

# INTERNATIONAL LAW, DISARMAMENT, WOMEN AND HUMAN RIGHTS

AN OUTCOME DOCUMENT OF AN EXPERT MEETING ORGANIZED BY WOMEN'S  
INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM

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Prepared

by

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Reaching Critical Will

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## LIST OF ACRONYMS AND ABBREVIATIONS

ATT	Arms Trade Treaty
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social, and Cultural Rights
CTBT	Comprehensive Nuclear-Test-Ban Treaty
ECHR	European Court of Human Rights
HRC	Human Rights Council
IACHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OHCHR	Office of the High Commissioner on Human Rights
R2P	Responsibility to protect
SALW	Small Arms and Light Weapons
UNODA	United Nations Office for Disarmament Affairs
UNSC	United Nations Security Council
UPR	Universal Periodic Review of the Human Rights Council
VCLT	Vienna Convention on the Law of Treaties

## EXECUTIVE SUMMARY

With generous support from the Norwegian government, the Women's International League for Peace and Freedom (WILPF) invited experts to Geneva to meet and discuss convergence in international law, with a particular focus on human rights, international humanitarian law, and disarmament. The seminar was convened on December 1<sup>st</sup> and 2<sup>nd</sup> 2011. The purpose was to examine: how, if, and in what circumstances the different disciplines of international law complement, intersect and can be concurrently invoked in advancing human rights, international humanitarian law, and disarmament with the Women, Peace, and Security agenda. To that end, experts from different specializations: human rights, international humanitarian law, and disarmament, as well as from international criminal law, and environmental law, were presented with an overview of the application of each discipline and asked to critique it from their own specialist perspective. The conference also sought to ensure that gender was factored into the discussions in each area.

The discussions themselves illustrate the problems faced when trying to scrutinise law out of context. There were inevitable forays into policy, into the political reality of disarmament, of the economic arguments made by States for continuing with the production and sale of arms, and of constraints that States would prefer in the application of their human rights obligations. As law does not exist in a vacuum, such discussions were necessary, but have not been set out in the outcome document which we have sought to keep as close as possible to the legal discussion and analysis that occurred.

This outcome document reflects what WILPF as organizer concluded from the conference and does not reflect the position of all participants.

### Conclusions and Recommendations

In general terms, the experts found that in some areas there has already been significant convergence with a trend towards greater coherence. Many obstacles exist, including the obvious policy perspectives, and indeed the desirability of collapsing legal regimes, which have specific intent into other disciplines where there could be outcomes that were not foreseen by the drafters or signatories.

Despite those reservations, there was general agreement that there is no real legal impediment to making arguments that would use law to better describe the reality of the modern world, from the prevention of conflict to the protection of the planet. The area of law seen as crucial to bringing the strands together was that of human rights, and how it could be invoked in those mechanisms, predominantly within the UN, which have been established to ensure compliance with treaties, conventions, international criminal law *et al.* This compliance is conducted variously through reporting, monitoring, adjudication and normative framework development. As it is within these bodies that theories of convergence should be advocated, there is a clear need to understand their respective roles and the connections between them.

Specific examples of how to affect this change appear in this document, such as bringing the issue of military expenditures into reports before human rights treaty bodies, particularly CEDAW, when a discriminatory impact against women can be shown. The concluding observations from treaty bodies are included in the compilation reports for the Human Rights Council to examine under the Universal Periodic Review process. The HRC has to ensure the mainstreaming of human rights into the work of the United Nations system. Their resolutions and recommendations should be referred to in reports to the General Assembly's First Committee on International Security and Disarmament. If such strategic legal submissions were put forward, coupled with advocacy at the national and international levels, it could gradually assist in creating legal coherence, and provide clarity to the nature of obligation and

the accountability which follows. NGOs and actors making submissions should ensure gender analysis at all stages, the provision of which in interventions would be of great assistance.

There is also a need for greater analysis of how law institutionalises gender roles and the approaches that should be taken to end the ensuing discrimination.

### **Next Steps**

This conference has provided WILPF with a basis for future work: we will use the document to advance understanding of law amongst our sections and with partner organizations and institutions. To this end, we will produce short versions of each section with a guide of legal frameworks and where and how to use them. There will be continued engagement with academics and practitioners to identify opportunities for advocacy and to develop strategy.



Madeleine Rees

Secretary-General

## DAY ONE

### BACKGROUND: Interplay between Different Areas of International Law

*Discussant: Vera Gowland*

The international community has witnessed a reflection of the globalization process in international law – both a compartmentalization/fragmentation of areas of international law and a paradoxical movement towards convergence<sup>1</sup>.

#### 1) On Fragmentation

Some of the challenges to coherence in international law come from:

- **Already existing specialization:** there is a high degree of specialization in some areas of international law, which has resulted in the development of self-contained regimes. Some examples of such sectors are trade, health and environment. These regimes not only contain their own secondary rules of state responsibility, but also special techniques of interpretation and administration. A good example of this is the World Trade Organization;
- **Diversification of formal techniques of multilateral treaty-making:** both in the forms that international agreements are taking and the changes in the importance and nature of State consent. When interpreting the formation of international customary law, tribunals no longer rely exclusively on state practice, but also look at the behaviour of the international community as a whole, including that of international organizations and the standard-setting activities of NGOs;
- **Increased regionalization and hybrid methods:** of law-making (particularly in environmental law) challenge procedural or institutional unity in the interpretation of international law;
- **Diversification of actors participating in the law-making process:** NGOs, global networks, private associations, and other experts are increasingly shaping international law-making. Furthermore, the private sector continues to expand its involvement in areas traditionally under State responsibility, such as the management of prisons, immigration, and the conduct of war.

The International Law Commission (ILC) Study Group on Fragmentation of International Law<sup>2</sup> has addressed the question of conflicting norms and devised a set of rules inspired by the VCLT. These resulted in a formal system of norm conflict resolution (weighing status or hierarchy, specificity, temporality, and *lex posteriore*). However, these rules are reductionist as they are exclusionary and do not take into account the growing trend of permeability between different fields of law and complementing regimes. Apart from the harmonizing role of interpretation under Article 31(3)(c), they are not particularly relevant in determining the incremental or complementary nature of norms.

#### 2) On Convergence

It is no longer possible to view areas of international law as separate from one another. The international community has seen the construction of a process, which has led to the creation of the domain of “public interest”. The emergence of international public policy acknowledges that there are certain principles and norms (*jus cogens, erga omnes*), which reflect certain interests and values of the international community as a whole.

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<sup>1</sup> Dr Gowland’s paper <http://clp.oxfordjournals.org/content/63/1/597.extract>

<sup>2</sup> <http://untreaty.un.org/ilc/ilcintro.htm>

## **Convergence of International Human Rights Law (IHRL) and International Humanitarian Law (IHL)**

There is no strict compartmentalization between IHRL and IHL.

- The International Court of Justice (ICJ) has tried on several occasions to articulate their interrelation. Unfortunately, in the Nuclear Weapons Case<sup>3</sup>, in the context of the legality of nuclear weapons, the ICJ disregards human rights law altogether. In doing so, it overlooked the notion of ‘arbitrary’ deprivation of life under the Covenant given the evolving positive obligation on the part of States to preserve it. This includes the duty of States to prevent war. Considering the right to life in such positive terms would have introduced the *jus ad bellum* consideration in determining what qualifies as ‘arbitrary killing’ in times of armed conflict.

Yet, there are other developments that point towards convergence:

- The European Court of Human Rights (ECHR) has upheld the obligations of the UK in the occupation of Iraq, deciding that IHRL applies extra-territorially in circumstances of occupation.

## **Convergence of Collective Security and Human Rights**

- The UN Security Council (UNSC) has linked Article 39 of the Charter, the “threat to international peace and security,” to State breaches of human rights and humanitarian law, thus broadening the notion of ‘threat to the peace’ beyond that of State security;
- The UNSC taking on a ‘legislative mode’: UNSCR 1820<sup>4</sup> has contributed to the protection of women and children in armed conflict;
- The creation of international criminal tribunals has contributed to the development of case law in international criminal law;
- The UNSC has responded to human rights and protection concerns by introducing some reform of its sanctions systems, which have security as their original objective.

