

# UNIVERSITY OF THE WESTERN CAPE

## LLM INTERNATIONAL & HUMAN RIGHTS LAW 2003

Research Paper in partial fulfillment of the requirements for the degree  
Magister Legum in the Faculty of Law

TOPIC

*WW III? WAR ON WOMEN CONTINUES!*

UNIVERSITY of the  
WESTERN CAPE  
"EXAMINATION COPY"

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## KEY WORDS

1. Women
2. Rape
3. Systematic Rape
4. Ethnic Cleansing and Genocide
5. International Instruments
6. International and National experience
7. International Criminal Tribunal for the Former Yugoslavia
8. International Criminal Tribunal for Rwanda
9. International Criminal Tribunal
10. Remedial Action



# ABSTRACT

## WW III? WAR ON WOMEN CONTINUES

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In the course of this research paper incidence of sexual slavery, sexual violence and rape during times of war will be examined. The incidence where systematic rape is seen as a weapon of war designed to exterminate a particular ethnic group will be highlighted. It will be argued that systematic rape can be suitably addressed as a form of ethnic cleansing and a form of genocide within the ambit of international human rights law.

International instruments and legal responses which should have prevented the sexual abuse of women during armed conflicts will be looked at. It will be argued that the introduction of the permanent International Criminal Tribunal has served as a turning point in the international definition of rape.

The international incidence of systematic rape, sexual slavery and slavery-like practices during armed conflicts will be examined. The international experience will include, *inter alia*, Japan, Nuremberg, Uganda, Yugoslavia and Rwanda. The South African experience seeks to determine whether rape may be considered potentially pervasive, a practice and whether women in South Africa are under threat.

The question whether rape is employed as a weapon of war will be examined. To this end, the activities of the international criminal tribunals for the former Yugoslavia and for Rwanda will be considered, whereafter the events which led to the establishment of the International Criminal

Court will be evaluated. It will be shown that the rape of women during armed conflict is no longer conceptualised as spoils of war, but more appropriately as a crime, which is punishable under international law.

It will be shown that the two international tribunals have clearly embraced a progressive stance in their statutes and in the interpretation of the provisions of the statutes through their decisions. An assessment of the International Criminal Tribunal for Rwanda will reveal that rape could be conceptualised as genocide.

Attempts to combat the problem of sexual slavery, sexual violence and rape will be examined. It will be shown that successful settlements have been won against Swiss, Austrian, German and French Banks, German corporations and some European Insurers. To this end, and to facilitate prosecutions, it is vital to build upon the jurisprudence emerging from the International Criminal Tribunal for Rwanda.

It will be shown that remedial action is necessary in order to break the cycle of violence against women. This includes the condemnation of war rape in international law and the right to compensation. It is argued that refusal to compensate victims could be attributed to lack of pressure from the international community.

It will be shown that rape and violent sexual abuse of women in armed conflict has a long history. It is shown that effective steps must be taken and maintained in order to ensure that this pattern ceases. Some recommendations are made which is based on the jurisprudence emerging from the International Criminal Tribunal for Rwanda. Women's rights within the international community need to be recognised as fundamental human rights.

**JUNE 2003**



## DECLARATION

I declare that *WW III? WAR ON WOMEN CONTINUES* is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name : .....

Date : .....

Signed : .....

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## ACKNOWLEDGEMENTS

At the end of any significant task, the weary worker pauses to assess his handiwork. An arrogant worker will say "I have done well," whilst a humble worker will say "We have done well".

The royal 'we' must begin with thanks to the lecturers who offered this course and exposed me to a learning experience I will never forget. The invitation to follow the course was made to me by Prof. Sarkin at MacDonaldis. His enthusiasm was so contagious that I travelled from MacDonaldis back in time from WW II to Rwanda. Thank you for the journey which has left me knowing more but understanding less.

The unending patience of my supervisor, Dr. Van der Poll, who has taught me a lesson in humility, dedication and attention to detail. You have redefined my understanding of a true academic.

To my loving wife, Avril, who has supported me throughout this research paper. My thanks goes to my children, Anthea, Corman and Lauren, who make me proud to be their father.

This research paper has revealed the reality that many people live under constant threat. One acknowledges the unmistakable hurt experienced by so many defenceless women and salutes those who have taken a stand in order to make a difference.

To the women in my life, whom I love dearly, I pray that the agony experienced by so many other women will not be visited upon you and that instead you will become fighters of the cause for human rights.

Thank You God for this life You have given me and for the many undeserved blessings You have bestowed upon me.

## CONTENTS

| <u>CHAPTER</u> | <u>TITLE</u>  | <u>PAGE</u> |
|----------------|---|-------------|
| 1.             | Introduction  | 3           |
| 2.             | International instruments and legal responses   | 8           |
| 3.             | Incidence of systematic rape, sexual slavery<br>and slavery-like practices during armed conflicts | 19          |
| 3.1            | The international experience  | 19          |
| 3.1.1          | Japan “Comfort Women” – China & Korea   | 19          |
| 3.1.2          | Nuremberg   | 23          |
| 3.1.3          | Uganda – The Lord’s Resistance Army   | 23          |
| 3.1.4          | Yugoslavia  | 25          |
| 3.1.5          | Rwanda  | 30          |
| 3.2            | The South African experience  | 33          |
| 3.2.1          | South Africa  | 33          |
| 4.             | Attempts to combat the problem  | 37          |
| 5.             | Remedial Action   | 40          |
| 6.             | Conclusions and Recommendations   | 45          |
| 7.             | Bibliography  | 50          |

## CHAPTER 1

### Introduction

Sexual slavery<sup>1</sup>, sexual violence<sup>2</sup> and rape<sup>3</sup> are some examples of the acts that are practiced without abandon during times of war. Chinkin maintains that the reality is that rape and violent sexual abuse of women in armed conflict has a long history.<sup>4</sup> Numerous incidents of women raped in other international and internal armed conflicts can be cited to illustrate this point. During the August 1990 invasion of Kuwait it is estimated that at least 5 000 Kuwaiti women were raped by Iraqi soldiers.<sup>5</sup> After the liberation, large numbers of foreign domestic working women in Kuwait were attacked and subjected to sexual violence from subsequently returning Kuwaitis;<sup>6</sup> women in Rwanda who are caught up in the

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<sup>1</sup> Sexual slavery occurs where a person is kept against their will for the sexual gratification of their captors on an ongoing basis, usually in a facility established for that purpose. (See Askin, K. (1997) *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, 11).

<sup>2</sup> Sexual violence is an act of assault upon a victim, which goes beyond rape and involves the use of objects and or weapons directed at the sexual organs of the victim. Other forms of sexual violence include:

- (a) Enforced prostitution which sexual assault on an ongoing nature, usually in a facility established for sexual convenience or profit (See par 3.1 *infra* – Comfort women);
- (b) Enforced sterilization, which includes any act that intentionally renders the victim incapable to conceive or procreate. (See par 3.1 *infra*);
- (c) Enforced impregnation, usually rape, with the objective of impregnating the woman (See par 3.4 *infra*);
- (d) Enforced maternity which prevents the woman from terminating the pregnancy;
- (e) Sexual mutilation which includes any destruction of a sexual organ or other body part associated with sexual activity such as the breast, vagina or anus;
- (f) Genocidal rape, which includes any attempt to destroy in whole or in part a particularly protected group through sexual assault regardless of whether the destruction is physical or mental (See Askin, K. (1997) *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, 11).
- (g) Ethnic cleansing which includes any attempt to render an area ethnically homogeneous by using force or intimidation to remove persons of a given group. (See Salzman, “*Rape Camps as a means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victims in the Former Yugoslavia*”, (1998) 20 *Human Rights Quarterly* 348-378).

<sup>3</sup> Rape consists in the male having unlawful and intentional sexual intercourse with a female without her consent. See Hunt, P M A, *South African Criminal Law and Procedure*, vol. II, *Common-Law Crimes*, 2<sup>nd</sup> ed by Milton J R L, 1982.

<sup>4</sup> Chinkin, C. *Rape and Sexual abuse of Women in International Law*. 5 *European Journal of International Law* 326.

<sup>5</sup> Middle East Watch, *A Victory turned Sour, Human Rights in Kuwait since Liberation* (1991).

<sup>6</sup> An American adviser to the Kuwaiti Government was quoted as saying that the reason for the prevalence of rape was a combination of shortage of police officers plus the fact that the “police don’t care because they are only Filipinos or Sri Lankans”. *Ibid.*, at 21-23.

vicious civil war in that country;<sup>7</sup> women in Kashmir who have suffered rape and death under the administration of the Indian army.<sup>8</sup> Throughout Peru's 12 year internal war women have been targets of sustained, frequently brutal violence committed by both parties to the armed conflict. Women have been threatened, raped and murdered by government security forces; and women have been threatened, raped and murdered by the Communist Party of Peru-Shining Path.<sup>9</sup> Often, the same woman is the victim of violence perpetrated by both sides.<sup>10</sup> Liberian women have been repeatedly raped in the ethnic violence of that country's civil war<sup>11</sup> and women from East Timor have been raped as well as killed since the occupation by Indonesia commenced in 1975.<sup>12</sup> Another example is the sustained rapes of the so-called 'comfort women' by the Japanese during World War II.<sup>13</sup>

The above examples illustrate that women are attacked in conflicts across the globe by men of all colours, religions, nationalities and ideologies.<sup>14</sup>

It is important to draw a distinction between *domestic* rape and *systematic* rape. Systematic rape is a planned act with the intent to defeat the opposition during

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<sup>7</sup> Africa Watch, *Rwanda, Talking Peace and Waging War: Human Rights since the October 1990 Invasion* (1992).

<sup>8</sup> Jammu and Kashmir Council for Human Rights, *Torture, Rape and Death* (1992); Asia Watch, *Human Rights Crimes in Kashmir: A Pattern of Impunity* (1993) 95-112.

<sup>9</sup> Americas Watch and the Women's Rights Project, *Untold Terror: Violence Against Women in Peru's Armed Conflict* (1992) 1.

<sup>10</sup> Americas Watch and the Women's Rights Project, *Untold Terror: Violence Against Women in Peru's Armed Conflict* (1992) 1.

<sup>11</sup> Swiss, S. (1991). *Liberia: Women and Children Gravely Mistreated*; Swiss, S. (1992). *Liberia: Anguish in a Divided Land*; Huband, (1993). Where There Are Any Little Girls They Should Be Raped, *The Guardian*.

