup> Thus, the Beijing Platform for Action addressed the relationship between peace, development and women's rights,<sup>26</sup> and the harmful impact of military spending and the arms trade in diverting resources away from development.<sup>27</sup> It identified the impact of conflict in increasing the caring burden on women as caretakers of children and the elderly,<sup>28</sup> in addition to 'the lifelong social, economic and psychologically traumatic consequences of armed conflict, foreign occupation and alien domination'.<sup>29</sup> Beijing was also critical in establishing women's participation in decision-making, including in issues of conflict prevention, management and resolution, as essential to achieving gender equality.<sup>30</sup> Indeed, the key strategic objective emerging from the women and armed conflict 'critical area of concern' in the Beijing Platform for Action was to '[i]ncrease

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23 See further Brammertz and Jarvis (n 10).

24 See further Bedont, B., and Hall Martinez, K. (1999). Ending Impunity for Gender Crimes under the International Criminal Court. *The Brown Journal of World Affairs*, 6(1), 65-85.

25 Beijing Platform for Action (15 September 1995) UN Doc. A/CONF.177/20 Annex II, Chapter 4, paragraphs 131-149.

26 Ibid, paragraph 131.

27 Ibid, paragraphs 13 and 138.

28 Ibid, paragraph 133.

29 Ibid, paragraph 135.

30 Ibid, paragraph 13. For a critical account of the focus on participation at Beijing, see Otto, D. (1996). Holding Up Half the Sky But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women. *Australian Feminist Law Journal*, 6, 7.

the participation of women in conflict resolution at decision-making levels and protect women living in situations of armed and other conflicts or under foreign occupation'.<sup>31</sup>

The emphasis on women's participation in conflict prevention, management and resolution gathered significant further traction in the aftermath of the Beijing Conference, ultimately leading to the adoption of landmark Security Council Resolution 1325 on Women, Peace and Security (WPS). The emphasis on participation is importantly understood as twofold: firstly, that exclusion from relevant decision-making and programming was *of itself* a violation of women's rights in conflict; and secondly, that women's participation could inform more effective conflict resolution, peacebuilding and enduring conflict-prevention. Thus, the identification of the exclusion of women from decision-making as a negative gendered cause and consequence of conflict has been important in informing the international community's understanding of the gendered effects of conflict. Resolution 1325 addresses the need for the protection of women from gender-specific effects of conflict, the need for the integration of a gender perspective throughout conflict prevention, management and peacebuilding and the need to address women's gender-specific needs throughout relief and recovery activities.<sup>32</sup>

International humanitarian law, also, was influenced by this busy period of norm development and thematic activity concerning women's rights in armed conflict. In 2001, the International Committee of the Red Cross (ICRC) published its landmark *Women Facing War* Report. This was the first sustained and systematic documentation of the routine violations of women's rights under international humanitarian law, in particular civilian women.<sup>33</sup> The Report involved fine-grained analysis of the impact of conflict on women, informed by ICRC country missions, on women's personal safety and freedom of movement,<sup>34</sup> women's access to food and water and to the means for

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31 Beijing Platform for Action (n 25), Chapter 4, paragraph 141.

32 UN Security Council Resolution 1325 (2000).

33 International Committee of the Red Cross. (2001). *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*. Geneva: ICRC.

34 Ibid, 42-75.

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safe food preparation,<sup>35</sup> sources of livelihood<sup>36</sup> and shelter,<sup>37</sup> access to health and healthcare, including basic standards of hygiene and sanitation,<sup>38</sup> education and information,<sup>39</sup> and the impact on the maintenance of the family unit.<sup>40</sup> In addition to the impact on civilian women, the Report addressed the particular humanitarian needs and entitlements of women detained and interned during conflict, addressing issues such as housing, security, food and water, healthcare and sanitation, and maintaining family links while in detention. Overall, these interventions were intended to improve operational responses to violations of international humanitarian law experienced by women.

It is important to note that this apparent ‘progress narrative’<sup>41</sup> of incremental improvements in the protections afforded to women’s rights under international law has been subject also to considerable critique from feminist doctrinalists. Principally, feminist international lawyers – or formalists<sup>42</sup> – have focused their critique on the soft law and consequently *weak legal status* of many affirmations of women’s rights in armed conflict. Such affirmations typically emerge at greater distance from state consent, with a likely negative impact on compliance.<sup>43</sup> Secondly, the proliferating nature of legal developments on women’s rights in conflict, emerging from distinct regimes with varying state parties and diverse enforcement bodies, replicate the same problems generated by *fragmentation* on other themes and issues under international law. There is the risk of creating a permissive environment in which states selectively comply only with those laws that most closely align to their existing interests and

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35 Ibid, 76-92.

36 Ibid, 93-101.

37 Ibid, 102-109.

38 Ibid, 110-123.

39 Ibid, 136-140.

40 Ibid, 124-135.

41 Mullally, S. (2011). Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative? *International and Comparative Law Quarterly*, 60(2), 459-484.

42 O'Rourke (n 14).

43 Charlesworth (n 4), 44.

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preferences.<sup>44</sup> Further, there is evidence of states exploiting fragmentation to deliberately pursue and exploit strategically-created treaty conflicts.<sup>45</sup>

Thirdly, the broad problems of *under-enforcement* of women's rights under international law, which manifests emblematically in widespread reservations to the CEDAW Convention, have been replicated rather than resolved by normative and legal developments on women's rights in conflict. The concern is clearly linked to questions of legal capture and legal status. Different norms and obligations, emerging from different parts of the international system will empower different actors and agents in their monitoring and enforcement. Typically, the most progressive articulations of women's rights will not align with the institution most empowered to meaningfully pursue enforcement of women's rights. Understanding international law as a system of rules with which states must comply reveals, therefore, important legal and normative development on women's rights in conflict, while nevertheless identifying significant shortcomings also to the system of rules.

*Story Two: A Set of Norms to which States are Socialised*

The concern of formalists with the legal capture and status of feminist-informed developments in international law reflects the disciplinary commitments of legal scholars. Other disciplinary perspectives, however, also weigh into the debate. For example, scholars of International Relations have attended to international law as a set of 'standards of behaviour defined in terms of rights and obligations,'<sup>46</sup> more commonly known as norms. Study of the emergence of a 'global gender equality regime' identifies the existence of explicit rules of gender equality in international treaties, the practice of state compliance to those rules, and evidence of a shared

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44 Chinkin (n 5).

45 Ranganathan, S. (2014). *Strategically Created Treaty Conflicts and the Politics of International Law*. Cambridge and New York: Cambridge University Press.

46 Kardam, N. (2004). The Emerging Global Gender Equality Regime from Neoliberal and Constructivist Perspectives in International Relations. *International Feminist Journal of Politics*, 6(1), 85-109, 87.

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understanding amongst states of women's rights as human rights, as conclusive evidence of the existence of a 'global gender equality regime'.<sup>47</sup>

International Relations scholarship is typically concerned with the origins of norms; the mechanisms by which they diffuse; and finally, the conditions under which norms will be influential in world politics.<sup>48</sup> Feminists have entered this conversation most concertedly in terms of the first question and the role of women's movements in generating new norms of gender equality and women's (human) rights. Work on transnational advocacy networks (TANs) typically identifies the transnational women's movement that targeted the UN as a key site for establishing norms and mobilised for formal recognition of women's rights as human rights as paradigmatic of non-state actors, social movements, generating new norms.<sup>49</sup> The Security Council's adoption of Resolution 1325 (2000) due to civil society advocacy exemplifies women's movement activity to generate new gender equality norms.<sup>50</sup>

The prominence and perceived success of feminist TANs in this norm generation and diffusion has highlighted the importance of 'soft law' forums in providing a platform for the generation of norms. To illustrate, in terms of norm diffusion, United Nations agencies and conferences have been key in the production of an international consensus on women's human rights. Indeed, as Kardam notes, 'the chronologies of the international women's movement are largely a collection of UN meetings: Mexico, Copenhagen, Nairobi, Vienna, Cairo, Beijing'.<sup>51</sup>

Importantly for the protection of women's rights in armed conflict under international law, the literature from international relations reveals that the role and influence of TANs is not uniform across all issue-areas. For example, foundational research by Keck and Sikkink that examines comparatively the transnational movements against slavery, against violence against women and against environmental pollution found that certain

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47 Ibid.

48 Finnemore, M., and Sikkink, K. (1998). International Norms Dynamics and Political Change. *International Organization*, 52(4), 887-917, 888.

49 Keck, M. E., and Sikkink, K. (1998). *Activists beyond Borders: Advocacy Networks in International Politics*. London and Ithaca, N.Y.: Cornell University Press, 165-98.

50 Cockburn, C. (2007). *From Where We Stand*. London: Zed Books; Anderlini, S. (2007). *Women Building Peace: What They Do, Why it Matters*. Boulder, CO and London: Lynne Rienner.

51 Kardam (n 46), 87.

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*intrinsic characteristics* of the given norm determine its diffusion potential.<sup>52</sup> Specifically, they found that issues involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) assigning responsibility, most effectively underpinned TAN activity.<sup>53</sup> This finding immediately indicates why the perpetration of sexual violence in armed conflict might more effectively motivate TAN activity and norm-development than, for example, economic and social rights.

Likewise, Finnemore and Sikkink found that the relationship of new normative claims to existing norms might also influence the likeliness of their influence on global politics and state behaviour.<sup>54</sup> They advanced a thesis based on the so-called '*adjacency*' of claims. Where new norms are broadly consistent with existing ones, the likelihood of diffusion is considerably higher. This insight is particularly useful in explaining the evolution of TAN activity and norm development documented above, from a focus on violence against women *per se* to more specific dedicated activity on sexual violence in armed conflict. The '*adjacency*' of both is clear. The question of adjacency is also useful in explaining why, for example, food security has not had the same diffusion success.