## **Linkages between Nuclear Weapons and Human Rights**

Public discourse has established several links between nuclear weapons and human rights:

- The legal use of weapons of mass destruction (not only nuclear weapons) contravenes the principle of proportionality and undue harm, and constitutes a crime against humanity;
- Article 13 of the draft American Declaration on the Rights of Indigenous Peoples<sup>5</sup> includes a reference to the effect of weapons in sub-section 6 and declares that indigenous peoples have the right to a safe and healthy environment;
- There is a clear link between the right to health and nuclear weapons, despite the failure of the ICJ to consider the Request for an Advisory Opinion from WHO<sup>6</sup>.

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<sup>3</sup> <http://www.icj-cij.org/docket/files/95/7495.pdf>

<sup>4</sup> <http://www.state.gov/documents/organization/106577.pdf>

<sup>5</sup> <http://www1.umn.edu/humanrts/instate/indigenusdecl.html>

<sup>6</sup> <http://www.icj-cij.org/docket/files/93/7648.pdf>

## THEME 1: The Disarmament Framework

### **Introductory Discussion: Overview of Disarmament Regulatory Framework**

*Discussant: John Burroughs*

#### **General and Complete Disarmament**

The call for “general and complete disarmament” has a long history. In the 1950s the proposed treaty was intended to include:

- the limitation and reduction of armed forces and conventional armaments;
- the prohibition of nuclear weapons and weapons of mass destruction of every type; and
- the establishment of effective control through an international control organ. See General Assembly Resolution 808 (IX) A (1954)<sup>7</sup>.

At the time, there was also a general conception of the creation of an international agency on disarmament that would incorporate all the different elements now distributed among different agencies and agendas. Regarding the limitation of armed forces and conventional arms, the underlying objective of the UN during its formative period was for a gradual reduction in military capacity such that there would be no offensive forces apart from those needed for defence, with a transition to UN-controlled forces maintaining international peace and security.

These aims were not fulfilled. Instead, States have negotiated separate conventions on the prohibition and elimination of specific types of weapons, notably biological weapons, chemical weapons, antipersonnel landmines, and cluster munitions. Only in the case of chemical weapons was there an establishment of an implementing agency.

Under the rubric of “general and complete disarmament” the First Committee of the UN General Assembly discusses these matters on a yearly basis.

#### **Weapons of Mass Destruction**

##### **1972 Biological and Toxin Weapons Convention (BTWC)**

This widely ratified agreement establishes the rule of non-possession of biological weapons and solidifies the existing rule of non-use. The agreement itself has essentially no verification or monitoring mechanisms, providing only that states parties may request the Security Council to undertake investigation of alleged violations. A small implementation support unit was created in 2006, but has no authority to assess or enforce compliance.

##### **1994 Chemical Weapons Convention (CWC)**

This widely ratified agreement prohibiting and eliminating chemical weapons is the most far-reaching multilateral disarmament treaty ever negotiated. It requires states to make declarations regarding the destruction of the weapons and conversion or dismantling of facilities. It establishes an implementing agency, the Organisation for the Prohibition of Chemical Weapons (OPCW), which carries out monitoring and verification tasks. Based on reports, an Executive Council of states parties makes determinations concerning compliance. The Conference of States Parties is empowered to take collective enforcement measures, such as economic sanctions. In cases of particular gravity, the Conference is required to refer the matter to the UN General Assembly and Security Council.

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<sup>7</sup> <http://daccess-ods.un.org/TMP/8569595.htmlv>.

## **Nuclear Weapons Agreements**

### **1968 Nuclear Non-Proliferation Treaty (NPT)**

Written mainly by the United States and Russia in the 1960s, the NPT is a treaty aimed at stopping the spread of nuclear weapons. It contains a very specific, mandatory obligation not to acquire nuclear weapons, and is monitored and verified by the International Atomic Energy Agency (IAEA).

The treaty also includes an obligation to “pursue negotiations in good faith” on nuclear disarmament (Article VI). However, there is no monitoring of disarmament by an international agency, and no timelines for the conduct or conclusion of nuclear disarmament negotiations. Even with respect to non-proliferation, the NPT itself has limited powers. The IAEA monitors implementation of safeguarding agreements, and in cases of non-compliance, implicating issues of international peace and security, refers the matter to the UN Security Council. Despite the safeguard system for non-nuclear weapon states, NPT States Parties are not empowered by the treaty to assess compliance or undertake enforcement or refer matters to the UN Security Council, or General Assembly. There is no Executive Council or standing secretariat. There are five-year Review Conferences. However, historically they have neither assessed disarmament or non-proliferation compliance, nor have they taken or recommended enforcement measures. Review Conferences have served as forums for development of norms and articulation of commitments under the treaty.

In short, NPT states parties have very restricted means and practices for ensuring compliance, unlike CWC States Parties. The real action regarding non-proliferation takes place in the IAEA, through its Board of Governors and in the Security Council. As to disarmament, there is nothing in place except for an important forum – the Review Conferences – regarding securing commitments. Nuclear-armed states outside the NPT – India, Israel, Pakistan – are not parties to those commitments.

### **Regional Nuclear Weapon Free Zone Agreements (NWFZs)**

NWFZs are in effect in Latin America, South Pacific, Southeast Asia, Africa, and Central Asia. These treaties reinforce the NPT obligation of non-acquisition of nuclear weapons. They severely limit, but do not absolutely prohibit, the deployment of nuclear weapons by outside powers in the region. Implementation is monitored by means of IAEA safeguards with very modest governance/administrative arrangements; there is a small administrative entity for Latin America, another is being created for Africa.

### **US-Russian Nuclear Arms Control Agreements**

Negotiated nuclear arms reductions so far have exclusively involved the US and Russia/Former Soviet Union, without any international/multilateral involvement.

### **1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT)**

This treaty is not yet in force, but has developed a norm against testing. Only the Democratic People’s Republic of Korea (DPRK) has tested a nuclear explosive device since the 1998 India/Pakistan tests. However, the CTBT does not prohibit computer-based or subcritical testing, still conducted by the US and the UK. The CTBT does have a provisionally operating implementing agency with a monitoring capacity comparable in scope and nature to those of the Chemical Weapons Convention.

## **Conventional Weapons and Arms Trade**

In the post-Cold War era, the international community has seen a few treaties that are compatible with a general and complete disarmament approach. However, rather than emphasizing state security and limitation of offense, as seen by the UN General Assembly (UNGA) in the 1950s, the emphasis has been on prevention of harm to civilians. The antipersonnel landmines and cluster munitions agreements break away from the Convention on Certain Conventional Weapons, by banning possession and use of landmines and cluster munitions during and after combat. They also provide for remedial provisions, such as clearance of mines and cluster munitions.

### **1997 Mine Ban Treaty**

The Mine Ban Treaty is widely ratified, though not by the principal producers whose militaries consider landmines an essential defensive weapon. It calls for non-use and non-possession of anti-personnel mines, and the clearance of land mines. It is the first treaty to address victim assistance – rehabilitation and reintegration. Regarding compliance, its approach is one of consultation. States Parties can authorize a fact-finding mission. Since there is no implementing agency, monitoring has been taken up by civil society.

### **2008 Convention on Cluster Munitions (CCM)**

As of 2011, the CCM has 61 States Parties and 108 signatories; and reflects the common pattern of non-participation of major users and producers. It is similar in design to the Mine Ban Treaty and calls for non-use and non-possession of cluster munitions, and the clearance of remnants. It also provides for victim assistance. Regarding compliance, the approach is one of consultation. However, there is no explicit provision for authorization of a fact-finding mission. It contains no reference to UN bodies or an implementing agency.

### **Arms Trade Treaty, now under negotiation**

This agreement would regulate trade in conventional arms, probably including small arms, light weapons, and it is hoped will include ammunition. One of the main goals of this treaty is to prevent arms transfers to unauthorized actors, or violation of human rights or international humanitarian law.