<sup>12</sup> McCrum, Mass Resistance, *The Guardian Weekend* (19/02/1994) 24. Women in East Timor have also been forcibly sterilized in large numbers as one of the ways 'the enemy has of making [our] ethnic identity disappear'. Taylor, J. (1991). *Indonesia's Forgotten War The Hidden History of East Timor* 159, quoting a letter from East Timor.

<sup>13</sup> Park, W (1993). "Comfort Women", Justice and International Law, paper delivered at the NGO Forum, World Conference on Human Rights, Vienna.

<sup>14</sup> Chinkin, C. A paper delivered at the American Society of International law, April 1993 and published as 'Peace and Force in International Law', in Dallmeyer, D. (ed.) *Reconceiving Reality: Women and International Law* (Studies in Transnational Legal Policy, No 25, American Society of International law (1993) 203.



armed conflict.<sup>15</sup> Systematic rape therefore occurs as a direct consequence of war.

A further distinction needs to be drawn between the definitions of *domestic* rape and rape as defined in international law. It is submitted that the definition of domestic rape<sup>16</sup> is limited and too narrow and may even be considered as being outdated and therefore fails to keep abreast with current situations.

There exists no internationally accepted definition of rape.<sup>17</sup> A precedent was however established in Rwanda.

The International Criminal Tribunal for Rwanda (ICTR) was set up in 1994.<sup>18</sup> The court convicted Jean-Paul Akayesu, the former mayor of the central Rwandan community of Taba, on nine counts of genocide and crimes against humanity on 2 September, 1998 and set an important precedent for other international courts.

In a second ruling the ICTR became the first *international tribunal* to define the crime of rape, calling it a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>19</sup> This was necessary, the court said, because “to date, there is no commonly accepted definition of [rape] in international law.”<sup>20</sup>

It is submitted that these acts are of such a degrading and violent nature that it may leave the victims<sup>21</sup> scarred for life. The perpetrators often escape

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<sup>15</sup> Askin, K. (1997) *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, 11 and Chinkin C, “Symposium – The Yugoslav Crises: New International Law Issues”, 5 EJIL (1994), 326-341 at page 333.

<sup>16</sup> Refer n 3 *supra*.

<sup>17</sup> Askin, K. (1997) *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, 11.

<sup>18</sup> See par 3.5 *infra*.

<sup>19</sup> See Human Rights Watch “Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath” *Human Rights Women’s Rights Project* 22 <<http://www.hrw.org/reports/1996Rwanda.htm>> [accessed on 30-05-2003].

<sup>20</sup> *Ibid*.

<sup>21</sup> Victim in this instance is being used to identify the person or persons who are subjected to the acts described in n 1 to 3 *supra*. It is not, however, intended to attribute to them the psychological diagnosis of victim.



prosecution whilst the victims are often left without any form of redress. The immeasurable physical and psychological injury inflicted on the victims is not acknowledged and so the cycle of impunity continues.

Women are raped in all forms of armed conflict, international and internal, regardless of whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all these.<sup>22</sup> They are raped by men from all sides – both enemy and ‘friendly’ forces.<sup>23</sup>

The unfortunate reality shows that armed conflicts still exist and claim an increasing number of victims, in particular those who should remain immune under the law: the civilian population. To achieve better protection for those victims, International Humanitarian Law<sup>24</sup> must be better known among those who should apply it. This includes combatants, public officials, and, especially in the growing number of situations where structures of authority have disintegrated, the whole population.<sup>25</sup>

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<sup>22</sup> Chinkin, C. A paper delivered at the American Society of International Law, April 1993 and published as ‘*Peace and Force in International Law*’, in D Dallmeyer (ed) *Reconceiving Reality: Women and International Law* (Studies in Transnational Legal Policy, No 25, American Society of International Law (1993) 203.

<sup>23</sup> Eg., Van den Haag, E. ‘The war in Katanga’, Report of a Mission (1962) 10. There have been press reports of abuses committed against women by UNTAC in Cambodia and by UN forces in Somalia. The Italian government has undertaken an investigation into reports of sexual abuses committed against Somalian girls by Italian troops serving with the UN forces; *The Guardian* 19 February 1994. One must not lose sight of the fact that women too may be charged with rape under international law. See *Prosecutor v Nyiramasuhuko* (case no. ICTR-97-21-I). Prosecution added rape charges to the indictment of former Minister of Family and Women’s Affairs, Pauline Nyiramasuhuko, for crimes committed by her subordinates. Nyiramasuhuko in 1997 became the first woman to be indicted by an international court for genocide. 1999 Country Reports on Human Rights Practices. Released by the Bureau of Democracy, Human Rights, and Labor. U.S. Department of State, 25 February 2000.

<sup>24</sup> Since World War II international law has become increasingly concerned with the protection of human rights. It has provided improved procedures for that purpose within the UN. This new emphasis has also been manifested in the adoption by the UN of the Universal Declaration of Human Rights and the conclusion of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, the signing of the International Convention on the Elimination of All Forms of Racial Discrimination in 1966, and the adoption in 1975 of the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhumane, or Degrading Treatment or Punishment. These measures have been supplemented by regional conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the American Convention on Human Rights (1969). Microsoft © Encarta © Encyclopedia 2002. © 1993-2001 Microsoft Corporation.

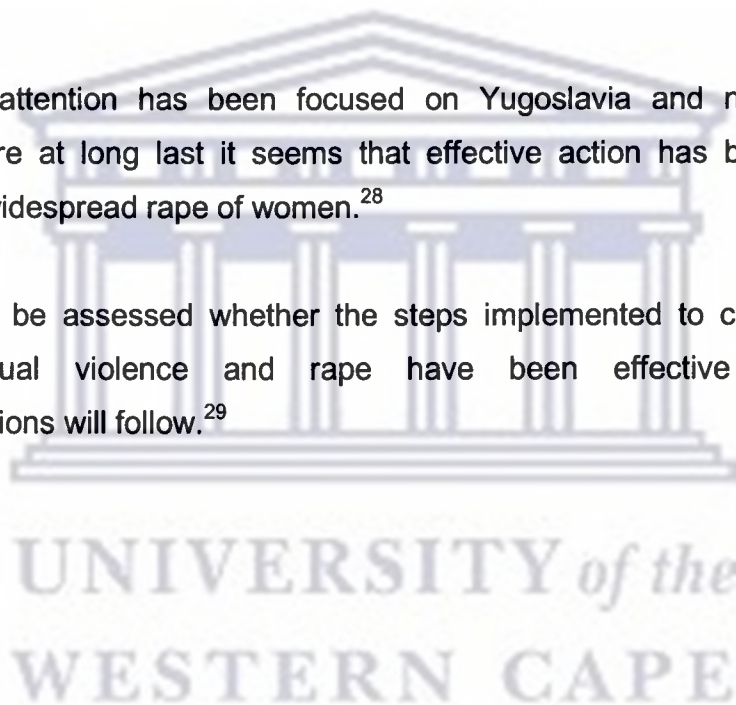
<sup>25</sup> Sassoli M & Bouvier A A (1999) ‘*How does Law Protect in War.*’ International Committee of the Red Cross, page 21.

There have been various attempts to curb the violence and attacks on women but to no avail as this practice still continues. Uganda is but one case in point. In this research paper some international instruments, which apply in the above situation or ought to apply, as well as the actions of Non Governmental Organizations and other interest groups, will be considered.<sup>26</sup>

The abuse on women in Japan, China, Korea, Germany, Uganda, Yugoslavia, Rwanda and the steps taken in each country to address the problem will also be considered.<sup>27</sup>

International attention has been focused on Yugoslavia and now lately on Rwanda where at long last it seems that effective action has been taken to address the widespread rape of women.<sup>28</sup>

Finally, it will be assessed whether the steps implemented to combat sexual slavery, sexual violence and rape have been effective and some recommendations will follow.<sup>29</sup>



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<sup>26</sup> See par 2 *infra*.

<sup>27</sup> See par 3 *infra*.

<sup>28</sup> See par 3.4 and par 3.5 *infra*.

<sup>29</sup> See par 5 and par 6 *infra*.

## CHAPTER 2

### International instruments and legal responses

It is submitted that there are numerous instruments that should have prevented the sexual abuse of women and children during armed conflicts. Discussed below are some instruments that should have protected women, alternatively afforded them a remedy or led to the prosecution of the perpetrators.

Furthermore, the later instruments, (1988 onwards) authorizes the right to intervene where human rights are being violated. The current incidence of sexual abuse of women in Uganda is a prime example calling for the United Nation's intervention.

#### 2.1 International Convention on the Political Rights of Women of 1952.

This Convention seeks to implement the principle of equality of rights for men and women and gives women the right to take part in the government of her country directly or indirectly through freely choosing representatives. It seeks to equalize the status of men and women in the enjoyment and exercise of political rights in accordance with the provisions of the Charter of the United Nations and of the Universal Declaration of Human Rights.<sup>30</sup>

Whilst its focus is on civil rights, this international instrument was one of the first to ensure that women are not treated as 'inferior' citizens. It is respectfully submitted that the international community was aware of the urgent need to rectify the unfair treatment of women and the need to prevent further abuse of women simply because of their sex.<sup>31</sup>

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<sup>30</sup> See <[http://www.unesco.org/human\\_rights/dca.htm](http://www.unesco.org/human_rights/dca.htm)> [accessed on 22/05/2001].

<sup>31</sup> The term 'gender' refers to the socially constructed roles of women and men in public and private life. Gender is distinct from 'sex', which is biologically determined. Sullivan, D. (1996) *Integration of Women's Human Rights into the Work of the Special Rapporteurs*. (New York: UNIFEM).

## 2.2 Declaration on the Protection of Women and Children in Emergency and Armed Conflict of 1974.

The General Assembly of the United Nations<sup>32</sup> expressed its deep concern over the sufferings of women and children belonging to the civilian population who in periods of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence are too often the victims of inhuman acts and consequently suffer serious harm.

It calls on all states involved in armed conflict, military operations in foreign territories or military operations in territories still under colonial domination to spare women and children from the ravages of war.<sup>33</sup> All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women and children.<sup>34</sup>

Notwithstanding the above, the legacy of rape and torture of women continued unabated, especially in Africa.