Two important insights have arisen from more recent work on TAN activity and norm-generation, taking place since the more consensual international politics of the 1990s expired. The first of these important contemporary insights is the *conflictual* nature of norm substance and ownership. Rather than focusing on a single movement or network, and their efforts to advance (generally progressive) norms, Clifford Bob for example focuses instead on 'the clash' between advocacy networks and their adversaries, who also form networks.<sup>55</sup> Rather than assuming that they have little impact and that civil society speaks with one voice against state and corporate destruction, his analysis rests on the premise that advocacy in the international space is characterised by conflict. With regard to international law:

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52 Keck and Sikkink (n 49), 165-98.

53 Ibid, 27.

54 Finnemore and Sikkink (n 48), 908.

55 Bob, C. (2012). *The Global Right Wing and the Clash of World Politics*. Cambridge and New York: Cambridge University Press, 17.

To challenge a detested norm's proclaimed emergence, rivals use submergence strategies. They attack purported soft laws, arguing that proponents highlighted favourable precedents while ignoring inconvenient ones. More belligerently, they invent incompatible norms, using tactics mirroring their foes'; their own conference declarations, quasi-judicial rulings, joint statements, expert opinions, and law review articles.<sup>56</sup>

Debates surrounding the language of 'gender' in the Rome Statute establishing the International Criminal Court provide a good example of such conflict in international norm-development.<sup>57</sup> While some states favoured inclusive language of 'gender' in the Statute, others feared that such language would attribute recognition to sexual minorities and to ideas of gender as pluralist and fluid that surpassed their domestic law.<sup>58</sup> The disagreement ultimately led a 'constructively ambiguous' definition of gender that attempted to incorporate understandings of gender both as fixed and biological and as fluid and socially constructed.<sup>59</sup>

Complementary insights emerge from the work of Krook and True, namely the *dynamic* nature of norms.<sup>60</sup> Whereas much norm-diffusion literature tends to assume the static substance of norms, comparative research on the differing fates of gender mainstreaming and gender quotas norms reveals their very different trajectories. Ultimately, Krook and True found, norms evolve in response to two important factors: firstly, to international debate over meaning, (as illustrated in the example of defining 'gender' in the Rome Statute); secondly, in interaction with their external normative environment.<sup>61</sup> This latter finding reinforces the earlier adjacency thesis of Finnemore and Sikkink, in which new norms that are broadly consistent and connected to existing

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56 Ibid, 31.

57 See further Bedont and Hall Martinez (n 24); Oosterveld, V. (2014). Constructive Ambiguity and the Meaning of 'Gender' for the International Criminal Court. *International Feminist Journal of Politics*, 16(4), 563-580.

58 Anderson, K. (2000). The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society. *European Journal of International Law*, 11(1), 91-120.

59 Statute of the International Criminal Court (Rome Statute) (17 July 1998) UN Doc. A/CONF.183/9 [hereafter Rome Statute], article 7(3): 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'

60 Krook, M. L., and True, J. (2012). Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality. *European Journal of International Relations*, 18, 103-127.

61 Ibid.

norms will be most successful in diffusing and ultimately influencing state behaviour. Of particular importance to gender equality actors is the clear finding that not all actors have equal voice in the contestation over meaning and in determining the external normative environment.<sup>62</sup> States are privileged actors in the negotiation of international treaty texts and the norms therein. There are hierarchies of influence amongst states. Likewise, well-resourced non-governmental actors of the global north are likely to have greater influence.<sup>63</sup>

On the whole, this literature has concluded broadly positively about the role of women's movements – not just in consuming or formally engaging with international law through prescribed avenues – but in generating, altering and diffusing such norms. This broadly positive assessment is important for understanding continued feminist engagement with international law, even in less propitious times.

## **THE SHARED STORY? INTERNATIONAL INSTITUTIONS AND GENDER EQUALITY NORMS**

What unifies these ostensibly quite different 'stories' of international law and its relationship to the domestic sphere is the agreed importance of the institutions of international law to both stories. Both are agreed that multilateral institutions made up of states, authorised and empowered to act on a supranational basis on particular specialised areas and interests, are significant for making international laws and norms impact on the ground, including within conflict-affected settings. The phenomenon explored here has traditionally been explained in terms of the legitimacy conferred on a state's policy by the approval of institutions of international law, which leads to greater international support. Countless scholars and policymakers have pointed to the '*legitimation function*' of international institutions, especially the UN.<sup>64</sup> More finely-grained research on how this legitimation function is performed – or withheld – in

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62 Carpenter, C. (2007). Studying Issue (Non)-Adoption in Transnational Advocacy Networks. *International Organization*, 61(3), 643-667.

63 Anderson (n 58).

64 See, for example, Finnemore, M. (1996). Norms, Culture, and World Politics: Insights from Sociology's Institutionalism. *International Organization*, 50(2), 325-347.

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practice has also revealed a potentially important role for civil society, in particular in respect of international human rights law.

Literature focused on the relationship between social mobilisation and state compliance has emphasised the interaction between international institutions and domestic civil society. Foundational in this field is the idea of the '*boomerang pattern*' first advanced by Keck and Sikkink in 1998. According to this typology, civil society organised transnationally in order to influence international organisations, which in turn placed pressure back on domestic governments.<sup>65</sup> In line with this comparative qualitative work of social constructivist scholars in international relations, quantitative political scientists have also scrutinised causal mechanisms between international human rights norms and domestic state behaviour. In particular, the pathbreaking work of Beth Simmons on why states comply with international human rights treaties also points to the relationship between international institutions and domestic civil society as determinative. According to Simmons' large-N study, ratification of a human rights treaty leads to improved human rights performance by ratifying states because treaty ratification *empowers domestic reform constituencies* to press for rule-complaint behaviour.<sup>66</sup> Thus, a critical conceptual and practical link between international gender equality norms relating to women and conflict and domestic peacemaking is the role of international institutions.

#### *Autonomy of International Institutions*

Importantly, research suggests that institutions of international law, although formally constituted by states, in fact operate with considerable autonomy from states.<sup>67</sup> Boyle and Chinkin consider the role of specialised institutions within the United Nations, such

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65 Keck and Sikkink (n 49), 12. Subsequent work sought to clarify and refine the modalities and causalities of this 'boomerang pattern'. Most notably in relation to international human rights law, Sikkink and colleagues came to propose the 'spiral model' of influence from international norms and organisations to eventually rule-consistent behaviour. Risse, T., and Sikkink, K. (1999). The Socialization of International Human Rights Norms into Domestic Practice: Introduction. In T. Risse, K. Sikkink, and S. C. Ropp (Eds.), *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.

66 Simmons, B. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge and New York: Cambridge University Press.

67 Barnett, M., and Finnemore, M. (1999). The Politics, Power, and Pathologies of International Organizations. *International Organisation*, 53, 699-732.

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as the UN Environmental Programme or the UN Development Programme. These bodies are institutions with a commitment to promote the relevant objectives of the UN Charter.<sup>68</sup> These institutions have built up an expertise in their special fields of law, while at the same time operating through finely tuned political processes. They draw upon experience derived from compliance monitoring and reporting procedures. They are thereby empowered by international treaty, but operate with considerable autonomy from state parties.

Further, the evidence suggests that increasing specialisation of international law, in which increasingly bespoke norms are developed, monitored (and potentially enforced) by increasingly specialised institutions in turn reinforces their autonomy in their respective issue-areas.<sup>69</sup> The autonomy of international institutions is grounded in their control of expertise.

### *Control of Expertise*

International relations literature explains institutional autonomy in terms of bureaucratic control of expertise:

[One] basis of autonomy and authority...is bureaucratic control over information and expertise. A bureaucracy's autonomy derives from specialised technical knowledge, training, and experience that is not immediately available to other actors. While such knowledge might help the bureaucracy carry out the directives of politicians more efficiently, Weber stressed that it also gives bureaucracies power over politicians (and other actors). It invites and at times requires bureaucracies to shape policy, not just implement it.<sup>70</sup>

International lawyers, including the International Law Commission, might explain this dynamic instead in terms of 'structural bias', whereby international organisations interpret authorising instruments – including conflicts between different international treaties and norms – in a manner that most empowers that institution.<sup>71</sup> International

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68 Boyle, A., and Chinkin, C. (2007). *The Making of International Law*. Oxford and New York: Oxford University Press, 123.

69 Pauwelyn, J. (2004). Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands. *Michigan Journal of International Law*, 25, 903-916, 904

70 Ibid, 709.

71 International Law Commission (n 13), 282. The resulting interpretative openness creates a danger of 'structural bias' - namely that what is understood as a 'mutually supportive' solution is determined in accordance with the priorities of the body whose task it is to interpret the conflict clause.



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relations and international legal scholars are largely agreed, therefore, that while constituted and authorised by participating member states, international organisations in fact operate in ways that are autonomous and aggregate further power to themselves.

To illustrate, growing emphasis on ‘gender expertise’ is evidenced, for example, by the Women, Peace and Security (WPS) Resolutions of the United Nations Security Council, the dominant international framework for responding to gendered needs in armed conflict and post-conflict reconstruction. The resolutions make repeated reference to the importance of gender expertise throughout relevant peace and security programming. They emphasise gender training (Resolution 1889, paragraph 4), welcome expert initiatives (Resolution 1888, Preamble), provide for additional personnel and bespoke offices with the requisite expertise (such as a team of experts in sexual violence in armed conflict) (Resolution 1888, paragraph 8), provide for women’s protection advisers and gender advisers (Resolution 1888, paragraph 7), as well as strengthening national gender expertise (Resolution 1889, paragraphs 7–8).