### **UN Programme of Action on Illicit Trade in Small Arms and Light Weapons**

This is an on-going process with biennial review meetings, which has stimulated national and regional measures to prevent the massive dispersion of small arms into conflict areas and possession thereof by unauthorized actors. The UN Programme of Action is not legally binding and therefore has faced difficulties regarding implementation.

## **Comments and Discussion**

### **Legal Basis for Accountability**

In a preliminary discussion participants concluded that IHL itself has very weak mechanisms and universal jurisdiction has not been very effective in achieving accountability. However, convergences between IHL and international criminal law have produced enforcement mechanisms and bodies for individual accountability (i.e. the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda

(ICTR)). The jurisprudence of the ICC could assist in identifying future application of international criminal law to individuals involved in the production, use, and transfer of arms, both conventional and nuclear.

With regards to nuclear arms, several entry points for the application of criminal law were suggested:

- The known and inevitable civilian death toll (whether it meets criteria for genocide);
- The catastrophic impact on health and the environmental consequences; and
- The cost of their continued renewal, deployment, and maintenance in relation to budgets available to fulfil human rights obligations, in particular ESCR.

Many participants argued that the nexus between nuclear weapons, human rights and IHL could be made clear to treaty bodies, the standing UN disarmament machinery, and during the UPR of the Human Rights Council.

Applying human rights to conventional arms is more straightforward. Participants suggested that a human rights analysis of production, sale and use of conventional arms would highlight the following:

- The cost of production in relation to environmental degradation and access to safe water;
- The cost of production and or purchase of weapons as a percentage of the overall fiscal budget and its impact on the obligations to the progressive realisation of ESCRs;
- Discrimination: certain gendered indicators, such as maternal mortality, access to education, show how women are disparately affected by the points above;
- Due diligence standards for governments regarding issuing end-user certificates for arms companies;
- Direct attribution to the State selling arms to regimes where it is reasonably foreseeable that violations of IHRL or IHL will occur;
- Individual liability for CEOs of companies trading with regimes which use weapons against the civilian population;
- Responsibility for the impact of militarisation on societies, in particular in regard to violence against women.

Except for budgetary allocation, these have yet to be argued in the human rights arena. The jurisprudence of the ICTY assists in some areas (like the *Perišić* case<sup>8</sup>), but further research is needed on how to put forward and sequence such arguments so as to build consensus.

### **Linkages between Disarmament and Responsibility to Protect**

The doctrine of responsibility to protect (R2P) figured prominently in the discussions on disarmament. A summary of expressed perspectives includes:

- The need to apply the doctrine before it is invoked to justify military intervention. R2P is about the prevention of violations of international law, in particular genocide and IHL and there is an obvious link with human rights. Hence, preventing the circumstances that lead to a demand for the invocation of R2P is key;
- Control of the sale of arms and monitoring through the human rights bodies could potentially become part of prevention, e.g. questioning a State's arms exports to regions where violations of IHRL are documented, where conflict is likely, or where it is reasonably foreseeable that the types of arms being sold would be used against the civilian population. This would include, for

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<sup>8</sup> <http://www.icty.org/sid/10793>

example, the arms that were sold to regimes where R2P has been invoked to justify military intervention.

### **Civilian Protection, Disarmament and Arms Control Treaties**

Conference participants noted that most recent treaties on conventional weapons, such as antipersonnel landmines and cluster munitions, prioritize protection of individuals and are based on IHL and IHRL. As there is a general push by many governments and civil society for the Arms Trade Treaty (ATT) to be negotiated with these elements at the heart of the treaty's objective, this suggests a fundamental shift in the importance attributed to human rights. However, there are several "sceptical" States involved in ATT negotiations, including the United States, that feel that incorporating human rights and IHL provisions into such a treaty is not "pragmatic". Ensuring that the final treaty is a tool that will make a real difference in delivering compliance with both IHL and human rights is therefore essential.

Some participants emphasized that IHL and civilian protection are dealt with differently in the nuclear weapons area. The only legal examination of IHL and the possession and use of nuclear weapons until today is the 1996 Advisory Opinion of the ICJ. The court was split, 7 votes to 7, on the question of illegality of use. It concluded with the casting vote of the President that "the threat or use of nuclear weapons would generally be contrary to the rules of international law" (paragraph 105, s. 2E). Some judges disagreed strongly with this position, believing that international law prohibits the use of nuclear weapons in *all* circumstances, while others felt that there could be extreme circumstances of self-defence, where the very survival of a State was at stake, in which use is lawful.

Participants felt that by applying a teleological approach using arguments underscored by human rights and environmental law obligations in the context of an analysis of the overall purpose of the UN Charter, it would be questionable if this latter opinion would hold if re-examined.

## THEME 2: Human Rights and Humanitarian Law

### Introductory Discussion

*Discussant: Christine Chinkin*

This section focused on exploring the intersections of International Human Rights Law (IHRL) (particularly, economic and social rights), and International Humanitarian Law (IHL) and its ramifications for disarmament. The discussant began by highlighting the framework and differences between IHRL and IHL. The table below summarizes her remarks on this subject.

IHRL	IHL
Applies at all times save for when there is specific derogation by the State. Some rights are non-derogable, e.g. the prohibition of torture.	The Geneva Conventions and the Hague regulations apply in times of armed conflict, both international and non-international, but are not limited to a formal declaration of hostility. Applies between States.
Applies to all individuals in a State's territory without distinction	Concerned with the conduct of conflict, so as to minimise/prevent suffering, particularly against civilians.
Concept of proportionality has a different meaning under IHL. For example, it relates to the minimum necessary measures to be taken to achieve an aim.	The concept of <i>unnecessary suffering</i> and <i>proportionality</i> are key to interpreting the degree of protection combatants and non-combatants receive. The proportionality refers to military necessity and the achievement of military objectives.
Procedural obligations flow from substantive obligations (e.g. the right to life, to be free, not to be tortured requires States to adopt procedural standards).	Is enforced through criminalisation and the prosecution of individuals through criminal law, both national and international criminal tribunals.
There is a range of accountability and implementation mechanisms, both domestic and international (e.g. treaty bodies, special procedures, regional courts). The international community has demonstrated willingness to create new mechanisms.	The place for application, aside from international criminal tribunals, is through national jurisdictions.
ICJ has recently placed emphasis on incorporating human rights in other areas of law.	Has formed the basis of the statutes of the <i>ad hoc</i> criminal tribunals and the Rome Statute. Not all criminal provisions in the conventions have been codified.

The differences outlined above give rise to a number of issues.

## **On Definition**

It was noted that the same violation can be defined differently under IHL and IHRL. For instance, under human rights law, torture is proscribed directly against the State, perpetrated solely by state agents. This is inappropriate for international criminal prosecution aimed at individual perpetrators. Therefore, torture was defined differently for the purposes of dealing with the crimes committed in former Yugoslavia and in the ICC.

Of itself this is not problematic given the application of human rights as a continuum pre, during and post conflict, the consequent obligations on the State, and the application of IHL into the conduct of both international and non-international armed conflict. In practical terms, however, it alters the nature of accountability once the demarcation lines become blurred: between domestic protests and non-international armed conflict which can then escalate into international armed conflict.

## **The Application of Human Rights in the Traditionally Sealed Area of Humanitarian Law**

The territorial scope of the laws of war has expanded with the reality of contemporary war (i.e. drones, the killing of Osama Bin Laden, the idea of enemy combatants) and the question was raised whether the global war on terror implied that IHL applies wherever there is a response to terrorist activities and whether this then nullifies human rights law. It was noted that there has been very little public response to summary execution apparently normalized and justified, even when it resembles the classic definition of disappearance.

Issues of application of IHL in conflict or occupation will almost certainly raise the issue of extra territorial application. An initial answer to some of these questions may be found in the extraterritorial application of IHRL by the European Court of Human Rights (ECHR) in the *Al-Skeini* case<sup>9</sup>. The Court looked at whether the European Convention applied in the case of the killing of Iraqis by UK forces during the UK's occupation of southern Iraq. The ECHR decided that when the State exercises authority over an individual, as a result of *lawful or unlawful* action, then the Convention is applicable. Overall, the ECHR decided that if a State is in a situation of occupation, then the occupying State is responsible. With regards to this specific case, the ECHR ruled that the entire range of human rights apply in the area under occupation, in the case before it requiring that investigators conduct an investigation following the death of a civilian (procedural obligations under Article 2).