## 2.3 International Convention on the Elimination of all Forms of Discrimination against Women (UN) of 1979.

Adopted in 1979 by the United Nations General Assembly, it is often described as an international bill of rights for women. The Convention on the Elimination of all Forms of Discrimination against Women defines what constitutes discrimination against women<sup>35</sup> and sets up an agenda for national action to end such discrimination.

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<sup>32</sup> Resolution 3318 of 14 December 1974.

<sup>33</sup> Resolution 3318 of 14 December 1974.

<sup>34</sup> See <<http://www.unhchr.ch/html/menu3/b/24.htm>> [accessed on 22/05/2001].

<sup>35</sup> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital

By accepting this Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms. This includes the establishment of *tribunals* and other public institutions to ensure the effective protection of women against discrimination.<sup>36</sup>

It is submitted that acts of rape against women fall within the mischief aimed at by this Covenant and it is incumbent upon the authorities to establish tribunals to charge and prosecute offenders.

#### 2.4 International Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UN) of 1984.

The parties to this Convention had regard for article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

They also had regard to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975.<sup>37</sup>

Notwithstanding the explicit reference to inhuman or degrading treatment, the Covenant falls short of stating rape as a crime against humanity. This omission made it difficult to prosecute offenders who commit rape.<sup>38</sup>

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status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>36</sup> The elimination of all forms of discrimination against women Internet:

<http://www.un.org/womenwatch/daw/cedaw/convention> [accessed on 22/05/2001].

<sup>37</sup> Internet: <http://www1.umn.edu/humanrts/instree/h2catoc.htm> [accessed on 22/05/2001]

<sup>38</sup> See par 1. In the past rape and other forms of sexual violence committed against women during armed conflict went unrecognized and unchallenged in international law. This was largely due to the fact that women were regarded as objects with no legal status.



2.5 Resolution of the UN General Assembly instituting the right to enter sovereign territory to save lives of April, 1988.

This Resolution of the United Nations General Assembly establishes the right of access to victims of natural disasters and emergency situations of the same order. This resolution also constitutes the recognition of the right of assistance.

2.6 Resolution 688 of 1991 of the Security Council. This Resolution is considered to constitute the foundation for the right to intervene. For the first time in its history, the international community considered an internal human rights problem to be a threat to the peace – the repression of Iraqi civilian populations in many parts of Iraq. Security zones under United Nations protection were created for the Kurds of Northern Iraq.

2.7 Resolution 794 of 1992. This Resolution authorizes a preventative military deployment in Somalia with the objective of instituting secure conditions for humanitarian rescue operations.

2.8 Declaration on the Elimination of Violence against Women of 1993.

The General Assembly of the United Nations recognizes the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human rights. To this end, Article 1 reads as follows:

Article 1

“The term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women...”<sup>39</sup>

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<sup>39</sup> See Declaration on the Elimination of Violence Against Women, *85<sup>th</sup> Plenary Meeting* 20 December 1993. <[gopher://gopher.undp.org/00/undocs/gad/RES/48/104](http://gopher://gopher.undp.org/00/undocs/gad/RES/48/104)> [accessed on 22/05/2001].



## 2.9 Permanent International Criminal Court

The process leading to the establishment of the International Criminal Court was concluded by the United Nations General Assembly on 17 December 1996.<sup>40</sup> It was decided that a Diplomatic Conference of the Plenipotentiaries should be held in 1998 to finalize and adopt a convention on its establishment. The creation of the international criminal tribunals for the former Yugoslavia and for Rwanda led to the creation of a permanent International Criminal Court to prosecute individuals accused of serious violations of international human rights and humanitarian law.<sup>41</sup> A total of 120 countries approved the Rome Statute of the International Criminal Court in July 1998. The creation of a court to combat against impunity of those responsible for the crimes listed in article 5 of the statute of the international Criminal Court is the result of various states which led a determined campaign with the strong support of non-governmental organizations.<sup>42</sup> By April 2002, 60 countries had ratified the Statute and consequently the Court came into existence in July 2002.<sup>43</sup>

Meron has demonstrated that rape has long been prohibited by the laws of war and has been incorporated into various modern Codes of Military Conduct.<sup>44</sup> The currently applicable laws of war are contained within the Geneva Conventions of 1949,<sup>45</sup> the supplementary Protocols of 1977<sup>46</sup> and in the Military Tribunal for the Far East.<sup>47</sup>

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<sup>40</sup> See Ratner, S. and Abrams, J. (2001) *Accountability for Human Rights in International Law: Beyond the Nuremberg Legacy* (2<sup>nd</sup> ed.) 187.

<sup>41</sup> Ibid.

<sup>42</sup> See n 40 *supra*.

<sup>43</sup> See <<http://www.org/campaigns/icc.htm> [accessed on 14/06/2003].

<sup>44</sup> Meron, "Shakespeare's *Henry the Fifth* and the Law of War", 86 AJIL (1992) 1-45; Meron, "Rape as a crime under International Humanitarian Law", 87 AJIL (1993) 424.

<sup>45</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed forces at Sea, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, all at Geneva, August 1949.

<sup>46</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol additional to the Geneva Conventions of 12

The Fourth Geneva Convention provides protection for civilians in international armed conflict and specifically provides that women should be protected against rape.<sup>48</sup> This provision is repeated in Protocol I.<sup>49</sup>

According to Chinkin,<sup>50</sup> the above provisions do not impose a blanket prohibition against sexual abuse, but rather oblige State parties to offer women protection against attacks on their honour<sup>51</sup> and to accord them special respect.

This view is supported by Hevener<sup>52</sup> who identifies treaties as being either protective, corrective, non-discriminatory or mixed. He states that these treaties are protective provisions where what is needed is an absolute assertion of all women's right to be free from sexual attack and abuse.

Hevener correctly argues that the above provisions may have been intended to 'protect' women, but on a closer examination they only serve to reduce women to a class or group of persons in need of 'special treatment'. These provisions serve to undermine the right of women to equality before the law. The fact that women, as a class, need *specific* legislation to protect them implies that the general body

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August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977.

<sup>47</sup> Charter of the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946, TIAS 1589.

<sup>48</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 27: "*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.*"

<sup>49</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Article 76.

<sup>50</sup> See n 1 supra.

<sup>51</sup> Niarchos, C. "Women, War and Rape: Challenges facing the International Tribunal for the former Yugoslavia" (1995) 17 *Human Rights Quarterly* 649.

Niarchos argues that the pitfalls of linking rape to honour may include:

- Reality and women's true injury are sacrificed. Rape begins to look like seduction with "just a little persuading" rather than a massive and brutal assault on the body and psyche.
- By presenting honour as the interest to be protected, the injury is defined from the society's viewpoint and the notion that the raped woman is soiled or disgraced is resurrected.
- On the scale of wartime violence, rape as a mere injury to honour or reputation appears less worthy of prosecution than injuries to the person. See Niarchos 674. For further discussion on the connection of honour and sexual violence see Bedont, B. "Gender Provisions" in Lattanzi, F. and Schabas, W. (eds.) (1999) 1 *Essays on the Rome Statute of the International Court*, 190.

of law is not sufficient to protect them and hence deprives them of their rights to equal treatment before the law.

One does not argue against 'substantive' equality but the very fact that substantive equality has become necessary highlights the frequent sexual abuse of women and children during war. Men may not have similar or comparable needs, but when one intends to treat men and women equally then one should accept that as persons they should be respected equally, even during times of war.

Another concern is that one has to interpret the provisions so as to include rape, since it is not spelt out as an explicit prohibition. Chinkin<sup>53</sup> cites Article 4 of the Fourth Geneva Convention as a case in point. The Fourth Convention applies to those "who at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".<sup>54</sup>

Article 76 of Protocol I enhances this protection by extending its scope to all women in the power of a Party to the conflict including a Party's own nationals.

It is evident that Article 4 is vague with regard to rape whilst article 76 attempts to narrow the ambit but still remains vague with regard to rape.

In non-international armed conflict, common Article 3 to the Geneva Conventions provides a *minimum* standard of behaviour that applies both to government and non-government forces. Prohibited actions include violence to life and the person, cruel treatment and torture, and humiliating and degrading treatment.

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<sup>52</sup> Hevener, 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective', 8 Human Rights Quarterly (1986) 70.

<sup>53</sup> Refer n 4 supra.

<sup>54</sup> Ibid.

The 1977 Additional Protocols<sup>55</sup> differ from the four Conventions as they contain stronger references to sexual violence. The Additional Protocols guarantee special protection of women. Article 75(2)(b) of Protocol I and article 4(2)(e) of Protocol II, which set out the fundamental guarantees contained in the Protocols, prohibit “outrages upon person dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.” Similarly, article 76 of Protocol I states that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault.”<sup>56</sup>

War crimes are not the only possible legal regime for the prosecution of rape committed during international armed conflict. There is also the crime against humanity and, it has been argued in the context of the former Yugoslavia, genocide.<sup>57</sup> A crime against humanity was defined in the Nuremburg Charter as:

*Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.*<sup>58</sup>

*Crimes against humanity* were established as a separate category to war crimes. The former was strongly influenced by events which occurred during World War II.

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<sup>55</sup> These Protocols are additional to the 1949 Geneva Conventions. Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts and Protocol II Additional to the 1949 Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflicts. Roberts, A. and Guelff, R. (2000) *Documents on the Laws of War* (3<sup>rd</sup> ed.), 419 and 481 respectively. For further discussions of the 1949 Geneva Conventions, see Schindler, D. “Significance of the Geneva Conventions for the contemporary world” (1999) 836 *International Review of the Red Cross* 715-729 and Kolb, R. “The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions” (1998) 324. See *International Review of the Red Cross* 409-419 <<http://www.icrc.org/publications/>> [accessed on 04-06-2003].

<sup>56</sup> While these references are an improvement from prior instruments by categorizing the crimes among the fundamental guarantees, they still connect the crimes to women’s honour and respect. The Protocols therefore continue the discriminatory treatment of these crimes.

<sup>57</sup> Chinkin C, “Symposium – The Yugoslav Crises: New International Law Issues”, 5 EJIL (1994), 326-341 at page 332.