The emphasis on expertise raises important questions about the mechanisms of accountability for these ‘experts’: to whom are they accountable? Certainly, the relationship to state parties seems tenuous, at best. We tend to regard experts as implementers, as ‘doers’, who bring political decisions to life. International experts operate ostensibly without discretion, driven by ‘facts-on-the-ground’, ‘empirical realities’, and ‘best practice’.<sup>72</sup> Increasing scrutiny of international ‘expertise’ highlights the assumed apolitical character of the growing place of expertise in global governance.<sup>73</sup> There is evidence of similar dynamics in feminist approaches to the WPS agenda. While attention, and critique, is concentrated on the avowedly political deliberations of UN summits, international conferences and UN Security Council Resolutions, insufficient attention is paid to the manifold ways in which ‘expertise’ shapes political understandings of social problems and the range of responses considered.<sup>74</sup> Expert individuals and units are supposedly there to ensure the translation of (settled and predetermined) international norms into policy implementation. The

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72 Kennedy, D. (2005). Challenging Expert Rule: The Politics of Global Governance. *Sydney Law Review*, 27(1), 1.

73 Ibid, 21.

74 Ibid, 17.

emphasis on 'expertise' obscures contestation over the content of international norms and reaffirms institutional autonomy.<sup>75</sup>

*International Institutions as 'Teachers of Norms'*

The autonomy of international institutions becomes important from a norm-perspective when they become engaged in 'teaching' gender equality norms. To illustrate, linked to their role as 'experts', international institutions play important roles in 'teaching' states about the substance and implementation of particular norms. One might consider the role of gender advisors in UN Security Council (UNSC) country missions in supporting states to develop National Action Plans on Women, Peace and Security, or the CEDAW Committee in its iterative interactions with states over the nature, substance and compliance with treaty obligations under the Convention.<sup>76</sup> The pedagogic activity of international institutions links also to their role in potentially accelerating norm diffusion.<sup>77</sup>

According to Finnemore and Sikkink, international actors encourage others to adhere to new norms through a process of socialisation and peer pressure that combines discursive strategies of praise for appropriate behaviour and denunciation for violation of norms. Further, these discursive strategies are accompanied by material strategies of rewards for good behaviour and sanctions against those who do not adhere to the relevant norms.<sup>78</sup> Whereas this 'socialisation' perspective on international behaviour continues to privilege states as key agents, a growing body of work on the autonomy of international institutions suggests they may, in fact, be key actors in gender equality norm-diffusion. In practice, international institutions are key agents of both discursive and material strategies. Thus, international relations and international law arrive at largely compatible conclusions on the important role of international institutions in operationalizing international norms, and making them matter on the ground in conflict-

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75 Squires, J. (2007). *The New Politics of Gender Equality*. Basingstoke: Palgrave Macmillan, 14-15.

76 O'Rourke and Swaine (n 14).

77 Finnemore and Sikkink (n 48).

78 Ibid, 910.

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affected states. The theoretical literature proposes a number of hypotheses that merit empirical case study investigation, to which the next section turns.

### **INTERNATIONAL NORMS PROHIBITING SEXUAL VIOLENCE AGAINST CIVILIANS AND THE RECRUITMENT AND USE OF CHILD SOLDIERS**

The article investigates the role of international institutions through a focus on institutional activity on the prohibition of sexual violence against girl soldiers in the DRC. The case study has been selected for a number of reasons. First, the issues both of sexual violence against civilians in armed conflict and the recruitment and use of child soldiers have been the subject of concerted treaty-based and soft law development in international law. Notably, both issues conform with the ‘intrinsic characteristics’ identified by Keck and Sikkink that lend themselves to norm diffusion, namely bodily harm to vulnerable individuals, with a relatively short and clear causal chain assigning responsibility. Thus, institutional activity on the issues across a range of international institutions is evident in the DRC.

In terms of the article’s theoretical contribution, there is great and growing feminist concern at the relative prominence of sexual violence in international law’s understanding of – and response to – violations of women’s rights in conflict. Concerns might be summarised as: the privileging of protective stereotypes of women;<sup>79</sup> the general failure to reveal and vindicate women’s agency;<sup>80</sup> and the abstraction of incidents of sexual violence from their context of structural gender inequality that both precede and survive conflict.<sup>81</sup> These concerns have prompted considerable reflection and critique on the value of ostensible feminist ‘successes’ in international law.<sup>82</sup>

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79 See, for example, Otto, D. (2009). The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade. *Melbourne Journal of International Law*, 10, 11.

80 See, for example, Mertus, J. (2004). Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women’s Agency. *International Feminist Journal of Politics*, 6(1), 110-129.

81 See, for example, Swaine, A. (2018). *Conflict-related Violence Against Women: Transforming Transition*. Cambridge and New York: Cambridge University Press.

82 For a typology of these concerns, see O’Rourke, C. (2013). International Law and Domestic Gender Justice: Why Case Studies Matter. In M. Fineman and E. Zinstag (Eds.), *Feminist Perspectives on Transitional Justice*. Antwerp: Intersentia.

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Further, scholars such as Augustine Park have criticised the tendency to make girls 'invisible' in international law through the dominance of women's rights or child rights frameworks.<sup>83</sup> For example, there is much criticism that the international norm against the recruitment and use of child soldiers in fact assumes a male victim and thus has been normatively blind to girls.<sup>84</sup> Notwithstanding this criticism, there is established practice under international law of addressing the rights and lives of girls within the broader framework of women's rights. This practice is evidenced most clearly in the CEDAW Convention. To quote the CEDAW Commentary:

Although it does not spell out that "woman" includes girls under the age of Eighteen (as does for example, the Protocol on the Rights of Women in Africa), this is evidently the case... Many of the concerns addressed in the Convention, such as trafficking, marriage, health, exploitation, and violence have immediate and important consequences for girls... The Committee refers readily to girls (or children) and requires that States parties pay particular 'attention to the specific needs of (adolescent) girls'.<sup>85</sup>

Further evidence is found in the Beijing Declaration and Platform for Action emerging from the UN's Fourth World Conference on Women, which addresses throughout 'women and girls'.<sup>86</sup> Likewise, the programme of work of the UN Commission on the Status of Women addresses the unequal position of women and girls.<sup>87</sup>

The author acknowledges and shares these important concerns at both the prominence of sexual violence and inattention to the specificity of girls' lives in international legal responses to gender dynamics of conflict. Ultimately, the article seeks – through case study analysis of international institutional activity on sexual violence against girl soldiers in conflict – to provide valuable new evidence as to practical implications of proliferating legal developments.

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83 Park, A. (2006). 'Other Inhumane Acts': Forced Marriage, Girl Soldiers and the Special Court for Sierra Leone. *Social and Legal Studies*, 15(3), 315-337, 323.

84 Tonheim, M. (2010). Where are the Research Gaps? Reviewing Literature on Former Child Soldiers' Reintegration in the African Context. In B. Maeland (Ed.), *Culture, Religion, and the Reintegration of Female Child Soldiers in Northern Uganda*. New York: Peter Lang.

85 Freeman, M. A., Chinkin, C., and Rudolf, B. (2012). *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*. Oxford and New York: Oxford University Press, 14 [footnotes omitted].

86 Beijing Platform for Action (n 25) passim.

87 See, for example, its 2010-2019 agenda, which includes *inter alia* violence against women and girls; rural women and girls; social protection for women and girls; <http://www.unwomen.org/en/csw>

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*The Prohibition of the Recruitment and Use of Child Soldiers*

The prohibition of the recruitment and use of child soldiers is clearly established under international humanitarian law, international criminal law and international human rights law. International humanitarian law (IHL) prohibits the recruitment as well as the participation of children in hostilities under Additional Protocols (APs) I and II.<sup>88</sup> This prohibition now constitutes customary IHL.<sup>89</sup> Further, the Rome Statute makes explicit the prohibition of the recruitment and use of child soldiers in international<sup>90</sup> and non-international<sup>91</sup> armed conflicts under international criminal law. In addition, the Security Council has developed a considerable body of thematic activity on children and armed conflict contributing *inter alia* to the recognition of the recruitment and use of child soldiers as a threat to international peace and security. Most significantly, Security Council Resolution 1539 requests the Secretary-General to annex to his annual reporting on children and armed conflict a list of parties that recruit or use children in violation of the international obligations applicable to them.<sup>92</sup> This listing can underpin *inter alia* the Security Council imposition of sanctions.<sup>93</sup>

Despite the consistency of the prohibition of the recruitment and use of child soldiers, there are considerable and legitimate questions about the extent to which this prohibition captures the most common activities of girl soldiers, given the heavily

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88 API requires parties to international conflicts to take 'all feasible measures' to ensure that children under fifteen years of age do not take a direct part in hostilities nor be recruited into the armed forces. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API) (8 June 1977) 1125 UNTS 3, article 77(2). APII specifically forbids the recruitment and participation of children under the age of fifteen in non-international armed conflicts. '[C]hildren who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.' Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII) (8 June 1977) 1125 UNTS 609, article 4(3)(c).

89 See further also International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 156. Recruitment of child soldiers. [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule136](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136)

90 Rome Statute (n 59), article 8(2)(b)(xxvi).

91 Rome Statute (n 59), article 8(2)(e)(vii).

92 United Nations Security Council Resolution 1539 (2004), paragraph 16.

93 *Ibid.*

gendered forms of child participation in armed groups.<sup>94</sup> For the purpose of understanding the regulatory legal framework, there are four pertinent types of child soldier activities and these are differently regulated under the different regimes. The categories of activities are (1) direct participation in combat and active military operations; (2) indirect participation, namely military activities linked to combat, such as scouting, spying, sabotage, use of children as decoys, couriers or military checkpoints, bringing supplies to the frontline; gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage; (3) support functions, such as food deliveries to an airbase or the use of domestic staff in an officer's accommodation, and (4) 'girls recruited for sexual purposes and forced marriage'.<sup>95</sup>

The Commentary on the APs acknowledges some ambiguity of the expression 'direct participation' in API's guarantee that 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.'<sup>96</sup> However, it appears that customary international humanitarian law prohibits 'participation in hostilities' encompassing both direct and indirect acts that affect the enemy forces.<sup>97</sup> An alternative approach towards interpreting the notion of 'direct/active participation' in hostilities in API is to refer to the *travaux preparatoires* of the International Criminal Court Statute, which recognises 'conscripting or enlisting children under the age of 15 and using them to participate actively in hostilities' as a war crime. The definition of 'participation' advanced in the *travaux* covers many activities and 'is therefore not limited to taking direct part in combat or deployment to

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94 Byron, C. (2012). Legal Redress for Children on the Front Line: The Invisibility of the Female Child. In C. M. Bailliet (Ed.), *Non-state Actors, Soft Law and Protective Regimes*. Cambridge and New York: Cambridge University Press; Quenivet, N. (2008). Girl Soldiers and Participating in Hostilities. *African Journal of International and Comparative Law*, 16, 219-235.