## **Extra-Territoriality and ESCR**

ESCR are non-derogable in the sense that the State must continue to fulfil obligations even during conflict in accordance with the available resources. The application of the *Al-Skeini* case to ESCR is limited since the European Convention is weak on ESCR, but it does contain the right to non-discrimination and equality.

Under IHL the occupying power is entitled to create its own security framework, must establish some hospital and service infrastructures, but cannot change the laws of the occupied territory. Having a wider range of human rights obligations, however, could lead to the powers in occupation playing a role in social transformation, which could be at odds with the IHL obligations.

This has been illustrated by the international administrations that were set up in Bosnia, Kosovo and in the occupation of Iraq, where State run economies were transformed into free market economies with

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<sup>9</sup> <http://www.bailii.org/eu/cases/ECHR/2011/1093.html>

great rapidity, accompanied by privatization programmes. This raises the question of how budgets and priorities in spending are scrutinized for non-discrimination and equality.

Under its General Comment 3<sup>10</sup>, the Committee on CESCR sets out concepts that may be of use in understanding these priorities. The first is the concept of *progressive realization*: if there is regression in access to or delivery of these rights during occupation, this violates the principle. The second is the obligation to *do no harm*: at a minimum respect and protect the existing ESCRs that individuals enjoy. This is particularly pertinent during occupation as social service provision is inevitably prejudiced.

### **Monitoring IHL and Human Rights**

The discussant also touched upon the fact that the Human Rights Council and the CEDAW committee, under its Optional Protocol, have considered situations of alleged violations of both IHL and IHRL. Whilst there are inevitable problems with such ventures, they are indicative of an understanding of the need to give full consideration to what is actually happening to persons in such situations and to establish a legal basis for accountability. The comment was made that it is no longer sufficient to be an expert in just IHRL or just IHL as they are increasingly seen as complementary.

### **On Women**

With regards to women in IHL, participants expressed concern about their invisibility in the laws of war. At the moment, IHL does consider some sex and gender-based crimes to constitute grave breaches and crimes against humanity. This has not always been the case, traditionally, women were to be respected and protected during war. The notion was that of women as objects of protection, rather than enjoying full agency and having rights.

Gender-based crimes have also featured in human rights courts with the recognition that domestic violence and rape can constitute violations of human rights. Courts' interpretations have brought the two areas of law closer together. Rape is now defined as a violation of personal autonomy and negation of consent in coercive circumstances. Similarly, the decision of the Inter-American Human Rights Commission (IAHRC) in the North Mexico Cases<sup>11</sup> is relevant, given that its circumstances had considerable resemblance to wartime situations.

## **Comments and Discussion**

### **Extraterritorial Obligations and Intersections of IHL and IHRL**

Participants welcomed the progressive interpretation of extraterritorial obligations in the Al-Skeini case. However, they presented a couple of cautionary notes. First, a case in Canadian Courts<sup>12</sup> shows that domestic courts continue to differ in their interpretations of extraterritorial obligations. There is also State concern as to the increasing scrutiny this will bring to their military operations.

The participants expanded the discussion on the intersections of IHRL and IHL, noting additional resources and cases, including:

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<sup>10</sup> <http://www.unhcr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument>

<sup>11</sup> [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf)

<sup>12</sup> <http://www.thecourt.ca/2009/11/04/khadr-2008-and-extraterritorial-applicability-of-the-charter-deepening-the-morass/>

- Amnesty International published a legal advice<sup>13</sup> on the definition of rape to be applied under the Rome Statute, highlighting the intersection required by Article 21 for judgments to be consistent with human rights law. It is clear that there remain concerns relating to the issue of consent in crimes of sexual violence and that this has still to be effectively addressed including in the ICC statute;
- Judge Tulken’s wording in her dissenting opinion, on *MC v Bulgaria* (2004)<sup>14</sup> is important. She states “Rape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to autonomy as a component of the right to respect for private life as guaranteed by Article 8”;
- For activist lawyers, the challenge with cases concerning women, rape and justice is to succeed in establishing a creative link between accountability and reparations. Law should describe the real experience of women, so that it is relevant in terms of justice and addresses what is demanded. In the *Gonzalez* case in IACHR<sup>15</sup>, part of the remedy was to provide a sense of security, providing guarantees of non-repetition;
- With regards to successfully advancing the law, some participants highlighted that activists must use the law strategically so as to create a jurisprudential basis for argument. Application of the teleological approach indicates the value of obtaining academic support for arguments, civil society endorsement and advocacy, and media support, so that there are compelling legal and policy arguments that change is necessary.

In discussing the blurring lines between the applicability of IHL and IHRL, participants noted the distinctions and whether they make a fundamental difference as to accountabilities and the prevention of impunity. The State is responsible under IHRL to ensure protection and thence prosecution. A failure to do so means the State itself is in violation and the regional and international human rights mechanisms should address that failure. Under IHL the State also has responsibility. Failure to secure compliance can lead to both State liability and individual criminal liability under either international or criminal law.

### **ESCR, Budgets and Weapons Spending**

Some participants put forward an argument that obligations under ESCR be interpreted through an analysis of budgetary allocations vis-à-vis weapons spending. For example, if there are financial constraints such as cuts made to social welfare, (which almost always impact on women disproportionately), but military expenditure remains unaffected or increases, (e.g. UK and trident) this contravenes obligations of progressive realisation and non-discrimination, and would have to be considered in the light of proportionality.

### **On Domestic Impact for Women**

An area of concern for many participants was the lack of impact that international law initiatives have on the ground. Even though there are cases advancing international jurisprudence, more is needed to ensure their domestic application. A more profound understanding of security and what it takes to enforce it may be needed. By themselves, enforcement and punishment will not necessarily create security, but they do counter a culture of impunity.<sup>16</sup>

There have been numerous consultations with women affected by conflict and the outcomes have shown that whilst important, prosecution is not always the greatest priority. Issues of ESCR, vetting, and community reparation feature very highly. This is illustrative of the absolute need for the

<sup>13</sup> <http://www.amnesty.org/en/library/info/IOR53/001/2011/en>

<sup>14</sup> <http://www.unhcr.org/refworld/docid/47b19f492.html>

<sup>15</sup> <http://www.law.miami.edu/hrc/pdf/USPU12626EN.pdf>

<sup>16</sup> An article by Fionnuala D. Ni Aolain in the *Human Rights Quarterly* addresses these issues in depth and can be found at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1279622](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279622)

participation of women in peace negotiations and post-conflict reconstruction and governance/ decision-making.

Another initiative to be undertaken domestically is to push for enabling legislation following the ratification of the Rome Statute, i.e. clearer definitions of torture, rape, etc. in accordance with international standards. Addressing rules of procedure at national and international level is vital so as to ensure *de facto* access to justice.

Given the impact of the sale of weapons in increasing violence against women, particularly domestically, there is a clear need to obligate States to exert stricter regulations on private arms dealers.

### **Women and the Militarization of Spaces**

Participants also highlighted the trend of militarization of humanitarian space. This is of major concern as it links assistance to militarised security, endangering aid workers and limiting their ability to work with the local communities as they become associated with the security apparatus. The impact of domestic and foreign military bases has been extensively documented as having a negative impact on women in that locality, both in terms of the potential for sexual exploitation and trafficking, as well as the increase in gendered relations relating to militarism.

## THEME 3: Accountability Mechanisms

### Introductory Discussion

*Discussant: Jane Connors*

Significant progress in international human rights law has been made over the past few decades. There is now an extensive system for human rights protection created through the human rights treaty system, and the expert and intergovernmental mechanisms aimed at the promotion and protection of human rights. States have shown strong support for advancing human rights through ratification and accession of the comprehensive web of human rights treaties, which they have concluded within the context of the United Nations. Progress made in international human rights law has also inspired individuals finding the language of human rights empowering, as it promises entitlements, rather than privileges. In this discussion it is important to recall the 1993 Vienna Conference's agreement that human rights are indivisible and interdependent and that there is no hierarchy of human rights, with civil, cultural, economic, political and social rights being equally important, and the realization of the right to development crucial.