Evidence of rape was introduced before the International Military Tribunal in Nuremberg by the French and Soviet prosecutions who were responsible for identifying war crimes against humanity in Western and Eastern Europe respectively. Four charges were brought against the major war criminals who stood trial before the International Military Tribunal in Nuremberg.<sup>59</sup> The charges included conspiracy, crimes against peace, war crimes and crimes against humanity. The United States prosecution team assumed responsibility for the conspiracy charge, the British for crimes against peace and the French and the Soviets for war crimes and crimes against humanity.<sup>60</sup> Yet the crime of rape does not appear once in the 179 page judgment of the International Military Tribunal. Rape is apparently folded into the general category of “ill-treatment of the civilian population.”<sup>61</sup> Since the Allies constituted the Nuremberg tribunal, their own war crimes largely escaped scrutiny. For the most part, rape went unpublished and unexamined in international law.

Chinkin contends that this association has been continued in the case of the former Yugoslavia. She states that when the four occupying powers in Germany adopted Control Council Law No. 10, they departed from the Nuremberg precedent and incorporated rape as a crime against humanity.<sup>62</sup>

*Genocide* is defined in Article II of the Genocide Convention.<sup>63</sup> There must be an intention to destroy, in whole or in part, a national, ethnic, racial or religious group through the commission of such acts as killing or causing serious bodily or mental harm to members of the group;<sup>64</sup> deliberately inflicting on the group

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<sup>58</sup> McDougall, G. (1998) *Systematic rape, sexual slavery and slavery-like practices during armed conflict* Final Report of the Special Rapporteur submitted to the Commission on Human Rights.

<sup>59</sup> Taylor, T. (1992) *The Anatomy of the Nuremberg Trials: A personal Memoir* 79-80 quoted in Niarchos, C. “Women, War and Rape: Challenges facing the International Tribunal for the former Yugoslavia” (1995) 17 *Human Rights Quarterly* 649.

<sup>60</sup> *Ibid.*

<sup>61</sup> See (1948) 22 Trial before the IMT 475 quoted in Niarchos 665. See n 37 *supra*.

<sup>62</sup> Control Council for Germany, Official Gazette, 31 January 1946.

<sup>63</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly, 9 December 1948, 78 UNTS 277.

<sup>64</sup> *Ibid.*, Article II(a) and (b).

conditions of life calculated to bring about its physical destruction in whole or in part;<sup>65</sup> imposing measures to prevent births within the group;<sup>66</sup> or forcibly transferring children of the group to another group.<sup>67</sup>

Rape does not appear to fall within this definition, but it has been forcefully argued that where it has been carried out on a massive and systematic basis for the purposes of producing babies of the ethnic class of the rapists, of destroying the family life of the victims and of cleansing the surrounding area of all ethnic groups,<sup>68</sup> rape becomes genocidal.<sup>69</sup>

The above body of legal instruments and prohibitions has, however, not been able to curb the sexual abuse of women. Factors which could possibly explain why rape has always been downplayed or ignored altogether, may be attributed to internal politics and international power-play between the offending forces.

Another factor which has been added to the prosecution of rape and other sexual offences, was the issue of an appropriate forum to try these abuses. There have been calls for a permanent international tribunal by Human Rights Organizations and non-governmental organisations. It is submitted that this may be the only way to ensure that there is international compliance with humanitarian law. The establishment of the International Criminal Tribunal has satisfied the above concerns.

The incidence of widespread rape in Yugoslavia has shocked the world. These barbaric acts against civilian women during the 21<sup>st</sup> Century have spurred the international community into action.

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<sup>65</sup> Ibid., Article II(c).

<sup>66</sup> Ibid., Article II(d).

<sup>67</sup> Ibid., Article II(e).

<sup>68</sup> *Prosecutor v Karadzic and Mladic* (Case No. IT – 95 – 5 – 1); *Prosecutor v Akayesu* (Case No. ICTR – 96 – 4 – T).

<sup>69</sup> Chinkin C, “Symposium – The Yugoslav Crises: New International Law Issues”, 5 EJIL (1994), 326-341 at page 333.



In the next chapter, the incidence of systematic rape will be examined with particular references to the former Yugoslavia and Rwanda.



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## CHAPTER 3

### International incidence of systematic rape, sexual slavery and slavery-like practices during armed conflicts

Parker and Chew are rightly of the opinion that not enough is being done to protect women simply because of the fact that they are women.<sup>70</sup> History has shown that women are regarded as spoils of war during armed conflict.<sup>71</sup> It is argued that the attacks on women are intentional and unlawful – women are seen as legitimate targets of the enemy. Attacks on women are not, therefore incidental to the war but a direct attempt to destroy the enemy.<sup>72</sup>

Below are some examples illustrating the systematic rape and slavery-like practices inflicted on women both nationally<sup>73</sup> and internationally.<sup>74</sup> Consideration is also given to the reaction of the international community to the plight of women which, in most instances, was minimal or totally absent. In Japan for example, the Japanese are steadfast in their denials and refusal to compensate victims despite the overwhelming evidence against them.

#### 3.1 The international experience

##### 3.1.1 Japan “Comfort women” – China and Korea

The Japanese introduced the concept of ‘comfort houses’<sup>75</sup> where they forced women to act as prostitutes and to serve the sexual needs of the soldiers.

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<sup>70</sup> Parker, K. and Chew, J. “*Compensation for Japan’s World War II War-rape victims.*”

<sup>71</sup> See Deuteronomy 21: 10-14 and 31: 32-35.

<sup>72</sup> McDougall, G. (1998) UN Special Rapporteur on Violence against Women: *Contemporary forms of slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict.* UN Human Rights Commission.

<sup>73</sup> See par 3.2 *infra*.

<sup>74</sup> See par 3.1 *infra*.

<sup>75</sup> See UN Speech on Comfort Women by Karen Parker <<http://www.webcom.com/hrin/parker/c95-11.html>> [accessed on 22/05/2001].

Besides being forcibly raped multiple times daily, these women were subjected to physical abuse and exposed to sexually transmitted diseases.<sup>76</sup>

According to Parker and Chew, these war-rape victims have to date received no compensation for their pain and suffering.

As many as 200 000 girls and woman were part of the Japanese program of comfort women or *jugan ianfu*. More than 145 000 of these girls and women died as a direct result of the treatment they received.<sup>77</sup>

At the beginning of 1931, only a few of these so-called comfort houses existed, but in 1937, as the Nanjin Massacre took place, comfort houses spread to wherever the Japanese had a presence. Women were injected with what they called 'injection number 606' to prevent sexually transmitted diseases. If injected enough times, it became impossible to become pregnant and, in cases where the infection or diseases worsened, the women were isolated and simply disappeared. In Okinawa for instance, when the comfort women became useless because of illness and disease, they were fed milk mixed with cyanide, their bodies were taken to caves and finally, the caves were blown up with grenades.<sup>78</sup>

As soon as the war was over, the Japanese Imperialists disappeared without a trace and the women were left in a land that, prior to their capture, they had nothing at all to do with. In some regions, as the Japanese men committed *hara-kiri*, the women were forced to do the same. In extreme cases such as North Burma and the Pacific Islands, the women were put into caves and blown up.<sup>79</sup>

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<sup>76</sup> Karen Parker and Jennifer F Chew "*Compensation for Japan's World War 11 war-rape victims*"

<sup>77</sup> Statement by Seijuro Arahune, Liberal Democratic Party member of Japanese Diet (1975).

<sup>78</sup> See "Jeong Shin Dae – The Real Story" <[www.koreatimes.co.kr/event/jeonshin/w1/e-w1.htm](http://www.koreatimes.co.kr/event/jeonshin/w1/e-w1.htm)> [accessed on 22/05/2001].

<sup>79</sup> See "Jeong Shin Dae – The Real Story" <[www.koreatimes.co.kr/event/jeonshin/w1/e-w1.htm](http://www.koreatimes.co.kr/event/jeonshin/w1/e-w1.htm)> [accessed on 22/05/2001].

There are three main facts which the Japanese Government has been denying since the Korean Council started:<sup>80</sup>

1. That the Japanese Government and Army directly planned and executed the whole scheme of the Comfort Women. According to the Second Report of the Japanese Government they admitted only in part by passing the buck to the non-governmental businesses.<sup>81</sup>
2. They do not recognize providing the comfort women to their soldiers as a crime against humanity. The Emperor and the Prime Ministers of Japan have expressed their remorse by saying that they felt sorry and were contrite about the victims and the pain the victims had to bear. However, they never recognized this act as a violation against international law and a crime against human rights.<sup>82</sup>
3. Since all the post-war claims were settled through the Korea-Japan Treaty in 1965, the Japanese argue that they have no more liability in this matter despite the fact that the United Nations Commission on Human Rights and other international organizations demand reparation.<sup>83</sup>

On 26 July 1945, the Potsdam Declaration pronounced their policy to mete out justice on all Japanese war criminals. The International Military Tribunal for the Far East (IMTF) was established on 19 January 1946 under General Douglas MacArthur.

The IMTF first convened during April 1946 and after a trial lasting more than two and a half years, only two defendants were convicted in connection with the Rape of Nanking. Matsui Iwane was convicted on a charge of deliberate and reckless disregard to take adequate steps to secure the observance and prevent

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<sup>80</sup> See "Opening a new Millennium with a new hope" by Eun-Hee, C.  
<[http://witness.peacenet.or.kr/e\\_comfort/newsletter/preface.htm](http://witness.peacenet.or.kr/e_comfort/newsletter/preface.htm)> [accessed on 22/05/2001].

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

breaches of the Law and Customs of Law.<sup>84</sup> Hirota Koki, the Foreign Minister when Japan conquered Nanjing, was convicted for participating in the formulation or execution of a common plan or conspiracy and of waging a war of aggression and a war in violation of international laws. Both were sentenced to death by hanging.

It is reported that Japanese scientists experimented on living persons causing them extreme pain before death. Most victims were women. This research was kept secret after the war because the United States, in exchange for the Japanese data, *granted immunity* to the Japanese doctors and helped to cover up the human experiments.<sup>85</sup> Instead of putting the ringleaders on trial, the United States gave them stipends in order to have some germ warfare advantage over the communist Soviet Union.<sup>86</sup> Emperor Hirohito and his family were also granted immunity from prosecution by the United States.