95 This language is taken from the Cape Town Principles and Best Practices, adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa. (1997). Retrieved from [https://www.unicef.org/emerg/files/Cape\\_Town\\_Principles\(1\).pdf](https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf)

96 International Committee of the Red Cross. (2016). *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd ed.), paragraph 1679.

97 The operation of a weapon and participation in combat obviously fall within the ambit of this definition. The ICRC has advanced the position that, since the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, indirect participation in international armed conflict should also be ruled out. See Quenivet (n 94), 228.

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the frontlines’; the activities of girls in military-related activities such as scouting, spying, sabotage, and the use of children as couriers fall within the remit of the proscription and those using them can be prosecuted for doing so. By contrast, according to the *travaux*, activities ‘unrelated to the hostilities such as food deliveries to an airbase [or] the use of domestic staff in an officer’s married accommodation’<sup>98</sup> would not qualify as participation in the hostilities.

In addition, the cognate question emerges of whether sexual abuse of girl soldiers by their own forces – what the Cape Town Principles addressing child soldiers refer to as ‘girls recruited for sexual purposes and forced marriage’<sup>99</sup> – can be understood to constitute direct or indirect participation. To the extent relevant soft law guides policy and programming for child soldiers, they adopt broad definitions. The 1997 Cape Town Principles, emerging from a UNICEF meeting of policy experts, use an encompassing definition. Notably, instead of defining participation in armed conflict, it focus on ‘child soldiers’, describing them as:

Any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.<sup>100</sup>

This definition embraces a broader interpretation than the provisions of international humanitarian, criminal and human rights law, as it covers many tasks that are related to the hostilities but that are not aiming at causing harm to the opponent, even indirectly. Further, the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007), which may more legitimately lay claim to ‘soft law’ status as the agreed outcome of a meeting of states, introduces the term ‘child associated with an armed force or armed group’:

A ‘child associated with an armed force or armed group’ refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual

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98 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act (14 April 1998) UN Doc. A/Conf.183/2/Add. 1, footnote 12.

99 Cape Town Principles (n 95).

100 Ibid.

purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.<sup>101</sup>

Nevertheless, this broad definition constitutes a weak norm, given its legal basis in 'soft law' consensus documents. Further, to the extent that the principles engage established legal categories, they reiterate existing criteria of direct and indirect participation. Thus, operative paragraph 6 of the Paris Principles specifically employs the expression 'used them to participate actively in hostilities,' attesting that participation must take an active form.<sup>102</sup>

Interestingly, the definition of child recruitment and use in the Security Council's thematic activities on children and armed conflict is apparently not limited to international humanitarian law or international criminal law. Rather, the definition of recruitment and use adopted by the Security Council Resolution 1539 refers to a broader legal regulatory frame than either IHL or International Criminal Law (ICL):

Requests the Secretary-General to attach to his report a list of parties to armed conflict that recruit or use children *in violation of the international obligations applicable to them*, in situations that are on the Security Council's agenda or that may be brought to the attention of the Security Council by the secretary-General, in accordance with Article 99 of the Charter of the United Nations, which in his opinion may threaten the maintenance of international peace and security;<sup>103</sup>

The very general definition offered in the Resolution 1539 arguably places greater emphasis on the operational activity of those empowered to monitor the resolution's compliance, as it would give rise to a de facto definition of child soldier recruitment and use. Looking across IHL, ICL and thematic activity of the UNSC, we see some significant doctrinal variation in the definition of child soldiers and prohibited activities.

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101 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, <https://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.

102 Quenivet (n 94).

103 United Nations Security Council Resolution 1539 (emphasis added).

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*The Prohibition of Sexual Violence against Civilians in Conflict*

The term ‘conflict-related sexual violence’ (CRSV) is increasingly popular in scholarship<sup>104</sup> and policy-making.<sup>105</sup> One broad definition of CRSV that is commonly utilised comes from the United Nations Secretary-General as ‘sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself’.<sup>106</sup> CRSV includes manifestations of violence that may reach the tactic of war threshold<sup>107</sup> as well as sexual violence against civilians within the wider context of the conflict. CRSV can be individual and collective, and the harms that ensue are physical, moral, emotional, social, immediate, and intergenerational.<sup>108</sup> Acts falling within the definition of CRSV include rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, and forced nudity.<sup>109</sup> This broad definition, however, is not strictly legal. It does not align with the regimes under scrutiny. As the section elucidates, the regimes differ in the acts that constitute sexual violence and in how the relationship to conflict is determined.

Under IHL, parties to conflict are bound by the interrelated core principles that are relevant to the conduct of any armed conflict, namely the obligation to distinguish between civilians and combatants and target only the latter. While civilians cannot be targeted, all harm to civilians is not prohibited. Rather such harm must accord with

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104 See especially Swaine (n 81).

105 See, for example, UN Women. (2010). *Addressing Conflict-related Sexual Violence: An Analytical Inventory of Peacekeeping Practice*; UN Department of Political Affairs. (2012). *Guidance for Mediators: Addressing Conflict-related Sexual Violence in Ceasefire and Peace Agreements*.

106 United Nations Secretary-General, Representative of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009) (24 November 2010) UN Doc. A/65/592-S/2010/604, paragraph 5.

107 Eriksson Baaz, M., and Stern, M. (2013). *Sexual Violence As A Weapon Of War? Perceptions, Prescriptions, Problems In The Congo And Beyond*. London and New York: Zed Books, 45-46.

108 See Representative of the Secretary-General (n 6), paragraphs 5, 8.5. See also United Nations Secretary-General, Conflict-Related Sexual Violence: Representative of the Secretary-General (13 January 2012) UN Doc. A/66/657-S/2012/33 (discussing implementation of United Nations initiatives and providing information on continuing violations).

109 United Nations Action Against Sexual Violence in Conflict. (2011). Analytical and Conceptual Framing of Conflict-Related Sexual Violence, <http://perma.cc/D97Z-YJDC>, 1.

principles of proportionality<sup>110</sup> and precaution in attack.<sup>111</sup> In addition, methods and means of combat should not cause 'unnecessary suffering'.<sup>112</sup> In terms of the regime's definition of sexual violence, critics argue that IHL does not prohibit sexual violence in a sufficiently robust manner, leaving the prohibition largely implied, rather than explicit.<sup>113</sup> Broadly speaking, rape is expressly prohibited,<sup>114</sup> while the prohibition of other forms of sexual violence is encompassed in less explicit provisions such as the prohibitions against cruel treatment and torture, outrages upon personal dignity, indecent assault and enforced prostitution, and those intended to ensure respect for persons and honour.<sup>115</sup> In contemporary IHL treaties, rape and other forms of sexual violence are prohibited in both international and non-international armed conflicts.<sup>116</sup> Two additional provisions protect specifically women 'against rape, enforced prostitution and any other form of indecent assault'<sup>117</sup> and children 'against any form of indecent assault'.<sup>118</sup>

In addition to establishing the presence of conflict, and the occurrence of sexual violence, a further critical element is required to amount to a violation of IHL. Even

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110 A party is required to forego any offensive where the incidental damage expected 'is excessive in relation to the concrete and direct military advantage anticipated'. See International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 14.

111. Ibid, Rule 97.

112 This principle of 'humanity' stipulates that civilians and those who are hors de combat must be treated humanely: any killing, torture, rape, mutilation, beatings, humiliation, and similar abuses are prohibited. In addition, methods or means of combat should not cause 'unnecessary suffering'. The International Court of Justice has defined unnecessary suffering as 'harm greater than that unavoidable to achieve legitimate military objectives'. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, paragraph 78.

113 See, for example, Gardam, J. (1993). The Law of Armed Conflict: A Gendered Regime? *Studies in Transnational Legal Policy*, 25, 171-201.

114 As early as the Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, article 44.

115 Gaggioli, G. (2014). Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law. *International Review of the Red Cross*, 96(894), 503-538, 511-517.

116 In international armed conflicts, Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (GCIII), article 14. The Fourth Geneva Convention is more explicit and provides that civilian 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'. GCIV, article 27. API provides that 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault', are 'prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents'. API (n 88), article 75(2)(b).

117 API, ibid, article 76(1)

118 Ibid, article 77(1).

when committed in times of armed conflict, sexual violence is not necessarily an IHL violation. The term ‘conflict-related sexual violence’ is not used in IHL treaties. Rather, the term conflict ‘nexus’ is used in IHL. This is a complex area, in which there has been significant (and ongoing) jurisprudential development,<sup>119</sup> sufficed to explain for the purpose of the paper by means of the following example:

In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a military barracks as a form of punishment – as he may have done already in peacetime – without this act having any link to the armed conflict situation, IHL would not apply to the act. On the other hand, in the same armed conflict, if the military commander rapes a person detained for reasons connected to the armed conflict, such an act clearly constitutes a violation of IHL (and human rights law). The nexus derives from a number of elements here: the identity of the perpetrator (a military commander), the identity of the victim (a person detained for reasons related to the armed conflict), and the context (situation of vulnerability of detainees to the Detaining Power).<sup>120</sup>

Under ICL, historically, while it has long been accepted that crimes of sexual violence are contrary to the laws of war<sup>121</sup> and customary international law, the foundational statutes remained silent on the status of rape as a war crime or a constitutive act of crimes against humanity. Nevertheless, the early jurisprudence of the ad hoc Tribunals determined these questions definitively. In a series of landmark judicial developments of international criminal law, rape was held to constitute a grave breach of the Geneva Conventions, constitutive of a crime against humanity and genocide.<sup>122</sup> The Rome Statute codified these developments and went beyond them by explicitly recognizing rape, sexual slavery, enforced prostitution, pregnancy and sterilization and other forms of sexual violence as crimes against humanity and as war crimes.<sup>123</sup>

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119 For an overview, see van der Wilt, H. (2012). War Crimes and the Requirement of a Nexus with an Armed Conflict. *Journal of International Criminal Justice*, 10(5), 1113–1128.