Although there are other avenues available to advance human rights, a human rights purist would say that we now have three human rights mechanisms at our disposal to advance the implementation of human rights obligations: the special procedures of the Human Rights Council, the Council's Universal Periodic Review mechanism, and the Human Rights' treaty body system.

#### **Special Procedures**

The Special Procedures of the Human Rights Council, the 47 member intergovernmental body within the UN tasked to progress human rights, consists of independent experts, 'special rapporteurs', and working groups, who address themes identified by the Council as requiring attention, as well as specific country situations. There are currently 33 thematic special procedures on subjects as diverse as freedom of religion and belief, extrajudicial executions, violence against women, health, water and sanitation, internally displaced persons and freedom of assembly. There are nine country mandates, the most recently established on Cote d'Ivoire.

The Council appoints mandate holders by following a rigorous selection procedure. Currently all geographic regions are equitably represented and gender balance has almost been attained. These are the most agile human rights mechanisms the United Nations has – although some commentators would consider them to be hardly agile at all. While all of the mandates are relevant to disarmament, Women, Peace and Security, some are particularly pertinent. These include the mercenaries working group, which has prepared a draft convention on private security companies, the mandate on the protection of human rights and fundamental freedoms while countering terrorism, the working group on discrimination against women in law and in practice, the newly established working group on human rights and transnational corporations and other business enterprises, and the newly established mandate on the promotion of truth, justice, reparation and guarantees of non-recurrence. All mandates undertake country visits, issue urgent appeals, allegation letters to States and press releases. All report to the Human Rights Council, with the majority also reporting to the General Assembly, since these obligations affect the content of international law.

Country visits by Special Procedures provide a valuable opportunity to bring together stakeholders, including authorities and civil society, and pursue dialogue on particular human rights issues and practical experiences. Cause and effect is of course very difficult to correlate, but it is clear that States have adopted legislation and changed policies as the result of the work of these mechanisms. The

mandate of the Special Rapporteur on Violence against Women has been particularly effective. A good example is her consistent call to States to adopt legislation on harmful traditional practices. Countries that have done so, and have indicated that this was as a result of such encouragement, include Chad (2002), Niger (2003), Mauritania (2005), Eritrea (2007), and Sudan (2008). Confidential urgent appeals sent by Special Procedures, usually by several mandates, have stimulated Governments to investigate individual cases and good outcomes have been obtained.

One of the motivations for the establishment of the Human Rights Council was a desire to streamline the special procedures mandate system. The institution-building of the Council included the notion of 'review, rationalization and improvement of mandates,' via which mandates were to offer a clear prospect of an increased level of human rights protection and promotion, be coherent within the system of human rights, pay equal attention to all human rights, make every effort to avoid unnecessary duplication, give consideration to expanding existing mandates, rather than creating new ones, consider merger of mandates and make new mandates as clear as possible so as to avoid ambiguity. These ideas were reflected in the Council's resolution 5/1 adopted in June 2007, and since that time there has been a steady growth in mandates and a significant overlap amongst the mandates. Clearly fragmentation is a risk, as is duplication, but reinforcement is valuable. At the same time, mandate holders must coordinate and cooperate better, so that the potential of the system is exploited to the fullest.

### **Universal Periodic Review (UPR)**

This is the newest human rights mechanism, introduced in 2008. It is the process by which the human rights performance of all Member States of the United Nations is considered periodically by their peers: the Members of the Human Rights Council and Observer States on the basis of a report of the respective State, a report compiling the output of human rights mechanisms, and a report compiling the views of 'stakeholders': civil society, including non-governmental organizations. By the end of March 2012 the first cycle of the UPR will have been completed, with 192 Member States reviewed, and the newest Member, South Sudan, being up for review for the first time during the second cycle. There has been 100% participation by States being reviewed, with a written report submitted by 98%. A report by the State under review on recommendations is now almost the norm, and voluntary mid-term reports are increasingly common. The level of representation of the State under review has been high, with 80% of this being ministerial and the balance being at the level of Secretary of State or Ambassador.

From the perspective of States, UPR has proven to be a transparent, collaborative instrument for change, which takes a broad and holistic approach. It has strengthened the notion of the universality of human rights, while, at the national level, the preparation of the State report has provided the framework for institutional collaboration across State structures, as well as between government and civil society. It has also laid the foundation for the creation of sustainable information collection, which is essential for ensuring implementation of human rights obligations at the national level. It has facilitated reporting to human rights treaty bodies, while at the same time existing human rights treaty body reporting structures have facilitated the preparation of the State report and the stakeholders report. The compilation report has also raised the profile of the human rights treaty bodies and the special procedures. Standing invitations to special procedures, as well as invitations to specific mandates were issued in the lead up, during or after review (Republic of Korea, Monaco, Zambia); some ensured that communications from special procedures were addressed. Ratification of human rights treaties often coincided with the review, as did withdrawal of reservations and submission of outstanding treaty body reports.

Thousands of recommendations have been produced by the UPR mechanism. During the first session, the average number of recommendations was 18 per State under review; by the eighth session this had risen to an average of 128 recommendations, with more than 10,000 recommendations made by the end of that session. At the same time, considering human rights mechanisms alone, the State under review will have further recommendations from human rights treaty bodies and special procedures. For recommendations to be useful, they should be precise, practical, constructive, but non-prescriptive, forward-looking, implementable and time-bound. UPR recommendations vary widely: some are precise, but some are vague and open-ended, and therefore difficult to follow up. It is to be hoped that during the second cycle, perhaps through clustering, that the number of recommendations will become more manageable and that they will be more precise so that their implementation can be tracked properly. A comprehensive system to track implementation of recommendations, with appropriate indicators, should also be developed. It is important that the UPR recommendations complement those of treaty bodies and special procedures, and it remains a concern that UPR recommendations mirroring those of the other human rights mechanisms or reiterate binding treaty obligations are sometimes rejected by the State under review.

### **Human Rights Treaty Bodies**

The third human rights mechanism available to encourage compliance by States with human rights obligations is the system of ten human rights treaty bodies. States parties are required to submit periodic reports (generally every four to five years) to nine of these bodies on the measures they have taken to implement the rights in the specific treaty. These are considered by the relevant committee, which discusses implementation with representatives of the State concerned and then formulates 'concluding observations' highlighting progress made and recommendations for further action. Human rights treaty bodies also issue 'general recommendations' or 'general comments' on a provision in a treaty or overarching themes. These are often very influential documents, which benefit from the input of researchers, UN system entities and civil society. They assist States in developing legislation, policies and programmes and can also be used by judiciaries to interpret legislation from a human rights perspective. For instance, CEDAW General Recommendation 19 has been used by courts to address the issue of violence against women. A notable example here is a 1997 case of the Supreme Court of India, which used the general recommendation to establish guidelines and norms to be observed in all workplaces to prevent and address sexual harassment. CEDAW is currently formulating general recommendations in the area of women in armed conflict and it is important that the outcome of this meeting be fed into this work. By the end of the current session of the General Assembly, with the exception of the Subcommittee on Prevention of Torture SPT, which has a mandate to visit places where persons may be deprived of their liberty, each human rights treaty body will have the potential competence to receive and consider petitions from individuals or groups of individuals alleging violations of the rights in their specific treaty. Currently, five treaty bodies, including CEDAW, have been invested with this competence and although the petition procedure is underutilized – particularly in the case of CEDAW – its outcomes have had significant impact including change in laws, policies and practices and affording individual relief. Where the CEDAW procedure is concerned, the few cases that have been decided on have formed the basis of an international feminist jurisprudence, which has been relied on by regional human rights courts.

Certainly the issues discussed today could form the basis of a complaint. A number of treaty bodies also have the competence to inquire of their own motion into reliable allegations of grave or systematic violations of the rights in the relevant convention. This competence is also invoked rarely, but again would be of significance in the context of the topics discussed at this conference.