Attempts to seek reparations from Japan or the Japanese industry, which exploited the slave labour, have been largely unsuccessful. Rape was also largely invisible in the trials of the Japanese war criminals.<sup>87</sup> Only four Japanese army officers were tried for the crimes relating to the Nanking Atrocities between 1946 and 1947.<sup>88</sup> The accused were the commander of the 6<sup>th</sup> Division, Lieutenant General Tani Hisao, the company commander of the 6<sup>th</sup> Division, Captain Tanaka Gunkicki, and two Second Lieutenants in the 9<sup>th</sup> Infantry Regiment of the 16<sup>th</sup> Division, Mukai Toshiaki and Noda Tsuyoshi.<sup>89</sup>

General Tani Hisao was the only accused available at the time. He pleaded not guilty but was convicted on 6 February 1947 and sentenced to death on 10

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<sup>83</sup> Ibid.

<sup>84</sup> See The Nanking Atrocities: The Postwar Judgment 1. International Military Tribunal for the Far East : <<http://web.missouri.edu/~jschool/nanking/tribunals/imtfe-01.htm>> [accessed on 22/05/2001].

<sup>85</sup> Sheldon H Harris: "*Factories of Death: Japanese Biological Warfare 1932-45 and the American Cover-up.*"

<sup>86</sup> Ibid.

<sup>87</sup> Levy, J: The California Cure for Japanese War Crimes : <<http://www.flamemag.dircon.co.uk/levy-japanese-war-crimes.htm>> [accessed on 22/05/2001].

<sup>88</sup> See: The Nanking Atrocities, "The Postwar judgement: II. Nanking War Crimes Tribunal." <[http://web.missouri.edu/~jschool/nanking/tribunals/nanjing\\_02.htm](http://web.missouri.edu/~jschool/nanking/tribunals/nanjing_02.htm)> [accessed on 22/05/2001].

<sup>89</sup> Ibid.



March 1947. Tanaka, Mukai and Noda were subsequently tried and sentenced to death and executed on 28 January 1948.<sup>90</sup>

### **3.1.2 Nuremberg**

Rape did not feature prominently at Nuremberg. This was due to the fact that the Germans were not guilty of rape but because the allied forces, especially Russians and the Moroccan forces under French control, were also guilty of many rapes.<sup>91</sup>

Nuremberg will remain as an international signal to women that their position will be secondary to political compromise. The high incidence of rape during World War II displayed a flagrant disregard for the rights of women. The extent and incidence of sexual abuse of women was so high that prosecution of the perpetrators may have delayed the settlements reached.<sup>92</sup>

Nuremberg also revealed international double standards and biased interpretations of legal instruments which failed to protect women.<sup>93</sup> Since the Allies constituted the Nuremberg tribunal, their own war crimes largely escaped scrutiny.<sup>94</sup> For the most part, rape went unpublished and unexamined in international law.<sup>95</sup>

### **3.1.3 Uganda - The Lord's Resistance Army**

This rebel movement is at present fighting a civil war to ostensibly overthrow the Ugandan government. The Lord's Resistance Army (LRA) raids villages and

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<sup>90</sup> Ibid.

<sup>91</sup> Laber, 'Bosnia: Questions about Rape', 40 NY Rev (25 March 1993) 3.

<sup>92</sup> Taylor, T. (1992) *The Anatomy of the Nuremberg Trials: A personal Memoir* 79-80 quoted in Niarchos, C. "Women, War and Rape: Challenges facing the International Tribunal for the former Yugoslavia" (1995) 17 *Human Rights Quarterly* 649.

<sup>93</sup> See page 14 *supra*.

<sup>94</sup> The allied forces constituting the Nuremberg tribunal were the United Kingdom, France, United Socialist Soviet Republic and the United States of America.

<sup>95</sup> See n 92 *supra*.



most of their attacks are on civilians.<sup>96</sup> Houses are looted, buildings burnt and civilians are subjected to mutilation, rape and slaughter.

The children, as young as eight, are forced to serve the rebels in their Sudanese camps.<sup>97</sup> They are used for running errands and cultivating the land while girls as young as twelve, are used as “wives” by rebel commanders.<sup>98</sup>

The abuse of women and children continue, and until the civil war is ended, one cannot predict the international community’s response. There are, however, at least two instruments which could possibly be used to render assistance.

First, Resolution 688<sup>99</sup> of the Security Council that is considered to be the foundation for the right to intervene under international law. For the first time in history, the international community considered an internal human rights problem to be a threat to international peace – the repression of Iraqi civilian populations in many parts of Iraq. Security zones under United Nations protection were created for the Kurds of Northern Iraq.<sup>100</sup>

Secondly, Resolution 794<sup>101</sup> authorized a preventative military deployment in Somalia, with the objective of instituting secure conditions for humanitarian rescue operations.

No security zones were or are being established in Uganda nor was there a preventative military deployment to avert the abuse of human rights.

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<sup>96</sup> See: “Armed conflict in the world today: *A country by country review.*” By Parker, K. and Heindel, A. (1997) <<http://www.webcom.com/hrin/parker/armedcon.html>> [accessed on 22/05/2001]

<sup>97</sup> See: “Armed conflict in the world today: *A country by country review.*” Parker, K. and Heindel, A. (1997) <<http://www.webcom.com/hrin/parker/armedcon.html>> [accessed on 22/05/2001].

<sup>98</sup> Human Rights Watch Children’s Rights Project: *The Scars of Death : Children Abducted by the Lord’s Resistance Army in Uganda* (1977) at 1.

<sup>99</sup> Resolution 688 of April 1991.

<sup>100</sup> See: “Armed conflict in the world today: *A country by country review.*” Parker, K. and Heindel, A. (1997) <<http://www.webcom.com/hrin/parker/armedcon.html>> [accessed on 22/05/2001].

<sup>100</sup> Human Rights Watch Children’s Rights Project: *The Scars of Death : Children Abducted by the Lord’s Resistance Army in Uganda* (1977) at 1.

<sup>101</sup> Resolution 794 of December 1992 of the Security Council.

### 3.1.4 Yugoslavia

In 1990 Bosnia-Herzegovina became independent from Yugoslavia.<sup>102</sup> Since that time there had been widespread military and paramilitary action between the Muslim-led Bosnian government and the Bosnian Serbs who sought to create a Serbian state. The conflict has been particularly brutal and inhumane and has included systematic rape and ethnic cleansing.<sup>103</sup>

In February 1995, Bosnia Croat and Muslim leaders rededicated themselves to a peace accord forming a Muslim-Croat federation.<sup>104</sup>

During the conflict, rape has been massive, organized and systematic. It has been perceived by the Special Rapporteur appointed by the United Nations Commission on Human Rights not only as an instrument of war, but as a method of ethnic cleansing “intended to humiliate, shame, degrade and terrify an entire ethnic group.”<sup>105</sup> An ethnic cleansing strategy, implies that one ethnic group or racial group sets out to destroy (exterminate) the other ethnic group or groups.<sup>106</sup> Bosnian and Croatian Muslim women were deliberately impregnated primarily by Serbian soldiers in rape camps established for this specific purpose. The Serbian military implemented this strategy in order that the children born would not be of pure Muslim descent, thus transforming mass rape into an issue of genocide.<sup>107</sup>

Condemnation of violations and calls for compliance<sup>108</sup> have been made within international political fora, notably the Security Council,<sup>109</sup> the Human Rights

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<sup>102</sup> U.S Department of State, Human Rights Report for 1999. “1999 Country Reports on Human Rights Practices”, Released by the Bureau of Democracy, Human Rights, and Labor. U.S. Department of State, 25 February, 2000.

<sup>103</sup> See <<http://www.webcom.com/hrin/parker/96report/bosnia.html>> [accessed on 22/05/2001].

<sup>104</sup> Ibid.

<sup>105</sup> Walzer cites the example of the Moroccan soldiers fighting with Free French forces in Italy in 1943; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2<sup>nd</sup> ed. 1992) Ch. 8.

<sup>106</sup> Ibid.

<sup>107</sup> Arden B Levy: *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*

<sup>108</sup> Chinkin C, “Symposium – The Yugoslav Crises: New International Law Issues”, 5 EJIL (1994), 326-341 at page 335.

Commission,<sup>110</sup> the Commission on the Status of Women,<sup>111</sup> and the Commission on the Elimination of Discrimination Against Women.<sup>112</sup>

Proceedings had been commenced against Yugoslavia (Serbia-Montenegro) in the International Court of Justice by Bosnia-Herzegovina<sup>113</sup> and upheld by the Courts. Yugoslavia (Serbia-Montenegro) has counterclaimed in similar terms<sup>114</sup> but was turned down by the Courts.

The options for the prosecution of individuals alleged to have committed such crimes are:

1. the domestic courts of any State, or
2. an international war crimes tribunal based on the precedent of Nuremberg.

In the United States<sup>115</sup> civil proceedings had been commenced under the Alien Torts Claim Act<sup>116</sup> and the Torture Victim Protection Act<sup>117</sup> against Radovan

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<sup>109</sup> The Security Council has condemned violations of international humanitarian law, including the massive, organized and systematic detention and rape of women; SC Res. 798, 18 December 1992, SC Res. 820, 17 April 1993. Cf G.A. Res. 47/121, 17 December 1992.

<sup>110</sup> Commission on Human Rights, E/CN.4/1993/L.21.22 February 1993.

<sup>111</sup> Report of the Secretary-General, Rape and Abuse of Women in the Territory of the Former Yugoslavia, UN Doc. E/CN.4/1994/5 (1993).

<sup>112</sup> Report of the Twelfth Session of the Committee on the Elimination of All Forms of Discrimination Against Women (International Women's Rights Action Watch, 1993).

<sup>113</sup> Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)). Request for the Indication of Provisional Measures, 1993 ICJ Reports. The Court indicated that Yugoslavia (Serbia and Montenegro) should immediately take all measures to prevent the crime of genocide. The Court reaffirmed these measures on 13 September 1993.

<sup>114</sup> On 10 August 1993 Yugoslavia asked the Court to indicate provisional measures against Bosnia and Herzegovina to take all measures to prevent commission of genocide against the entire Serb ethnic group. On 13 September 1993 the Court refused to make such an order.

<sup>115</sup> Sassoli M & Bouvier A A (1999) *How does Law Protect in War.* International Committee of the Red Cross. Page 1247 to 1251.

<sup>116</sup> 28 USC par 1350; 28 USC par 1331.

<sup>117</sup> Pub. L. No. 102-256, 106 Stat. 78 (1992).