120 Gaggioli (n 115), 515.

121 Chinkin, C. (2009). Gender-related Violence and International Criminal Law and Jurisprudence. In A. Cassese (Ed.), *Oxford Companion to International Criminal Justice*. Oxford and New York: Oxford University Press, 76, confirmed by *Delalic and others* (IT-96-21) TJ (16 November 1998), paragraph 145.

122 For an overview of jurisprudential developments, see Gaggioli (n 115).

123 Rome Statute (n 59), articles 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi). Further, the forced marriage jurisprudence of the Special Court for Sierra Leone, a hybrid court with elements of domestic and international jurisdiction, in which the Prosecutor argued that the ‘bush wife’ phenomenon – the capture of women who were then ‘married’, forced to have sex with their abductors and to bear their children – was not adequately captured by offences such as rape or enslavement., leading to the later indictment of forced marriage as a crime against humanity, Consolidated indictments of AFRC and RUF, Special Court

ICL requires a conflict-nexus in order to establish that a war crime has occurred. The question of conflict nexus has been extensively litigated, but is defined to broad acceptance by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Kunarac* case. The Appeals Chamber confirmed that what distinguishes a war crime from, for example, a purely domestic criminal offence is the armed conflict 'environment' in which it is committed. The conflict must have been important to the perpetrator's 'ability', 'decision', 'manner' or 'purpose' to commit the crime. Ultimately, if the perpetrator 'acted in furtherance of or under the guise of the armed conflict', that would establish the necessary nexus.<sup>124</sup> The Appeals Chamber went on to identify a number of factors to determine whether or not an alleged offence is sufficiently related to the armed conflict to constitute a war crime. These factors included:

the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the crime is committed as part of or in the context of the perpetrator's official duties.<sup>125</sup>

Along the lines of the ad hoc tribunal case law, the ICC Elements of Crimes provide that for a war crime to exist, it must be committed 'in the context of and associated with' an armed conflict.<sup>126</sup> The wording 'in the context of' refers to the existence of an armed conflict, and 'associated with' refers to the nexus requirement. Conflict-related sexual violence must thus be committed by a person (whether combatant or civilian) in the context of and associated with an armed conflict in order to amount to a war crime under the Rome Statute. Ultimately, the determination is made on a case-by-case basis. It is clear that this conflict nexus requirement mitigates against the broad definition of 'conflict-related sexual violence' now prominent in relevant policy-making and

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for Sierra Leone, Case No. SCSL-2004-16-PT (under the rubric of 'other inhumane acts'). Special Court for Sierra Leone Statute, article 2(i). See further Gekker, E. (2014). Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How Katanga Utilises a Ten-Year-Old Rule but Overlooks New Jurisprudence. *Hastings Women's Law Journal* (Winter), 105-133.

124 ICTY, Prosecutor v. Dragoljub Kunarac and Others, Case No. IT-96-23and23/1 (Appeals Chamber), 12 June 2002, paragraph 58.

125 Ibid, paragraph 59.

126 See, for instance, International Criminal Court, Elements of Crimes, article 8(2)(a)(i)-1.

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advocated in much feminist literature. Indeed, this conflict nexus requirement has been a key line of feminist critique in international criminal law.<sup>127</sup>

The Security Council, also, has been prominent in advancing a norm prohibiting sexual violence in armed conflict. Resolution 1820 was adopted in 2008 and it marked the first time the Security Council noted that sanctions could be imposed on parties to an armed conflict in order to protect women from sexual violence. The Council denounced rape as a tactic of war used to intimidate, disperse, or forcibly relocate members of a community or ethnic group and expressed the possibility of imposing targeted sanctions against parties ‘who commit rape and other forms of sexual violence against women and girls in situations of armed conflict.’<sup>128</sup> The Security Council has not specifically defined sexual violence—it refers to the targeting of civilians, including women and children, for ‘rape and other acts of sexual violence’ or ‘sexual and gender-based violence.’ In practical terms, Resolution 1960 (2010) established standardised monitoring, analysis and reporting arrangements (MARA) to provide ‘systematic, timely, reliable, and objective information on conflict-related sexual violence to the Security Council’. MARA reporting informs the listing of parties to conflict credibly suspected of committing or being responsible for rape and other forms of conflict-related sexual violence in the UN Secretary-General’s report on sexual violence in armed conflict to the Security Council, which can in turn underpin *inter alia* the imposition of sanctions.<sup>129</sup>

The prohibition of the recruitment and use of child soldiers is clearly established under international humanitarian law, international criminal law and under relevant thematic activity by the UN Security Council. Likewise, sexual violence against civilians, in particular rape, is clearly prohibited across the three regimes.<sup>130</sup> Where these norms are less clear, however, is the combatant or civilian status of ‘girls recruited for sexual purposes and forced marriage’ and in the precise legal treatment of sexual violence

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127 See, for example, Swaine (n 81).

128 The language of United Nations Security Council Resolution 1820 (2008) was repeated in United Nations Security Council Resolution 1888 (2009), paragraph 19, United Nations Security Council Resolution 1960 (2010), 7; and United Nations Security Council Resolution 2106 (2013), 13.

129 United Nations Security Council Resolution 1820.

130 This literature and primary legal sources are too extensive to cite comprehensively, but see generally Gaggioli (n 115).

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perpetrated against child soldiers. As the remaining sections reveal, these definitional questions around the boundaries of the norm prohibiting the recruitment and use of child soldiers and the norm prohibiting sexual violence against civilians in armed conflict raise practical challenges for the institutions of international law charged with the implementation, monitoring and enforcement of these norms.

## **GROUNDING INTERNATIONAL NORMS: INTERNATIONAL INSTITUTIONAL ACTIVITY ON SEXUAL VIOLENCE AGAINST GIRL SOLDIERS IN THE DRC**

### *Sexual Violence and Girl Soldiers in the DRC*

The DRC has one of the highest rates of child soldiers in the world, with an estimated 30,000, constituting 12 per cent of the global total of child soldiers. Although there is abundant evidence that girls are recruited and used by armed groups in the DRC in very large numbers – girls are estimated to represent up to 40 per cent of these children<sup>131</sup> – many continue to be invisible. Indeed, the global literature on girl soldiers reveals that, until relatively recently, the term child soldier meant a 'boy soldier'.<sup>132</sup> In the DRC context, this underrepresentation of girls is due to a variety of reasons.<sup>133</sup> Girls are frequently considered by armed group commanders as dependents, as their roles in the group as 'wives' or concubines is not considered by their recruiters as making them eligible for formal reintegration processes, which is where most children are separated from armed groups and documented.<sup>134</sup> Therefore, the typically reduced visibility of girl soldiers can be attributed to the different and gendered roles they perform in armed groups. Whereas boys are more often engaged in direct combat and bodyguard duties

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131 MONUSCO. (2015). *Invisible Survivors: Girls in Armed Groups in the Democratic Republic of Congo from 2009 to 2015*. Retrieved from <https://monusco.unmissions.org/en/invisible-survivors-girls-armed-groups-democratic-republic-congo-2009-2015>.

132 Tonheim (n 84), 19. More recent reporting by MONUSCO estimates that between 30% to 40% of all children recruited to armed groups are girls, based on evidence from hundreds of witnesses interviewed. In 2009 alone the percentage of girls released from armed groups was 7% of the total, compared to 8% in 2014, indicating a small improvement over the reporting period. GoDRC and child protection partners should devise strategies to reach a target of at least 15% by the end of 2016. MONUSCO, *ibid*.

133 This discussion is taken from MONUSCO (n 131).

134 *Ibid*.

for commanders, girls are typically involved as domestic servants to individual commanders and responsible for food preparation for entire armed groups.<sup>135</sup> Further, there is widespread evidence of sexual violence and forced marriage between these girls and male soldiers.<sup>136</sup>

### *Institutional Activity under International Humanitarian Law*

The most commonly identified weakness of international humanitarian law concerns its institutional structures and enforcement procedures. Grounded in a principle of reciprocity between armed actors, the regime operates without an effective monitoring body or enforcement procedure. According to the Geneva Conventions and APs, three enforcement procedures attend international humanitarian law, namely ‘protecting powers’, international fact-finding commissions and prosecutions. Yet third states are always reluctant to become formally involved. The API establishes an ‘International Fact-Finding Commission’ which has to date never been activated.<sup>137</sup> Consequently, the International Committee of the Red Cross (ICRC) in practice plays a unique role in promoting compliance with IHL on the ground in conflict-affected settings, often with a large and well-resourced country presence.

The ICRC is a critical institutional actor for understanding the relationship between international gender equality norms and women’s and girls’ rights in conflict-settings. Its activities fall into three broad categories, all of which implicate the protection of gender equality norms in conflict. First, the ICRC is expressly authorised under IHL to provide humanitarian assistance to wounded and sick combatants and civilian populations, subject to the consent of the parties to the conflict.<sup>138</sup> Thus, while IHL

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135 Ibid.

136 Ibid.

137 API (n 88), article 90. Cassese, A. (2014). Current Challenges in International Humanitarian Law. In A. Clapham and P. Gaeta (Eds.) *The Oxford Handbook of International Law in Armed Conflict*. Oxford and New York: Oxford University Press, 13.

138 GCI, article 9. The same text is replicated across articles 9, 9, 9 and 10 of GCI, II, III and IV, respectively. Further, Common Article 3 provides that an ‘impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict’. Under API, the ICRC ‘may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the parties to the conflict’. See also International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 124B.