## **Conclusion**

According to the discussant, it is clear that there are connections and disconnections within the particular mechanisms – certainly, coordination could be stronger among special procedures mandate holders and discussions relating to the lack of coherence among the human rights treaty bodies have been on-going for over 20 years. Indeed, Louise Arbour, when High Commissioner, suggested the creation of a unified standing treaty body to address the fragmentation of the system, as it existed in 2006. Since that time, two new treaty bodies have been established, and more are likely to be in the future. Louise Arbour’s idea was disliked by treaty body members and a number of Member States, particularly those who could see that this might be a step toward a World Human Rights Court, a notion which has gained more traction. As to connections and disconnections across the mechanisms – there is little interaction, although UN reports will suggest otherwise. Only on very few occasions has a country rapporteur briefed a treaty body, which was considering his or her country, and thematic procedures rarely interact with the treaty bodies. For instance, there is room for action and collaboration between CEDAW and the Special Rapporteur on Violence Against Women. UPR is the exception, however, as one of the reports forming the basis of the review consists of a compilation of the recommendations made by treaty bodies and special procedures. This report is then provided to these mechanisms also. UPR is new, however, and it has not been subjected to the scrutiny it deserves. It is left to see whether the UPR reinforces or rejects recommendations of the other bodies.

## **Comments and Discussion**

Several participants believed that it is feasible to design a strategy using the human rights mechanisms to address disarmament and the Women, Peace and Security agenda. For example:

- Bringing the issue of nuclear disarmament and the arms trade to the discussion of the UPR;
- Undertaking advocacy in treaty bodies and special procedures to interpret the obligations under UNSCR 1325.

## **Strategies for Using Human Rights Mechanisms Effectively**

Some noted that the advocacy done by LGBT organizations is illustrative of how to successfully place an issue on the agenda of the human rights mechanisms, and suggested similar actions such as:

- Consistent reporting with all issues being integrated throughout the reporting process;
- Systematically submitting input to treaty bodies with the aim of influencing concluding observations and hence developing the normative framework;
- Using the concluding observations as sources of soft law, or normative documents; and
- Coalition-building amongst advocacy groups across the disarmament spectrum as they relate to women in armed conflict.

## **Using Special Procedures**

Some participants also argued that there is the potential to work with current mandate holders on disarmament and human rights. There was interest in discussing the potential of creating a Special Rapporteur on Disarmament and Human Rights.

## Using UPR

It was suggested that disarmament could be introduced to the UPR through:

- Arguments of ESCR and non-discrimination;
- Under R2P, where sales are to unstable regimes;
- An analysis of the impact of the proliferation of arms on women in a given country.

Although without the status of law, the Maastricht Principles on Extra-Territorial Obligations (ETOs) of States in the area of Economic, Social and Cultural Rights<sup>17</sup> seek to clarify the human rights obligations of States beyond their own borders and could be used to provide a basis for advocacy with the above mechanisms in relation to ESCRs.

## First Committee

One participant noted the low expectations toward the UNGA First Committee, where States give brief, superficial statements with little accountability. States should link such statements to their respective legal basis, including human rights. This could lead to more effective monitoring and resolutions that include somewhat substantiated compliance.

A resolution<sup>18</sup> on *Women, disarmament, non-proliferation and arms control* passed in the First Committee in 2010 recognizes the importance of the Women, Peace and Security agenda, despite several countries questioning the connection of this agenda with disarmament. However, the resolution still needs content (WILPF has taken steps in this direction, including a presentation on International women's day 2010 to the Conference on Disarmament and a seminar in March 2011). This resolution will be on the First Committee's agenda again in October 2012.

## On Budgetary Analysis as a Tool

Participants discussed the notion of using budgetary analysis to highlight how to apply the ESCR concept of maximum use of available resources to disarmament.

They also mentioned that CEDAW has previously taken up the question of gender analysis with regards to budgeting and that similar analysis has been applied in the CESCR, as well as in the Human Rights Committee.

Voluntary reporting by States on their respective arms expenditure is extremely useful. Treaty bodies have congratulated Sweden for its initiative in presenting this information in the past. Similarly, the CEDAW committee in its concluding observations on the Philippines commented on their extensive military expenses.

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<sup>17</sup> <http://www.crin.org/docs/Press+Release+Maastricht+ETO+Principles.pdf>

<sup>18</sup> <http://www.reachingcriticalwill.org/political/1com/1com10/res/L39Rev1.pdf>

## DAY TWO: FURTHER DISCUSSIONS

### THEME 1: Environmental Impact

*Facilitator: Felicity Hill*

#### **Disarmament, Development and the Environment**

In recent years, climate change, food, water and resource scarcity, and the global war on terror, have meant that coordinated action is needed to re-evaluate security. This session focused on how the international community can no longer view the environment simply as a backdrop for human activities, but should instead be a crucial part of any human rights, international humanitarian law (IHL), or disarmament discussion.

Several participants argued that security postures and the procurement policies of militaries around the world are now increasingly geared to anticipating conflicts over water and resources, as well as waves of people displaced by climate impacts. They went on to identify the fragility of the planet as a key issue for security policies in the future. Given its carbon intensive and polluting nature, the planet cannot sustain the weight of war nor preparation for war; which have global impacts and human rights implications. Climate change prompts not only industry and individual change, but also challenges militarism, particularly as in many countries the military absorbs the biggest portion of oil and is the biggest source of carbon and other pollution.

The session raised the point that the intersection of environmental and disarmament issues with human rights is not a new one. The disarmament and development linkage was rearticulated in the 3 September 1981 report of the UN expert group Chaired by Swedish Ambassador Inga Thorsson<sup>19</sup> and the first attempt by the United Nations to ‘investigate systematically and in-depth’ the range of relationships between disarmament and development. The report generated material for several decades of disarmament diplomacy and informed the whole notion of the peace dividend.

It was noted that some resources and initiatives on environment and armed conflict already exist, such as a United Nations Environmental Programme (UNEP) report<sup>20</sup> from 2004 on the definition of widespread and lasting effects on the environment, and the UN Compensation Commission looked into this question<sup>21</sup> in the context of liabilities for clean-up cost related to the environmental damage caused by the Gulf War. However, some participants believed that there was significant scope for further developing such an approach.

#### **Nuclear Weapons and the Environment**

There is research from the 1980s that tracks data on what a “nuclear winter” would look like. Currently, scientists are using a modern climate model to re-examine the climate response to potential nuclear wars<sup>22</sup>. Simulating the use of a range of the world’s nuclear arsenal, they showed that the climatic response would be significant and that climate changes would prove more long-lasting than previously thought: and developing countries with weaker infrastructure would prove particularly vulnerable to the resulting global famine and agricultural collapse. Data such as this could be used to

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<sup>19</sup> Thorsson, Inga. 1986. “The Relationship between Disarmament and Development: The Swedish Follow-Up Study.” *Disarmament: A Periodic Review*. Volume IX, No.1, pp. 80–89

<sup>20</sup>[http://postconflict.unep.ch/publications/int\\_law.pdf](http://postconflict.unep.ch/publications/int_law.pdf)

<sup>21</sup> <http://www.asil.org/insights050810.cfm>

<sup>22</sup> <http://www.agu.org/pubs/crossref/2007/2006JD008235.shtml>

effectively frame the issue of nuclear disarmament within the broader environmental understanding of security.

### **Normative Standards for the Environmental Effect of Weapons**

There are few normative standards for assessing the environmental effect of weapons. There is a vague comment in Article 35 (3) of the Additional Protocol I<sup>23</sup> stating that "[it] is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." However, there is no definition of what constitutes "long-term" or "wide-spread."

In terms of strategy, participants suggested to routinely bring up these inconsistencies in the HRC, and through the UPR mechanism address these types of gaps with governments. Doing so could build up awareness and the legitimacy of the nexus between arms, climate, and human rights.

### **The "Disposal" Angle of the Impact of Arms on the Environment**

The United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, 3-14 June 1992, was agenda setting for the environment movement. Despite the efforts of WILPF and many other NGOs, neither any preparatory work nor the final document did include the pollution or environmental consequences of military action. This was a great disappointment given the impact of militarism (war and preparation for war) on the environment, as well as the consumption of resources diverted from realising the UN goals of peace, security and equality. It was suggested that the upcoming Rio +20 is an opportunity to notice and address this gap in the UN's agenda.