Karadzic<sup>118</sup>, who had command authority over the Bosnian-Serb military forces.<sup>119</sup>

In *Kadic et al v Karadzic*,<sup>120</sup> the plaintiff-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia.<sup>121</sup> The plaintiffs allege that they were victims (and representatives of victims) of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war.

In his capacity as President, Karadzic possessed ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by military forces under his command.

On appeal, the judgment of the District Court that dismissed the appellant's complaints for lack of subject-matter jurisdiction was reversed, and the cases were remanded for further proceedings.

These civil proceedings ensured that the defendant (Karadzic) did not have easy access into the United States where he could escape/evade responsibility and accountability for his actions.

An International Criminal Tribunal for Yugoslavia (ICTY) was established in terms of Resolutions 808 and 827 of the Security Council, acting under Chapter VII of

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<sup>118</sup> Karadzic was served while he was in New York 'availing himself of the security and sanctuary of the United Nations, engaging in press and other activities promoting his policies'; *Kadic v. Radovan Karadzic*, Civil Action No. 43, CN 1163, United States District Court, Southern District of New York.

<sup>119</sup> *Kadic v. Radovan Karadzic*, Civil Action No. 43, CN 1163, United States District Court, Southern District of New York; *Jane Doe I & Jane Doe II v. Radovan Karadzic*, Civil Action No. 93 Civ. 0878 PKL, United States District Court, Southern District of New York.

<sup>120</sup> Civil Action No. 43, CN1163, 13 October 1995.

<sup>121</sup> Sassoli M & Bouvier A A (1999) 'How does Law Protect in War.' International Committee of the Red Cross. Page 1247 to 1251.



the United Nations Charter.<sup>122</sup> The ICTY has been accorded jurisdiction over war crimes, genocide and crimes against humanity. To meet the requirements of the principle *nullum crimen sine lege*, the definition of each offence relies upon pre-existing customary and conventional humanitarian law. In this regard it was ruled that international humanitarian law as embodied in the Geneva Conventions, The Hague Convention, the Genocide Convention and the Nuremberg Charter are without doubt customary international law.<sup>123</sup>

Since the former Yugoslavia was a party to the four Geneva Conventions and the two Protocols mentioned earlier,<sup>124</sup> the ICTY could determine whether grave breaches of these instruments have been committed, that is, violations of humanitarian law or acts amounting to genocide. Parties to the conflict also signed a Memorandum of Understanding on 27 November 1991 and 22 May 1992 wherein they confirmed that the Geneva Conventions shall apply.<sup>125</sup>

It was confirmed on Appeal in the case of *The Prosecutor v Tadic a/k/a "Dule"*<sup>126</sup> that the Geneva Conventions shall apply.<sup>127</sup>

*The Prosecutor v Tadic a/k/a "Dule"*, was the first trial held in 1994 by the United Nations tribunal and produced many consequences that could have a significant bearing on the sexual violence against women under international law. Tadic was found guilty of persecution<sup>128</sup> for taking part in a campaign of terror including rape and sexual violence. He was further convicted for aiding and abetting crimes of

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<sup>122</sup> Sassoli M & Bouvier A A (1999) 'How does Law Protect in War.' International Committee of the Red Cross. Page 1147.

<sup>123</sup> Sassoli M & Bouvier A A (1999) 'How does Law Protect in War.' International Committee of the Red Cross. Page 1118 and 1119.

<sup>124</sup> Ibid.

<sup>125</sup> Sassoli M & Bouvier A A (1999) 'How does Law Protect in War.' International Committee of the Red Cross. Page 1109 to 1116.

<sup>126</sup> Case number IT-94-1-AR72, 2 October 1995.

<sup>127</sup> Sassoli M & Bouvier A A (1999) 'How does Law Protect in War.' International Committee of the Red Cross. Page 1159 to 1220.

<sup>128</sup> Par 4 of the indictment refers to a number of varied and separate incidents, which are alleged to constitute persecution. It charges that the accused participated with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, the seizure and imprisonment of Muslims and Croats in the Omarska, Keraterm and Trnopolje camps, and the deportation and expulsion by force or threat of force of the majority of Muslim and Croat residents from opstina Prijedor.



sexual violence through continued and knowing participation in or tacit encouragement of such crimes.<sup>129</sup> This decision marks significant developments in international law on rape and other forms of sexual violence as such crimes were found to constitute persecution and in that the accused was convicted for not preventing the sexual violence against women.<sup>130</sup>

The Fourth Geneva Convention provides protection for civilians in international armed conflict and specifically provides that women should be protected against rape.<sup>131</sup> The ICTY also has jurisdiction over violations of the laws or customs of war and if rape is regarded as a weapon of war then it can be brought under this prohibition. That is, "employment of... weapons of war calculated to cause unnecessary suffering."<sup>132</sup>

The definition of crimes against humanity follows that of the Control Council Law No. 10 and therefore *includes* rape.<sup>133</sup> The Secretary-General of the United Nation's report makes it clear that to constitute a crime against humanity the acts must be of a very serious nature and be committed as part of a widespread or systematic attack against any civilian population.<sup>134</sup>

The significance of the Secretary-General's report is that systematic attacks on the civilian population will fall within the ambit of crimes against humanity. Perpetrators may consequently be prosecuted for these acts and even possibly rape, if such evidence is produced.

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<sup>129</sup> Par 477 of the judgement.

<sup>130</sup> Par 477 of the judgement.

<sup>131</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 27.

<sup>132</sup> Hague Convention (IV). Respecting the Laws and Customs of War on Land and the Hague Regulations, 18 October 1907.

<sup>133</sup> Control Council for Germany, Official Gazette, 31 January 1946.

<sup>134</sup> Ibid.

### 3.1.5 Rwanda

In 1959 the Hutu people in Rwanda rebelled against the Belgians as well as the Tutsi elite with the result that hundreds of thousands of Tutsi fled and were displaced.<sup>135</sup>

In 1962 Rwanda and Burundi became separate, independent countries.<sup>136</sup> The Hutu installed government in Rwanda and continued with Tutsi massacres and some Tutsi escaped to Uganda and formed the Rwanda Patriotic Front (RPF).

Major General Juvenal Habyarimana, a Hutu, staged a military coup in Rwanda in 1973 and remained in power through elections in 1978, 1983 and 1988. Members of both the Hutu and Tutsi opposed him and some Hutu supported the RPF.

In 1990 the RPF invaded Rwanda and fought government forces for three years, displacing hundreds of thousands of people. Melchior Ndadaye, a Hutu and the first democratically elected president, was murdered by the Tutsi-dominated army in 1993. The subsequent fighting led to more than 150,000 deaths.<sup>137</sup> Ndadaye's successor, Cyprian Ntaryamira died with the president of Rwanda when their plane was shot down. The subsequent peace pact that divided power between a Hutu president and a Tutsi prime minister ended when the Hutu president Sylvestre Ntibantuganya was removed from power by the military in July 1996.<sup>138</sup>

Troops and militia loyal to the government began systematically killing opponents, those suspected of supporting the RPF, including many Hutu.<sup>139</sup>

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<sup>135</sup> See <<http://www.webcom.com/hrin/parker/96report/rwanda.html>> [accessed on 22/05/2001].

<sup>136</sup> After World War II, Rwanda and Burundi became U.N Trust Territories; the Tutsi monarchy resisted Belgian efforts at democratic reform. In 1959, Rwanda's Hutu revolted, killing about 20,000 Tutsi and driving up to a third of the group into exile. The Hutus won a U.N conducted referendum; Belgium granted the Hutu government of Rwanda full independence in 1962.

<sup>137</sup> See <<http://www.webcom.com/hrin/parker/armedcon.html>> [accessed 22/05/2001].

<sup>138</sup> See n 137 *supra*.

<sup>139</sup> *Ibid*.

Attacks reached the point of genocide with stories of rivers clogged with dead bodies. Up to a million people were slaughtered in 14 weeks, mostly from the Tutsi minority and almost half the population fled the country.<sup>140</sup> The United Nations Commission on Human Rights held a special session on Rwanda in May 1994. In July 1994, the RPF captured the capital.<sup>141</sup>

Prior to the commencement of the conflict in Rwanda, General Romeo Dallaire, Commander of UN Assistance Mission in Rwanda (the UNAMIR) warned his superior, Kofi Annan, of imminent massacres. The United States Central Intelligence Agency issued its own prediction of half a million possible deaths and the Human Rights Watch reported that the climate in Rwanda was ripe for genocide.<sup>142</sup>

Despite the early warnings and predictions, it is estimated that between 500 000 and 800 000 Rwandans were massacred and the United Nations estimates the number of women raped to be at least 250 000, most of them Tutsi.<sup>143</sup>

Sexual violence and the fueling of genocide in Rwanda has been partly attributed to the use of ethnic and gender stereotyping of Tutsi women in newspapers and radio broadcasts. Many victims (in their accounts of rape and other forms of sexual violence in Rwanda) report that the perpetrators made ethnicity-based sexual remarks about the women before, during and after the assaults.<sup>144</sup>

In the report on the situation of human rights in Rwanda submitted by Mr Ren Degni-Segui, Special Rapporteur of the Commission on Human Rights under paragraph 20 of Resolution S-3/1,<sup>145</sup> it is stated that the situation of Rwandan women as victims is deplorable and continues to be so, despite the remedial

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<sup>140</sup> See n 137 *supra*.

<sup>141</sup> See <<http://www.webcom.com/hrin/parker/96report/rwanda.html>> [accessed on 22/05/2001].

<sup>142</sup> See U.S. Department of State, Human Rights Reports for 1999.

<[http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/rwanda.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/rwanda.html)> [accessed 22/05/2001].

<sup>143</sup> *Ibid.* page 1 to 2.

<sup>144</sup> American Journal of International Law, Vol. 91 pp 628-634, 650.