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imposes an obligations on parties to conflict concerning civilian access to humanitarian aid, in circumstances in which belligerent actors are failing to meet these obligations, the ICRC negotiates with the parties on matters relating to the supply of food for the civilian population: safe access to fields and crops, safe passage of food convoys, security of food assistance operations.<sup>139</sup> Second, the ICRC engages in protection activities, which is analogous to a monitoring role, but also involves direct representations to weapons bearers to encourage the cessation of named IHL violations.<sup>140</sup> The ICRC engages in a highly confidential dialogue with targets in an attempt to rectify violations of IHL. Third, the ICRC engages in IHL promotion activities. It issues public interpretations of the law and actively supports new rules in many areas. The ICRC thus regards itself as the 'promoter and guardian of international humanitarian law'.<sup>141</sup> The ICRC promotes IHL by educating state and non-state armed groups about implementing IHL through legislation, military manuals, and training.<sup>142</sup> In its education and training of participants in armed conflicts, the focus is on translating the norms of IHL (regardless of the state's ratification status or domestic law) into doctrine, operational policies, and rules of engagement. The ICRC thus grounds its mandate in the Geneva Conventions.

Across its roles, we can see evidence of institutional autonomy, control of expertise and a pedagogic role as a 'teacher' of norms in the ICRC's country office. Its presence in the Congo is long-standing, since 1978. Its mandate reflects the broader threefold ICRC mandate of assistance, protection and promotion. In terms of its control of expertise, the ICRC's more abstract doctrinal discussions of IHL maintain that domestic chores and sexual services of girl soldiers do not constitute 'participation' as prohibited under customary IHL.<sup>143</sup> The ICRC instead invokes the protections attached to civilians and the 'special care' afforded to children under IHL to underpin the prohibition of

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139 International Committee of the Red Cross (n 33), 85.

140 Ibid, 26.

141 Ratner, S. R. (2011). Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War. *European Journal of International Law*, 22(2), 459-506.

142 See further, Kellenberger, J. (2014). The Role of the International Committee of the Red Cross. In A. Clapham and P. Gaeta (Eds.) *The Oxford Handbook of Law in Armed Conflict*. Oxford and New York: Oxford University Press, 20-36.

143 International Committee of the Red Cross. (2011). *Guiding Principles for the Domestic Implementation of a Comprehensive System of Protection for Children Associated with Armed Forces or Armed Groups*.



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enslavement and sexual violence against civilian girls, as distinct from categorising girls subjected to this treatment within armed groups to be girl soldiers.<sup>144</sup>

In its country-specific activities in the DRC, the ICRC gives little express prominence to the relatively weak gender equality norms that address girl soldiers. From a review of published statements of the ICRC's activity in the DRC, it seems clear that gender-sensitivity on, in particular, child soldiers is not prioritised. Drawing on its annual reports, ICRC activities on child soldiers first emerged as constituent of its overall work on restoring family links impacted by the conflict – thus its assistance mandate – but with little clear evidence of gender-sensitivity. Much of the activity focused on unaccompanied children.<sup>145</sup> As the years unfolded, more dedicated activities around child soldier reintegration and preventing their re-mobilisation emerged, including direct representations to armed groups to prevent re-mobilisation.<sup>146</sup> Child soldiers frequently featured as subject of confidential representations to armed groups,<sup>147</sup> including representations to the national army, the FARDC.<sup>148</sup> However, nowhere do reports of this work indicate any deliberate gender-sensitivity in its child soldier activity. For example, the 2006 annual report is the first time that gender-disaggregated figures are provided on the number of unaccompanied minors registered by the delegation, but the number of former child soldiers is not gender-disaggregated.<sup>149</sup>

The ICRC has an express pedagogic role through its promotion activities. For example, the delegation established links with leaders of some armed groups in North and South Kivu, distributed to them educational materials aimed at ending sexual violence against

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144 Ibid. Nevertheless, in its policy prescriptions for the reintegration of former child soldiers, the ICRC adopts the broader category of CAAFAG, which clearly includes this latter group of activities and thereby evidencing norm reinforcement in a practical sense.

145 In 2001, the 'persisting problem' of child soldiers was expressly noted in an annual report, as an IHL violation, but also by way of disaggregating what number of unaccompanied children were former child soldiers. In 2001, the ICRC in cooperation with the national society registered its first group of 225 child soldiers who had been demobilised. International Committee of the Red Cross, *Annual Report 2001*, 77.

146 International Committee of the Red Cross, *Annual Report 2002*, 63.

147 International Committee of the Red Cross, *Annual Report 2003*, 57; International Committee of the Red Cross, *Annual Report 2006*, 87; International Committee of the Red Cross, *Annual Report 2009*, 122; International Committee of the Red Cross, *Annual Report 2015*, 135.

148 For example, International Committee of the Red Cross, *Annual Report 2006*, 87.

149 Ibid, 88.

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women, and conducted dedicated sessions on 'addressing sexual violence'.<sup>150</sup> Critically, its confidential engagements and public IHL promotion activities address state security forces, UN forces and non-state armed groups and militias about their obligations under IHL and their conduct in violation of IHL in respect of sexual violence and child soldiers. The confidential nature of these engagements means that their detail is unclear, beyond the broadest possible statement of, for example, number of educational seminars given to particular actors in a given year. Importantly, the reports strongly suggest that, in its engagement with armed actors – in particular non-state armed groups – the ICRC emphasises the 'main principles of IHL'<sup>151</sup> (most critically, the principle of distinction)<sup>152</sup> over precise detail (for example, whether domestic chores constitutes 'participation' in armed groups, or whether sexual violence against members of one's own forces can constitute a war crime). Thus, while its abstract statements of IHL observe formal distinctions between direct and indirect participation by girl soldiers, in its active teaching activities, considerably greater flexibility in the law is evident. This flexibility and 'pragmatism' has led some observers of the ICRC to observe that Geneva Law is as far from country office activities as the country office is from Geneva.<sup>153</sup>

Further, the ICRC is also a 'teacher of norms' in less overt ways. The ICRC is the international institution doing the difficult and essential work of engaging directly with 'weapons bearers' in pursuit of improved compliance with IHL. In terms of its protection mandate, the 2003 ICRC annual report is the first time sexual violence is mentioned as an IHL violation in the DRC, in the context of the East of the country,<sup>154</sup> leading to confidential representations to relevant authorities to reduce the incidence of rape.<sup>155</sup> The discursive and material strategies by which international institutions praise

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150 Ibid, 90.

151 International Committee of the Red Cross, *Annual Report 2009*, 124.

152 International Committee of the Red Cross, Public Statement 2008, to all belligerents to protect civilians, issued after renewed fighting in the Kivus. The *Annual Report 2008* noted that confidential dialogue 'was instrumental in ensuring safe access to conflict-affected civilians', International Committee of the Red Cross, *Annual Report 2008*, 100.

153 Forsythe, D. (2005). *The Humanitarians: The International Committee of the Red Cross*. Cambridge and New York: Cambridge University Press.

154 International Committee of the Red Cross, *Annual Report 2003*, 56.

155 International Committee of the Red Cross, *Annual Report 2006*, 87. For example, International Committee of the Red Cross, *Annual Report 2007*, 97: 'Dialogue was strengthened with armed groups

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and denounce, reward and sanction, certain behaviours are evident in the ICRC's protection activities. The ICRC makes confidential representations to weapons bearers regarding past or ongoing violations. The ICRC's confidential representations remain confidential unless the confidential dialogue is not improving the treatment of IHL violations, in which case the ICRC will engage with other actors, such as third-party governments, international organisations and NGOs, in order to cultivate other influences on conflict parties. Failing that, public criticism either of the quality of dialogue with a particular belligerent actor, or specifically naming IHL violations, is the last resort of the ICRC and only activated in a minority of situations.<sup>156</sup>

The focus on the institutional activities of those charged with monitoring and enforcing women's rights in armed conflict has brought useful insights from the case study of the ICRC in the DRC conflict. First, it is clear that the boundaries and limitations of the country delegations' activities are not necessarily determined by either its strict legal mandate or IHL more broadly, thus evidencing the organisation's significant institutional autonomy from its role as defined in the Geneva Conventions. The evidence is that strict IHL distinctions regarding definitions of 'participation' and various child soldier activities have limited impact on the ICRC's activities on the ground in their engagement with armed actors. Second, the relatively weak norms regarding gender-sensitivity in responding to child soldiers had little apparent impact on ICRC country activities. Third, in terms of its pedagogic role, the case study suggests that the ICRC dialogue with the state, non-state armed groups and local communities using 'humanitarian' language and projects is valuable currency for the realisation of gender equality and security on the ground.

### *Institutional Activity under International Criminal Law*

It is, at least in part, the weakness of the monitoring and enforcement procedures attached to international humanitarian law that has underpinned extensive feminist

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and FARDC, and allegations of IHL violations... including sexual violence made known to them so that they could bring such abuses to an end'.

156 International Committee of the Red Cross. (2005). Doctrine 15, Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence, *International Review of the Red Cross*, 87(858), 393-400.

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focus, engagement and legal development under international criminal law. International criminal law has offered a means to respond to widespread impunity for the most serious violations of international humanitarian law. Moreover, through the existence of formalised criminal tribunals, international criminal law has offered clear institutions to target advocacy and intervention. Feminist actors have frequently been to the forefront of calls for prosecutions for international crimes.<sup>157</sup> Thus a strong anti-impunity norm was given significant impetus with the entry into force of the Rome Statute establishing the International Criminal Court, though the boundaries of that norm continue to evolve.