### **On a Special Rapporteur on Environment and Disarmament**

One of the topics discussed was the potential for a Special Rapporteur for human rights and the environment. It was highlighted that there are already some mandates that include environmental components, including the Special Rapporteur on Toxic Waste<sup>24</sup>. Perhaps, a Special Rapporteur could look into the meaning of Article 35 of Additional Protocol I from a human rights perspective.

Specific areas to explore related to the environment could be to:

- Map military pollution, not radiation alone;
- Track whose rights are impacted by military pollution; and
- Investigate how indigenous peoples are being affected by military activity and environmental destruction.

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<sup>23</sup> <http://www.icrc.org/ihl.nsf/full/470?opendocument>

<sup>24</sup> <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx>

## Theme 2: The Development of an Arms Trade Treaty

*Facilitator: Ray Acheson*

Main questions:

- How can human rights law and international humanitarian law be integrated into the arms trade treaty (ATT)?
- How can these elements of law enhance the ATT's preventative capability?
- What is the relationship between the ATT and the UN Security Council resolutions on women, peace, and security?

### **International Humanitarian Law (IHL)**

In a guide on Applying international humanitarian law to arms transfer decisions<sup>25</sup>, the International Committee of the Red Cross (ICRC) notes, “When a State transfers military weapons or equipment, it is providing the recipient with the means to engage in armed conflict—the conduct of which is regulated by international humanitarian law (IHL).” Many participants therefore felt that a future ATT must ensure that arms transfer decisions consider whether or not the recipient is likely to respect IHL and that transfers are not authorized if there is a clear risk that the arms will be used to commit violations of this law.

Based on the recommendations from the ICRC, the following IHL-specific criteria should be included in an ATT:

- Record of compliance with international law governing the conduct of armed conflict, including IHL;
- Assessment of risk of perpetration of war crimes, crimes against humanity, violations of IHL and/or human rights, breaches of the 1949 Geneva Conventions or their Additional Protocols of 1977;
- Record of compliance with international human rights law;
- Existence of accountable authority structures to ensure respect for IHL and human rights law and capacity to ensure that the arms transferred are used in a manner consistent with IHL and human rights law; and
- Record of the prevention of the recruitment and participation of children into the armed forces or armed groups.

### **Human Rights**

Participants were divided on the strategic use of human rights in ATT. Some felt that a human rights approach would not prove helpful since there is no immediate clarity for how it could be incorporated in the ATT debate. It was pointed out that the legal use of weapons and the application of due diligence standards bring HRL into the disarmament discussions.

As Amnesty International emphasizes in its report on ‘Applying human rights standards to arms transfer decisions’<sup>26</sup>, “All states have obligations under international human rights law applicable to transfers of conventional arms.” The report also correctly notes that “the use of conventional arms could result in the perpetuation of serious violations of a spectrum of human rights, including civil, cultural, economic, political and social rights, and rights relating to women, children, minority and indigenous groups.”

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<sup>25</sup> <http://controlarms.org/wordpress/wp-content/uploads/2011/02/Applying-IHL-to-arms-transfer-decisions-ICRC-practical-guide.pdf>

<sup>26</sup> <http://controlarms.org/wordpress/wp-content/uploads/2011/02/Applying-Human-Rights-standards-to-arms-transfer-decisions-Amnesty-practical-guide.pdf>

Applying human rights law to arms transfer decisions is necessary in order to prevent human rights violations or abuses. A preventative approach “would aim to prevent arms transfers where there is a clear risk that a particular group, such as the security forces, will use those arms for serious violations or abuses of human rights.” Amnesty argues that this approach creates opportunities for constructive dialogue between potential exporting and importing States, through which “preventative or remedial measures could be discussed and implemented as a prerequisite for decisions regarding particular arms transfers.”

In order for human rights criteria to be applied in an effective and fair manner, the assessment process for arms transfer decisions must:

- Apply to all transfer authorizations to all countries, without distinction;
- Include a case-by-case assessment of each application for an arms transfer decision;
- Use objective, verifiable, and detailed information from credible and reliable sources on the nature of the arms/ammunition, the intended recipient, the likely uses, the route, all those involved in the transfer; and the risk of diversion;
- Use up-to-date information on human rights standards and violations; and
- Include an assessment of the recipient State’s respect for international human rights law in relation to those rights likely to be impacted, taking into account the following indicators:
  - The formal commitments made by a State to relevant international and regional human rights instruments;
  - The implementation record of the State of its human rights obligations through national policy and practices;
  - The State’s legal, judicial, and administrative measures necessary for the respect and promotion of its human rights obligations;
  - The State’s governmental infrastructure and its capacity to implement and ensure respect for human rights obligations and to bring human rights violators to justice and provide remedy and reparation to victims; and
  - The degree of the State’s cooperation with international and regional human rights mechanisms.

### **Integrating a Gender-Perspective into the Future ATT**

Participants noted that women are uniquely affected by the accumulation of weapons, the arms trade, and armed conflict: weapons facilitate trafficking, forced prostitution, and sexual violence; and they are often used to kill, threaten, or intimidate women in their homes and communities. Many men carry guns as part of their constructed role as “protectors” of women; this masculine concept also impacts policies regarding armament and disarmament. The arms trade is a gendered business: almost all buyers, sellers, and users are men. This also includes the arms industry, media advertisers for weapons, State weapons producers, private weapons producers, gun dealers, brokers, and transporters.

## Theme 3: The Responsibility to Protect

*Discussant: Gillian Kitley*

Following the genocide in Rwanda and the international community's failure to intervene, it was former UN Secretary-General Kofi Annan who asked the question as to when and if the international community would have an obligation to intervene for the sake of protecting populations.

In December 2001, the International Commission on Intervention and State Sovereignty (ICISS), established by the Canadian Government, released its report on "The Responsibility to Protect." Building on the idea that State sovereignty brings positive responsibilities, the report put forward the idea that the international community has the responsibility to prevent mass atrocities with economic, political, and social measures, to react to current crises by diplomatic engagement, more coercive actions, and military intervention as a last resort. Furthermore, it has a responsibility to rebuild by bringing security and justice to the victim population and investigate the root cause of the mass atrocities. The report was instrumental in moving discussions forward, but was not adopted by UN Member States.

The African Union (AU) pioneered the concept that the international community has a responsibility to intervene in crisis situations, if States fail to protect their population. Ratifying the Protocol to the African Charter on Human and Peoples' Rights (2004), African nations agreed that for the purpose of the "protection of human and peoples' rights" the union had the right "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." The AU also adopted the Ezulwini Consensus in 2005, which welcomed R2P as a tool for the prevention of mass atrocities.

### **R2P in the United Nations**

At the 2005 World Summit, Member States included a commitment to R2P in the Outcome Document (A/RES/60/1, Paragraphs 138 and 139). These paragraphs gave language to the scope of R2P and the responsibilities of both States and the international community.

In April 2006, the UN Security Council reaffirmed the provisions of Paragraphs 138 and 139 in resolution S/RES/1674, thus formalizing their support for the concept. The next major advance came in January 2009 with the release of UN Secretary-General (UNSG) Ban Ki-Moon's report on "Implementing the Responsibility to Protect" (A/63/677). This report outlined the three Pillars of R2P:

- Pillar One: the primary responsibility of States to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, as well as their incitement;
- Pillar Two: the commitment of the international community to provide assistance to States in building capacity to protect their populations from these mass atrocity crimes and violations and to assist States under stress before crises and conflicts break out;
- Pillar Three: the responsibility of the international community to take "timely and decisive" action to prevent and halt mass atrocities when a State is "manifestly failing" to protect its populations, should peaceful means be inadequate, through the Security Council and in accordance with the Charter.

This report led to a successful debate in the General Assembly in July 2009. This debate marked the first time since 2005 that the General Assembly had come together to discuss R2P. Some of the main priorities that emerged from the debate were for regional organizations like the African Union to play a strong role in implementing R2P, the need to strengthen early warning mechanisms in the United Nations, and to better define the roles UN bodies would play in implementing R2P.