<sup>145</sup> 25 May 1994.

measures taken.<sup>146</sup> He stated that rape as a weapon has given rise to serious psychological and social problems.<sup>147</sup>

In November 1994, the International Criminal Tribunal for Rwanda (the ICTR) was established in Arusha, Tanzania, to prosecute Rwandan officials for the 1994 genocide of Tutsis.<sup>148</sup> The first judgment, on 2 September 1998 found Jean-Paul Akayesu, the mayor of Taba, a small town in central Rwanda, guilty on nine counts of genocide, crimes against humanity and violations of the Geneva Conventions in the first ever trial before the Tribunal.<sup>149</sup>

Akayesu was sentenced to three life terms plus 80 years. This was the first ever conviction for genocide and it was the first time that an international tribunal ruled that rape and other forms of sexual violence could constitute genocide. It was also the first conviction of an individual for rape as a crime against humanity.<sup>150</sup>

Akayesu appealed against his sentence and on 1 June 2001, the Appeals Chamber, after examining the arguments, ruled that the Trial Chamber did not commit any error on a question of law or error of fact in the case. It therefore affirmed the decision made by the Trial Chamber upon convicting and sentencing the accused.<sup>151</sup>

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<sup>146</sup> Sassoli M & Bouvier A A (1999) 'How does Law Protect in War.' International Committee of the Red Cross. Page 1272-1274.

<sup>147</sup> N 43 *supra*. This confirms the use of rape as a weapon of war.

<sup>148</sup> Frontline: *The triumph of evil: Justice in Rwanda*. (1999).

<<http://www.pbs.org/wgbh/pages/frontline/shows/evil/readings/justice.html>> [accessed on 06/03/2001].

<sup>149</sup> Case No. ICTR – 96 – 4T).

<sup>150</sup> See Press Release: ICTR/INFO-9-2-269.EN Arusha, 1 June 2001.

<<http://www.icttr/ENGLISH/PRESSREL/2001/269.htm>> [accessed on 06/10/2001].

## 3.2 The South African experience

### 3.2.1 South Africa

South Africa is not characterized by widespread incidences of rape as set out above.<sup>152</sup> However, there is growing concern from the public about the increasing number of *domestic* rapes. This, in part, has prompted the legislature to pass into law minimum sentences for certain serious offences.<sup>153</sup> It is from this perspective that the South African situation will be examined.

Studies have indicated the connection between militarization of the nation State and violence against women.<sup>154</sup> Other connections have been drawn between *normal* peacetime attitudes towards women and rape in armed conflicts. One connection that has been controversial in the context of the former Yugoslavia is the direct causal link between pornography in that country and the mass rapes of Muslim women.<sup>155</sup>

Vogelman characterizes South African society as a *rape culture*. He supports the notion that the remarkable thing is not that rape occurs, but that we have managed for so long to see it as a rare and deviant act, when it is, in fact, so embedded in our cultural norms as a rare result of the clash between the feminine and masculine mystiques.<sup>156</sup>

Vogelman rightly states that rape is defined as one of the mechanisms of social control that serves to confine women to the subordinate feminine gender role. The central focus is on factors that promote rape, from the micro level of intrapsychic processes to the macro-level of social structure.<sup>157</sup>

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<sup>151</sup> See Press Release: ICTR/INFO-9-2-269.EN Arusha, 1 June 2001.  
<<http://www.ictt/ENGLISH/PRESSREL/2001/269.htm>> [accessed on 06/10/2001].

<sup>152</sup> See par 3.1.1 to 3.1.5 *supra*.

<sup>153</sup> Section 51 of the Criminal Law Amendment Act 105 of 1997.

<sup>154</sup> See Chinkin, C. (1993) *Women and Peace: Militarism and Oppression*, in Mahoney, K. and Mahoney, P. (eds), *Human Rights in the 21<sup>st</sup> Century: a Global Challenge*.

<sup>155</sup> MacKinnon, C. (1992) *Turning Rape into Pornography*, *Ms Magazine*, July/August 1992.

<sup>156</sup> See n 157 *infra* and n 158 *infra*.

<sup>157</sup> 1990 SAJHR, "The sexual face of violence: Rapists on Rape."



Vogelman also highlights the ways in which macro-factors, such as alienation in the workplace, class and race positions and the violent nature of contemporary South African society, predispose men to rape. He summarizes his conclusions as follows:

“men rape primarily to bolster their masculine pride and feed their desire for power. This is largely attributable to the rapists needs to live up to society’s ideal of masculinity – to be aggressive, strong, virile, dominant and all-powerful; his need to compensate for feelings of powerlessness stemming from the family; alienation in the workplace and political and racial oppression; his socialized belief in rape myths; his objectification of women; his conditioning which leads to believe that violence is the simplest means to solve problems and to get what he wants; his need to compensate for sexual and masculine inadequacy; and his strong association of sex with violence.”<sup>158</sup>

A substantial body of knowledge has been developed showing, that at least in contemporary western societies including South Africa, violence against women is *over determined*.<sup>159</sup>

Estimates of the proportion of rapes that are reported to the police in South Africa range from one in every two cases to one in every twenty cases. This suggests that between 24 360 and 462 840 rapes were not reported in 1992.<sup>160</sup>

Research in the United States has shown that over 40% of the men who rape girls aged between 14 and 18 years are authority figures.<sup>161</sup> Recognition of the relative powerlessness of children in the sexual arena undergirds the special statutory offence of Sexual Offences with Youths<sup>162</sup>, the main aim of which is to protect children under 16 years from sexual relations with adults. This offence is commonly referred to as statutory rape.

The focus on minors reveals the position held by the offenders, namely, authority figures with whom the child ought to have been safe. Van den Haag is right when he states that women are raped by men from all sides – both enemy and

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<sup>158</sup> Vogelmann, L. (1990) SAJHR, *The sexual face of violence: Rapists on Rape*.

<sup>159</sup> Ibid.

<sup>160</sup> 1993 SAJHR, page 514.

<sup>161</sup> Ibid.

<sup>162</sup> Sexual Offences Act 23 of 1957 as amended.

'friendly' forces.<sup>163</sup> In the South African context we are not at war and as such we do not have a defined enemy. Notwithstanding this South African society is being characterized as a rape culture.<sup>164</sup> MacKinnon draws a correlation between peace time activities in the former Yugoslavia and the subsequent systematic sexual abuse of women during war.<sup>165</sup> It is submitted that the South African rape culture does not bode well for the advancement and protection of women's rights. People in authority<sup>166</sup> are normally regarded as 'friendly' forces and are generally trusted and are people whom others regard as custodians of good morals.

The common law offence of rape hinges on the issue of consent. For the statutory crime of a Sexual Offence with a Youth, consent is legally irrelevant and the central issue is instead the age of the victim. In practice this statutory offence is most commonly used to try men who have had 'consensual' sex with adolescent girls under the age of 16. This is preferred as it avoids the situation where a minor child is cross-examined in order to determine whether they gave consent or not.

Furthermore, it is noteworthy that girls between the ages of 16 and 18 years, who are neither considered to be children in terms of Child Care Act<sup>167</sup> nor protected by section 14 of the Sexual Offences Act.<sup>168</sup> In fact, girls who are over 12 years of age face the same arduous task of proving non-consent to sexual intercourse as do adult women if they wish to charge their perpetrators with *rape* and/or if they wish to secure legal abortions on the grounds of rape.<sup>169</sup>

This is clearly unfair because, for the statutory crime of a sexual offence with a youth, consent is legally irrelevant and the central issue is the age of the victim

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<sup>163</sup> See n 21 *supra*.

<sup>164</sup> Vogelmann, L. (1990) SAJHR, *The sexual face of violence: Rapists on Rape*.

<sup>165</sup> MacKinnon, C. (1992) *Turning Rape into Pornography*, *Ms Magazine*, July/August 1992.

<sup>166</sup> Examples are priests, doctors, parents, teachers etc.

<sup>167</sup> Child Care Act 74 Of 1983 as amended.

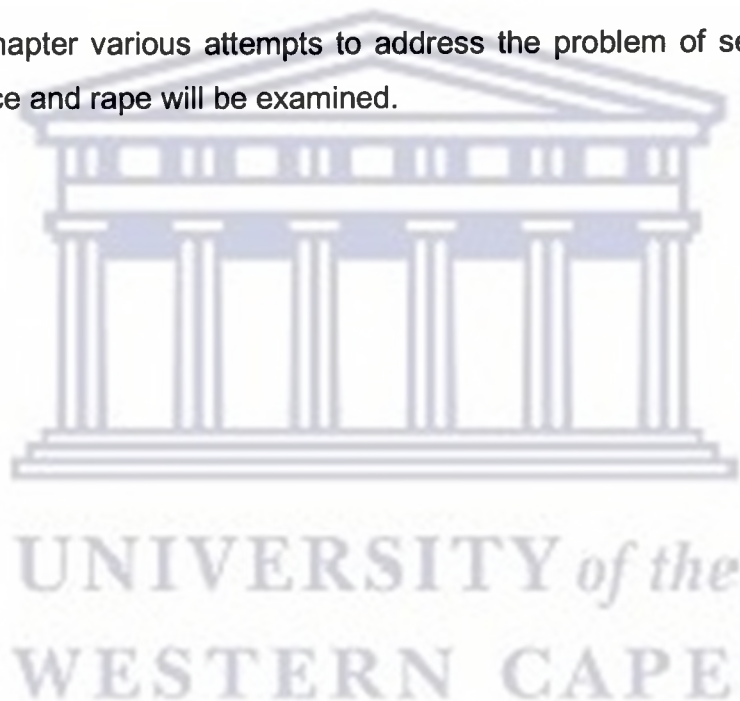
<sup>168</sup> Act 23 of 1957 see also n 164 *supra*.

<sup>169</sup> See n 164 *supra*.

instead. It therefore follows that if the coercive potential of adults is to be adequately recognized under rape law, then there should be at least an irrebuttable *presumption* of non-consent under the age of 18 years in cases involving adult accused.

The South African *rape crises* does not bode well for the future of the suppression of sexual violence against women. The rape statistics<sup>170</sup> indicate that the rape of women in South Africa is pervasive and women are under threat.

In the next chapter various attempts to address the problem of sexual slavery, sexual violence and rape will be examined.



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<sup>170</sup> See n 158 *supra*.