The autonomy of the ICC is most apparent in the role of the Office of the Prosecutor (OTP). The OTP is formally independent. The Prosecutor has the authority to act *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.<sup>158</sup> Efforts to constrain this autonomy at the Rome Statute negotiations were largely unsuccessful, with the exception that the Security Council can by resolution defer an investigation. In addition, it can be argued that the Office of the Prosecutor plays a monitoring role through its mandate to consider all credible evidence of wrongdoing in order to determine whether authorisation should be sought from the Court to proceed to an investigation.<sup>159</sup> To this end, the Prosecutor is authorised to seek further information from states, UN organs, national and international non-governmental organisations and any other credible source.<sup>160</sup>

The 'complementary jurisdiction' of the ICC has heightened the role of the OTP in terms both of its control of expertise and its pedagogic function. The ICC's complementary jurisdiction over international crimes, including sexual violence in armed conflict and the recruitment and use of child soldiers, means that it can only exercise jurisdiction where the state party has been shown to be 'unwilling or unable' to conduct domestic prosecutions.<sup>161</sup> In practice, the Office of the Prosecutor operates

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157 See, for example, Copelon, R. (1994). Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law. *Hastings Women's Law Journal*, 5(2), 243-266.

158 Rome Statute (n 5959), article 13.

159 Ibid, article 15(2).

160 Ibid, article 15(2). See further International Criminal Court Office of the Prosecutor. (2013). *Policy Paper on Case Selection and Prioritisation*.

161 Rome Statute (n 59), article 17.

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quite publicly about the countries either being considered for preliminary examination and under examination, thereby prompting further scrutiny of those conflict-settings.<sup>162</sup>

The Informal Expert Paper on Complementarity advocates two underpinning principles, namely partnership (with national jurisdictions) and vigilance.<sup>163</sup> The principle of ‘vigilance’ speaks to the Office of the Prosecutor’s monitoring role:

The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should generally benefit from a presumption of bona fides and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the Prosecutor will take follow-up steps, leading if necessary to an exercise of jurisdiction.<sup>164</sup>

It is, in the first instance, the OTP who determines whether genuine efforts are being made by states to investigate alleged international crimes and to correspond with states as to further appropriate actions to satisfy the OTP’s requirements.

The OTP’s unique role and independence casts the office as critical to translating international anti-impunity norms into criminal accountability for specific violations of women’s and girls’ rights in conflict. The OTP’s high profile role therefore made the failure to specifically include charges for sexual violence in the first indictment issued by the Court in the *Lubanga* case all the more disappointing to gender justice advocates. Instead, the charges were confined to the recruitment and use of child soldiers. The indictment therefore marked an important development in the anti-impunity norm against the recruitment and use of child soldiers, as the first such indictment by any international criminal tribunal. Nevertheless, it meant that the question of whether the forced involvement of girls in domestic or sexual roles in armed groups constituted ‘participation’ for the purposes of prosecuting the recruitment and use of child soldiers became central to the case. The Court ultimately concluded that it did not, despite an intervention arguing the contrary from the UN Secretary-General’s Special Representative on Children in Armed Conflict. While hugely disappointing for the many victims failed by the prosecution’s strategy, the Court’s finding was broadly consistent with established categories of IHL and ICL at the time. It did pose a

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162 See, for example, the Colombian case: Urueña, R. (2017). Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003-2017. *American Journal of International Law*, 111(1), 104-125.

163 International Criminal Court Office of the Prosecutor. (2003). *Informal Expert Paper: The Principle of Complementarity in Practice* (2003), paragraph 1.

164 Ibid.

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concerted challenge, however, to many feminist advocates in international criminal law who relied on judicial autonomy – specifically, judicial development of the law – to criminalise new and newly-recognised gender harm.<sup>165</sup>

In the Court's second foray into the DRC conflict, namely the prosecution of Bosco Ntaganda, the Court had the opportunity to revisit the precedent established in *Lubanga*.<sup>166</sup> On this occasion, confirmed charges specifically included, *inter alia* war crimes of rape and sexual slavery against girl soldiers within Ntaganda's own ranks. Throughout the prosecution, from Confirmation of Charges to the Appeals Chamber, the Defence argued that the Court could not have jurisdiction over the crimes allegedly committed within Ntaganda's forces, because war crimes cannot be committed against combatants from the same armed forces as the perpetrator. Such crimes, the Defence argued, would come within the ambit of domestic criminal law and human rights, but were not covered by the war crimes prohibition.

Illustrating the unclear boundaries of the norms against sexual violence and against the recruitment and use of child soldiers, the Court addressed the question in different ways at each level. The Pre-Trial Chamber found that '[t]he sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time'.<sup>167</sup> Therefore, the Chamber concluded that children fighting in Ntaganda's forces who had been sexually abused remained under the protection of IHL and, consequently, it could exercise jurisdiction over those crimes.<sup>168</sup> Trial Chamber VI's decision took a rather different approach, by determining that the prohibition of rape had attained *jus cogens* status under international law. Consequently 'such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any

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165 See, for example, Chinkin (n 121), discussing the role of the Special Court for Sierra Leone jurisprudence.

166 On 9 June 2014, three pre-trial judges of the Court confirmed charges against Ntaganda and found substantial grounds to believe that military groups under Ntaganda's command committed war crimes in the eastern Democratic Republic of the Congo from 2002-2003. The 13 charges against Ntaganda include, *inter alia*: murder, attacking civilians, rape, sexual slavery of civilians and child soldiers under the age of fifteen years and using them to participate actively in hostilities, and five counts of crimes against humanity.

167 *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ICC-01/04-02/06, Pre Trial Chamber II, 9 June 2014, paragraph 79.

168 *Ibid*, paragraph 80.

legal status’,<sup>169</sup> and that it did not, therefore, need to determine whether the victims were ‘members’ of the armed forces at the relevant time.<sup>170</sup> This decision, however, was confined to the crime of rape and did not apply to other forms of sexual violence.

Ultimately, the approach of the Appeals Chamber was to prove even more dramatic in its implications. The Appeals Chamber unanimously confirmed the Trial Chamber’s judgment, however expanding the initial judgment in some significant respects. The Appeals Chamber determined that members of an armed force or group are not categorically excluded from protections against the war crime of rape and sexual slavery<sup>171</sup> when committed by members of the same armed force or group. Nevertheless, it must be established that the conduct in question ‘took place in the context of and was associated with an armed conflict’ of either international or non-international character. ‘It is this nexus requirement that sufficiently and appropriately delineates war crimes from ordinary crimes.’<sup>172</sup> Therefore, according to the Court, the victims of war crimes of rape and sexual slavery need not be ‘protected persons’ (i.e. civilians) under IHL.<sup>173</sup> On this basis, the Appeals Chamber concluded, the question of child soldiers’ membership of the group while victims of war crimes was now moot.<sup>174</sup>

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169 *Prosecutor v. Bosco Ntaganda*, Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06, Trial Chamber VI, 9 October 2015, paragraph 51.

170 *Ibid*, paragraphs 52-53.

171 Under Rome Statute (n 59), article 8(2)(b)(xii) and (2)(e)(vi).

172 *Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, ICC-01/04-02/06 OA5, Appeals Chamber, 15 June 2017, paragraph 2.

173 *Ibid*, paragraph 51.

174 *Ibid*, paragraph 69. The Appeals Chamber then went onto consider whether status requirements exist under ‘the established framework of international law’: paragraph 56. They concluded that, while there was no precedent for applying grave breaches scheme to victims of own forces, there was no reason it is precluded: paragraph 60. The Appeals Chamber then expressly departed from the precedent of Special Court for Sierra Leone that ‘the law of international armed conflict never intended to criminalise acts of violence’ against own forces: paragraph 61. In conclusion, the Appeals Chamber found no reason to ‘introduce’ status requirements to article 8(2)(b)(xxii) and (e)(vi) of the Statute on the basis of the ‘established framework of international law’: paragraph 66. ‘The Appeals Chamber appreciates the seemingly unprecedented nature of this conclusion’ (paragraph 67).

The Appeals Chamber emphasises in this context that Elements of Crime for each war crime contains an express nexus requirement which must be established in each particular instance. Therefore, in the Appeals Chamber view, it is the nexus requirement and not the status requirement that sufficiently distinguishes war crimes from ‘ordinary’ crimes. [The nexus requirement would] prevent undue expansion of the reach of the law of war crimes. (paragraph 68)

At one level, the extraordinary decision of the Appeals Chamber, in effectively upending the distinction between combatants and civilians in cases of sexual violence connected to conflict, is simply yet another example – albeit dramatic – of judicial development of international criminal law. To draw on Krook and True's analysis, it constitutes an example of dynamic norms that evolve in response to the external normative environment. For those primarily concerned with securing criminal accountability for sexual violence, the Appeals Chamber made a positive step by convicting Ntaganda for all crimes of sexual violence against members of his own forces.<sup>175</sup> In this vein, Rosemary Grey opined after the Appeals Chamber decision:

It is a sign of the gender blindness of IHL and ICL that until now, it was not clear whether the sexual abuse of children by members of their 'own' armed group can, in fact, be a war crime.

By answering that question in the affirmative, the ICC Appeals Chamber has made an enormously important contribution to international criminal law.<sup>176</sup>

At another level, however, in a litany of contested jurisprudence, the decision of the Appeals Chamber in *Ntaganda* stands out as the most controversial. Instead of being the primary vehicle for enforcing IHL, ICL now stood to challenge its key tenets. Throughout its decision in *Ntaganda*, the Appeals Chamber inaugurated a potentially very significant norm conflict that would ultimately lead others to question both the ICC's control of expertise and its pedagogic role towards state parties. IHL lawyers responded with grave concern. For example, Kevin Jon Heller admonished the Court for its 'legally indefensible' conclusion that risked 'delegitimising both the Court and the law of war crimes itself'.<sup>177</sup> Implications of the judgment include that, under the Rome Statute, raping members of own armed forces is a war crime but murdering them is not. In addition, as not all forms of sexual violence are prohibited under *jus cogens*, according to Appeals Chamber logic they would not be a war crime if committed

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<sup>175</sup> See, for example, Deutch, S. T. (2016). Putting the Spotlight on the Terminator: How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence during Conflict. *William and Mary Journal of Women and Law*, 22, 655-688, 685.