The General Assembly then adopted Resolution (A/RES/63/308), which acknowledged the UNSG's report and noted the GA's intention to continue debating all aspects of R2P implementation in the Assembly. In 2010 and 2011, the UNSG's reports and subsequent debates have focused on "Early warning, assessment and the Responsibility to Protect" (A/64/864) and "The role of regional and sub-regional arrangements in implementing the Responsibility to Protect" (A/65/877-S/2011/393).

## Challenges

While there is broad support for the concept itself, some States have concerns about its implementation, primarily in relation to the third pillar. Even before SC action on Libya this year, some States were raising concerns at what they felt was lack of clarity around when and how the third pillar would be applied. These voices have become louder since the implementation by NATO of SC resolution 1973 (19 March 2011), which authorized the use of "all necessary measures to... protect civilians". Questions have been raised about the timeliness, legitimacy, proportionality and effectiveness of military action – and the intentions of NATO, which some have claimed extended to regime change. At the 9 November 2011 open debate in the General Assembly on the Protection of Civilians, Brazil introduced a concept of "Responsibility while protecting" (A/66/551-S/2011/701), emphasizing the importance of the "do no harm" principle and calling for a focus on prevention rather than response in implementing R2P.

## Next Steps

Next summer's Secretary General report and debate on R2P will focus on pillar three, lessons learned, and the range of tools available under Chapters VI, VII, and VIII of the UN Charter. There are numerous events being organised in the run-up to the debate, and efforts to engage all Member States so that concerns can be adequately addressed. Articles, reports and notice of events can be found on the websites of:

- The International Coalition for the Responsibility to Protect<sup>27</sup>;
- The Global Centre for the Responsibility to Protect<sup>28</sup>; and
- Office on Genocide Prevention and the Responsibility to Protect<sup>29</sup>

## Comments and Discussion

### Indicators, Frameworks for Assessment

Participants focused on discussing the indicators that can act as early warning mechanisms and to assess the prevention pillars of R2P. The following areas were particularly emphasized:

- The R2P's unit's use of UNSCR 1325 indicators to assess level of risk and as an early warning;
- The question of whether the massive discrimination of women would be a valid indicator that violence is likely to escalate;
- Collaboration in developing principles and indicators with regional and sub-regional organizations, such as the on-going discussions that are taking place with the African Union in regards to Somalia ; and
- The use of the Human Rights Council recommendations during the UPR as data points or benchmarks towards R2P assessments.

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<sup>27</sup> [www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org)

<sup>28</sup> <http://globalr2p.org/>

<sup>29</sup> [www.un.org/en/preventgenocide/adviser/index.shtml](http://www.un.org/en/preventgenocide/adviser/index.shtml)

## **The Status of R2P**

Participants noted although it is clear that R2P is not solid international law, it has a strong element in its favour, which is evidenced in its shifting the jurisprudential underpinning of when intervention is necessary. No longer do people speak of a right to intervene, but rather a responsibility and will to intervene. Participants believed that there is serious movement towards making R2P part of international law.

Louise Arbour's article<sup>30</sup> on how R2P should be used was cited as an important resource.

## **On the Pillars**

With regards to prevention and supporting diplomatic means, participants were interested in:

- The extent to which the capacity of States to support preventative activities is assessed;
- Whether States have an obligation to accept assistance in circumstances of humanitarian need;
- The importance of using all diplomatic means at States' disposal – from offering good offices to supporting programmes on the ground;
- The applicability of the responsibility to prevent additional human rights violations in cases where a military intervention has already happened; and
- Whether the responsibility to prevent increases obligations on international support to realise economic and social rights.

## **Disarmament Links**

Participants queried whether the indicators for R2P reports already look at the presence and circulation of arms. Several participants indicated that this should be included with the doctrine, therefore being applicable to the arms trade itself. It was noted that coherent and serious application to the situation in Libya prior to recent intervention would have raised the question of the sale of arms to the regime, in particular the type of weaponry being sold, some of which was specifically for the control of civilians and was indeed, used against the civilian population.

## **Environment**

Some participants suggested exploring R2P from an environmental standpoint.

## **Risks**

There was consensus that the concept should not be abused to further foreign policy objectives of intervening States, for example in relation to allegations of State possession of WMD's or increasing nuclear capability.

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<sup>30</sup> <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1891072>

## REFLECTIONS ON CROSS-CUTTING THEMES: WOMEN, PEACE & SECURITY, AND IHRL MECHANISMS

### UPR Review and Disarmament

*Facilitator: Ray Acheson*

This session focused on how to include new issues, in particular disarmament, in the UPR process.

Some participants expressed the need for caution with regards to overloading the agenda of the UPR. The number of recommendations issued has grown significantly, with the danger of sacrificing conciseness and the ability to act upon them. It would undermine all progress if the HRC became deadlocked as a result. There was, however, a general agreement as to the need to approach security issues in a comprehensive manner.

A participant noted that the Human Rights Council and treaty bodies have examined some issues related to weapons, including cluster munitions, and white phosphorus, in particular as humanitarian concerns. In this sense, the areas of law have shown convergence.

Participants also emphasized that, in order to make sure that the results of UPR advocacy in Geneva reach the respective State there must be cooperation with local activists.

Other intersections that would be worth exploring in this area are:

- The issue of explosive weapons in heavily populated areas and the danger they pose in peacetime; and
- Cuba, which has brought up the right to peace, in a relevant expert meeting at which the High Commissioner participated. A Costa Rican Court ruled<sup>31</sup> last year that there is a right to peace. Disarmament could be considered under this rubric.

### Women, Peace and Security Resolutions, and CEDAW

*Facilitator: Maria Butler*

This session addressed existing mechanisms and tools for advancing women's rights in conflict. Discussions acknowledged the limitations and distortions of the Women, Peace and Security agenda (particularly UNSCR 1325), but participants underscored the need to re-focus work on implementation. On women's participation, comments noted that UNSCR 1325 has not empowered women to speak on security, and disarmament policy, as expected. This was identified as a gap and an area for further work. It was noted that the Women, Peace and Security agenda (particularly UNSCR 1325) obligates us to reconsider the paradigm of security: women's human rights and full equality are a prerequisite to sustainable peace, rather than an ancillary by-product or after-effect. For this reason, when thinking about participation under UNSCR 1325, we must also think of the other pillars, especially conflict prevention.

There seems to be some momentum and opportunity to utilize human rights procedures more effectively and frequently to promote advocacy and implementation in this area. The discussions addressed the current status of these opportunities, noting that CEDAW has been receptive to UNSCR

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<sup>31</sup> <http://ateaysublevada.over-blog.es/article-corte-costarricense-anula-decreto-presidencial-militarizando-a-la-policia-costa-rica-court-invalid-75234601.html>

1325 in terms of in concluding its comments. Further, UNIFEM<sup>32</sup> has also published a guide on the synergies between the two.

The comments also addressed potentials for development. WILPF has identified CEDAW as a forum for thematic intervention on WILPF priority themes of disarmament and women's rights. Currently, there are two CEDAW general recommendations under development. It was noted that CEDAW has also been working closer with the world of academia, which offers potential for further advancement.

## Gender Dimensions

*Facilitator: Widney Brown*

### **On Women as Subjects of Rights, Rather than Objects of Protection**

Participants noted that there is a tendency among governments to approach women's rights, from the perspective of looking at women as victims. Such a protectionist approach is problematic and can lead to further disempowerment.

The redistribution of power in post-conflict settings substantially impacts women in a negative way. Essentially, power imbalances during conflict are replaced with political and economic power imbalances post-conflict. Most post-conflict economic and social policies, as well as training and retraining programmes marginalize women. Some participants believed that the entire political economy of post conflict approaches needs to be re-conceptualised from a gender perspective.

### **On Women and Paradigms**

Several participants believed that applying the discrimination paradigm tends to reduce women to numerical representations and results in attempts to establish equality through quota. This is insufficient as it addresses numbers only.

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<sup>32</sup> [http://www.unifem.org/materials/item\\_detail.php?ProductID=104](http://www.unifem.org/materials/item_detail.php?ProductID=104)