<sup>176</sup> Grey, R. (2017). ICC Appeals Chamber issues 'unprecedented' decision on war crimes of rape and sexual slavery. 14 June <https://ilg2.org/2017/06/14/icc-appeals-chamber-issues-unprecedented-decision-on-war-crimes-of-rape-and-sexual-slavery/>

<sup>177</sup> Heller, K. J. (2017). ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL. *Opinio Juris*, 15 June <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>



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against own forces.<sup>178</sup> Heller concluded that, not only did the International Criminal Court get it wrong again, but also the decision risked undermining the very fabric of international humanitarian law.<sup>179</sup>

This sort of norm conflict is unlikely to enhance understanding or compliance with the core IHL principle of distinction between civilians and combatants and the obligation not to target civilians. From the viewpoint of prosecuting individuals who recruit and use children in hostilities, broadening the threshold of ‘participation’ is positive. However, under IHL, those people (including children) who meet the criteria for direct participation may be attacked for the duration of that participation.<sup>180</sup> If the Court’s understanding of ‘active/direct’ participation under the Rome Statute is overly broad, the protection available to girls associated with armed groups *as civilians* narrows accordingly. Definitional problems between IHL and ICL create unnecessary ambiguity as to the relationship between the Court’s understanding of the active/direct concepts under the Rome Statute and treaty provisions of IHL. The result is that targeting a civilian engaged in scouting, sabotage or guarding military objectives (among other things) would be illegal under the Rome Statute but permitted under IHL. Uncertainty as to which regime might govern the action of parties to a conflict creates greater potential for impunity and greater likelihood for tensions between the pedagogic activities of institutions under IHL and ICL. The potential for uneven gender outcomes is clear.

### *Institutional Activity under the United Nations Security Council*

In institutional terms, the comparative advantage of the Security Council in the protection of gender equality norms in conflict lies squarely in its unique enforcement authority. Under the UN Charter, the Security Council has a range of robust responses it can engage to threats to international peace and security, up to and including the use

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178 Diab, N.I. @NaderiskDiab ‘also not all forms of sexual violence are jus cogens so according to AC logic they would not be a war crime.’ 16 June 2017, 9.17AM. Tweet.

179 Heller (n 177).

180 Beringola, A. M. (2016). Ensuring Protection of Child Soldiers from Sexual Violence: Relevance of the Ntaganda Decision on the Confirmation of Charges in Narrowing this Gap. *Amsterdam Law Forum*, 8(2), 58-68, 62.

of force.<sup>181</sup> Since the emergence of the Children and Armed Conflict and the Women, Peace and Security thematic agendas at the Security Council in 1999 and 2000, respectively, there has been considerable activity to improve alignment between gender equality norms in conflict and the Security Council's activation of enforcement measures. Efforts towards norm alignment have manifested clearly in the mandates of peacekeeping missions, in the imposition and monitoring of sanctions, and in the broader role and significance of mechanisms to 'list' perpetrators of sexual violence in armed conflict and violators of children's rights in armed conflict in relevant annual reports of the Secretary-General to the Security Council. The listing procedure operates with considerable autonomy from state interests, while the direct interaction with conflict parties through monitoring and agreeing action plans involves a direct pedagogic role.

Resolution 1612 (2005) established a monitoring and reporting mechanism (MRM) to monitor the recruitment and use of child soldiers<sup>182</sup> (the so-called 'listing' mechanism, whereby known perpetrators of child soldier recruitment and use are listed in the annex to the Secretary General's annual report on Children and Armed Conflict). Resolution 1612 also established a Working Group on Children and Armed Conflict to review situations on the Secretary-General's annexes, assess progress made in action plans and make specific recommendations to the Council and other relevant bodies for action.<sup>183</sup> The final critical expansion of monitoring activities under the Children and Armed Conflict Agenda came in Resolution 1998 in 2011, which added five other grave violations of children's rights in armed conflict to inform the Secretary-General's listing activities, namely: killing and maiming, sexual violence, abductions and forced displacement, denial of humanitarian access, and attacks against schools and hospitals.<sup>184</sup> The relative autonomy of these listing procedures is evidenced in, for example, the inclusion of the UK – a Security Council permanent member – in the 2012

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181 For Security Council powers, see Charter of the United Nations (24 October 1945) 1 UNTS XVI, Chapter VI and Chapter VII.

182 United Nations Security Council Resolution 1612 (2005), paragraph 2.

183 Ibid, paragraph 8.

184 United Nations Security Council Resolution 1539 (2004).

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report and the listing of post-demobilisation criminal gangs in Colombia, against the express opposition of the Colombian government.<sup>185</sup>

The Secretary-General's reports and listings that address *inter alia* the DRC suggest a definition of child soldier recruitment and use that includes all of the following elements (1) direct participation in combat;<sup>186</sup> (2) indirect participation, namely military activities linked to combat, such as scouting, spying, sabotage, use of children as decoys, couriers or military checkpoints, bringing supplies to the front line, gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage;<sup>187</sup> (3) support functions, such as food deliveries to an airbase or the use of domestic staff in an officer's accommodation,<sup>188</sup> and (4) 'girls recruited for sexual purposes and forced marriage',<sup>189</sup> though inconsistently so. While the listing procedure therefore demonstrates the institution's control of expertise, the Security Council has nevertheless been criticised for using an unclear and inconsistent definition of recruitment and use of child soldiers to inform the 'listing' mechanism.<sup>190</sup> Questions are raised therefore as to the clarity of the norms being 'taught' through this process.

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185 See further O'Rourke, C. (2019). *Women's Rights in Armed Conflict under International Law*. Cambridge and New York: Cambridge University Press.

186 See, for example, United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2006/389; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2007/391; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2010/369; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2014/453.

187 See, for example, United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2006/389; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2010/369; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2014/453.

188 See, for example, United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2010/369; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2014/453.

189 See, for example, Report of the UN Special Representative of the Secretary General on Children and Armed Conflict, UN Doc. S/2006/389; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2007/391; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2008/693; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2010/369; United Nations Secretary-General, Representative of the Secretary-General on Children and Armed Conflict, UN Doc. S/2014/453.

190 Waschefort, G. (2015). *International Law and Child Soldiers*. Oxford and Portland: Hart Publishing, 162.

To illustrate, it is unclear from the listing of DRC parties to conflict whether sexual violence against girl soldiers is to be treated as a grave violation of sexual violence against children or a grave violation as the recruitment and use of child soldiers. This has practical implications as, to date, almost all of the action plans have been related to stopping recruitment and use of children as soldiers, which was the only trigger for getting on the Secretary-General's Annexes until 2009. There have been no action plans on stopping sexual violence against children, although the Afghanistan action plan on stopping recruitment includes an annex on sexual violence, and the DRC action plan on stopping recruitment includes references to sexual violence.<sup>191</sup> The substance and precise contours of the norms being 'taught' are therefore unclear and potentially problematic.

In terms of the Security Council activities on Children and Armed Conflict, norm incoherence also carries practical consequences for the mandate of UN forces in the DRC. Most significantly, Resolution 2098 (2013) established the 'Intervention Brigade' to 'neutralise' listed armed groups and to reduce the threat of sexual and gender-based violence and child soldier recruitment and use posed by armed groups.<sup>192</sup> This move by the Security Council thereby extended the peacekeeping mandate to include an offensive military component and was without precedent. While this new departure for UN peacekeeping was avowedly taken on in the pursuit of civilian protection, including the rights of women and girls, this active combat role for the UN presents acute challenges to its thematic agendas and internal norm coherence. Active combat increases the likelihood of UN forces engaging in hostilities with forces that contain child soldiers. Once a child engages in hostilities, she or he is targetable by opposition forces, as is the case with any other soldier or fighter.<sup>193</sup> In their terms of engagement, it is unclear whether UN forces adopt the narrower IHL definition of 'active/direct participation' or the Security Council's apparently (though inconsistently) broader definition in order to determine whether girls recruited for

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191 Thompson, S. K. (2014). Children and Armed Conflict. In J. Genser and B. Stagno Ugarte (Eds.), *The United Nations Security Council in an Age of Human Rights*. Cambridge and New York: Cambridge University Press, 108.

192 United Nations Security Council Resolution 2098 (2013), paragraph 9.

193 Waschefort (n 190), 194.

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sexual purposes and forced marriage' are legitimate targets. The norm inconsistencies may already carry very grave consequences indeed.

## CONCLUSION

Fragmentation is a pressing concern in international legal scholarship. The specific gender implications of fragmentation have, however, been unexamined to date. Normative and legal developments in the protection of gender equality in conflict have proliferated in recent decades across diverse regimes of public international law. While celebrated for bringing political priority and the potential of legal enforcement to the rights of women and girls in conflict, the ultimate impact of such norms on domestic conflict-affected settings is unclear. This article has sought to redress this gap in two distinct ways. First, the article revealed international institutions as key actors in the translation of fragmented gender equality norms into practice on the ground in conflict-affected settings due to their institutional autonomy, control of expertise and pedagogic function. Second, through a case study of international institutional activity to prohibit sexual violence against girl soldiers in the DRC, the article revealed the role of international institutions not only in implementing international norms, but in fact in constituting them – often in a conflicting manner – through their operations.

The extent to which the institutions examined in fact demonstrated autonomy, control of expertise and pedagogic function varied between institutions. The ICRC is the autonomous institution and teacher of norms *par excellence*. The ICC's autonomy and control of expertise appeared, by contrast, more circumscribed and more vulnerable to challenge, in particular where its control of expertise seemed unclear and unconvincing. Thus, ostensible alignment between norms and institutional activities appears important for institutions to maintain their significance. Finally, for the Security Council, institutional autonomy was more obvious in its pedagogic function in teaching norms to states subject to monitoring than in its internal activities.

Ultimately, the findings confirm the broad thesis that institutions are not just implementers of international norms, but in fact constitute the substance of norms through their activities, sometimes in contradictory ways. Therefore international institutions operating in conflict-affected settings are an important focus of empirical

study, especially in order to understand the relationship between international norms and institutional practices in conflict-affected settings.