## **CHAPTER 4**

### **Attempts to combat the problem of sexual slavery, sexual violence and rape.**

According to McDougall, ending the cycle of impunity which currently exists for acts of violence and sexual slavery during armed conflict will require political will as well as concerted action by the international community, the United Nations, Governments and non-governmental actors.<sup>171</sup>

Women have struggled to make their experiences and conceptions of the world known and understood in the wider community.<sup>172</sup> Feminist theory has played a significant role in deepening our understanding of oppression and disadvantage and have begun to play an important role in formulating responses to them.<sup>173</sup> With respect to the development of International Humanitarian Law and the international law of human rights, the graphic descriptions given by the media of the violations of the rights of women in Bosnia and Herzegovina have forced the international community to reconsider its definitions of war crimes and crimes against humanity.<sup>174</sup>

The Sub-Commission on Prevention of Discrimination and Protection of Minorities (the "Sub-Commission")<sup>175</sup> requested the submission of a working paper on the situation of systematic rape, sexual slavery and slavery-like practices during wartime.<sup>176</sup> A summary of the purpose of the study, the history of systematic rape, issues of responsibility and liability, jurisdiction to try

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<sup>171</sup> McDougall, G. (1998). *Systematic Rape, Sexual slavery and slavery-like practices during armed Conflict*. Commission on Human Rights.

<sup>172</sup> See: *A Feminist Appraisal of the Dayton Peace Accords* by Dolgopol, U. <<http://www.law-lib.utoronto.ca/Diana/fulltext/dolg.htm>> [accessed on 06/10/2001].

<sup>173</sup> See par 3.2.1 and n 164 *supra*.

<sup>174</sup> *Ibid.* General Assembly Resolution 51/115 (1996) *Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia*.

<sup>175</sup> McDougall, G. (1998). *Systematic Rape, Sexual slavery and slavery-like practices during armed Conflict*. Commission on Human Rights.

<sup>176</sup> The paper was aimed at all internal and international conflicts after World War II and is not restricted to a particular region.

perpetrators, possible sanctions against violators and possible forms of reparation was submitted to the Sub-Commission during 1996.

A final report prepared by McDougall, as Special Rapporteur, was submitted in 1998 to the United Nations Human Rights Commission.<sup>177</sup> This report recommends that the Japanese government should assume responsibility, acknowledge its violation of international law, make a public apology in writing to individual women, pay compensation to individual women, amend educational curricula to reflect true historical realities, fully disclose related documents, identify and punish perpetrators.<sup>178</sup>

A further intention of the study was to advance discussions over rules and procedures that may advance prosecutions of perpetrators by domestic courts and international criminal tribunals.

Successful settlements have been won against Swiss, Austrian, German and French Banks, German Corporations and some European Insurers and there are on-going claims against the Vatican, insurance companies, with potential lawsuits against South American, Turkish and Iberian banks.<sup>179</sup>

Past attempts to sue Japanese companies, however, have been ineffective and it was not until 1999 that Japanese wartime conglomerates have been sued.<sup>180</sup>

The American Congress, through the Torture Victim Protection Act of 1991, has granted foreign victims access to litigate through United States courts even though the torture took place on foreign soil.<sup>181</sup>

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<sup>177</sup> McDougall, G. (1998). *Systematic Rape, Sexual slavery and slavery-like practices during armed Conflict*. Commission on Human Rights.

<sup>178</sup> See: *The Other Holocaust: Nanjing Massacre* – [www.skycitygallery.com/japan/japan.html](http://www.skycitygallery.com/japan/japan.html) [accessed on 22/05/2001].

<sup>179</sup> McDougall, G. (1998). *Systematic Rape, Sexual slavery and slavery-like practices during armed Conflict*. Commission on Human Rights.

<sup>180</sup> See: *The California Cure for the Japanese War Crimes*, Levy J <http://flamemag.dircon.co.uk/levy-japanese-war-crimes.htm> [accessed on 22/05/2001].



More recently, numerous charges based on sexual violence have been brought by the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia. The International Tribunal for Rwanda was put under pressure to investigate and prosecute crimes of sexual violence. Progress has also been made in addressing gender-based violence in armed conflict in the context of the international criminal tribunals.

To successfully combat the problem, it is vital that the crime is clearly defined; however, there is no explicit definition of rape in International Humanitarian or Human Rights Law. Judge Navi Pillay states that the genocide conviction of Akayesu, mayor of Taba commune in Rwanda, explicitly recognizes that rape resulted in the “destruction of the spirit, of the will to live, and of life itself.”<sup>182</sup> She added that this new jurisprudence emerging from her court and from the ICTY provided a precedent for the way in which international and regional bodies view and treat sexual violence.

In a second ruling the ICTR became the first *international tribunal* to define the crime of rape, conceptualizing it as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” This was necessary, the tribunal said, because “to date, there is no commonly accepted definition of [rape] in international law.” This definition establishes a precedent which would assist future tribunals in addressing the problem of rape during war.

In the following chapter, some possible steps which could be taken to remedy the effects of sexual slavery, sexual violence and rape will follow.

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<sup>181</sup> See: *The California Cure for the Japanese War Crimes*, Levy J <http://flamemag.dircon.co.uk/levy-japanese-war-crimes.htm> [accessed on 22/05/2001].

<sup>182</sup> De Rebus, October 2002.

## CHAPTER 5

### Remedial Action

#### 5.1 Introduction

There has been a failure until now to address the situation of war rape in spite of the fact that in all wars, since the beginning of time, rape and violence against women has been a fundamental feature. There has also been a failure to raise the issue of violence against women sufficiently (or at all in some cases) in the post-World War II tribunals at Nuremberg and Tokyo and this is why these issues are still before us today.

Because of increased pressure by women activists and non-governmental organisations, wartime rape in the territory of the former Yugoslavia and in Rwanda is under serious scrutiny at the international tribunals established to address war crimes in those areas. Women activists have been instrumental in ensuring that the International Tribunals for the Former Yugoslavia would prosecute rape as a war crime.<sup>183</sup>

Besides the condemnation of war rape in international law, international law has long required compensation for victims of war crimes. The right to compensation of injury is, according to Grotius, one of the five basic elements of international law<sup>184</sup>. The famous American case of *Marbury vs Madison (1803)* calls the right of individual compensation “the very essence of civil liberty.”<sup>185</sup>

The right to individual compensation has existed in the international law sphere for hundreds of years. Woolsey, writing in 1892, refers to the customary law right

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<sup>183</sup> See n 142 and n 143 *supra*.

<sup>184</sup> Grotius, H: *De Jure Belli Ac Pacis Libri Tres* 12 (Francis Kelsey trans. 1949) (original published 1625) *Legal Opinion on Comfort Women – Part II* <http://www.webcom.com/hrin/parker/j-ew-af2.html> [accessed on 22/05/2001].

<sup>185</sup> See: United Nations Commission on Human Rights: U.N. Speech on Comfort Women. <http://www.webcom.com/hrin/parker/c95-11.html> [accessed on 22/05/2001].

of individuals to redress or compensation.<sup>186</sup> The great Calcutta High Court Judge Guha Roy calls compensation of injured aliens “a timeless axiom of justice.”<sup>187</sup>

There is no exclusion of compensation for war crimes in international law. A 1796 United States Supreme Court decision acknowledged the right to compensation is acquired by private persons during war;<sup>188</sup> the Hague Convention of 1907 requires compensation for violations of the rules of war. Accordingly, war rape victims should be compensated.<sup>189</sup>

## 5.2 Abortion as an option for survivors of rape

It is noteworthy that South African abortion law *does* permit the survivors of rape and incest to have legal abortions. It is crucial to note that the large majority of female rape and incest survivors in this country today live in socio-economic conditions that further limit their chances of acquiring legal abortions. These are women who are disadvantaged in their access to education and information, who are economically impoverished and who live in areas where there are few medical resources.

Ward<sup>190</sup> is correct in his objection to the Choice of Termination of Pregnancy Act.<sup>191</sup> Ward, an obstetrician in Cape Town, warns about the ability of existing medical facilities and personnel to cope with the demands of this legislation. In addition to this there are personnel who would object for reasons of conscience. Women, who have been impregnated as a result of sexual violence, are also

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<sup>186</sup> Woolsey, T: Introduction to the Study of International Law 17-18 (1892).

<<http://www.webcom.com/hrin/parker/j-ew-af2.html>> [accessed on 22/05/2001].

<sup>187</sup> Roy, G : Is the Law of Responsibility of States for Injuries to Aliens a part of Universal International Law, 55Am.J.Int'l L.863 (1961) <<http://www.webcom.com/hrin/parker/j-ew-af2.html>> [accessed on 22/05/2001].

<sup>188</sup> Ibid.

<sup>189</sup> United Nations Commission on Human Rights: Fifty-first session – Agenda item 11. <<http://www.webcom.com/hrin/parker/c95-11.html>> [accessed on 22/05/2001].

<sup>190</sup> Examining the issues. “Circumstances indicating potential for conflict – Abortion. <<http://www.consciencelaws.org/examining-conscience-issues/back.../backabortion14.htm>> [accessed on 05/06/2003].

faced with dilemmas based on religion and conscience. This raises a double jeopardy for the victim.

The poor standard of medical facilities is particularly characteristic of the countries addressed above which are in the throes of war and civic institutions, like hospitals, are but hardly functional. Since abortion is illegal in Rwanda,<sup>192</sup> pregnant women either had to obtain an illegal abortion, with risk to life, or make a life long commitment to unwanted babies. Others who were forced to give birth have rejected the infants and rumours of infanticide are common.<sup>193</sup> Van Thielen and Arnou<sup>194</sup> state that one woman in Rwanda expressed guilt at not having been able to *accept death*, rather than rape. The women interviewed, felt shame beyond expression from carrying the children of the *interahamwe*, the militia group most responsible for carrying out the genocide.

Further, the Catholic Church condemns abortion even in the event of rape and some Croatian women's groups testify that many Catholic hospitals refuse to perform the procedure.<sup>195</sup>

Abortion for most women, is not regarded as an option, in fact, it strengthens the misguided perception that women are victims<sup>196</sup> and must take responsibility for the suffering inflicted upon them.

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<sup>191</sup> Choice of Termination of Pregnancy Act, 1996.

<sup>192</sup> Article 325 of the 1977 Rwandan Penal Code.

<sup>193</sup> Swiss, S & Giller, J. Rape as a Crime of War: A medical Perspective, 270 *Journal of American Medical Association* 612,614.

<sup>194</sup> Van Thielen, S. and Arnou, A. (1995). *The Devil's Children – Rwanda's Shame – The Women's Testimony, 1995.* <<http://www.imsite.org/ra05.htm>> [accessed on 06/03/2001].

<sup>195</sup> Croatian doctors who maintain that they will perform abortions in cases of rape unless serious medical reasons mitigate against it have disputed this claim. Askin 288; MacKinnon, C. "Turning Rape into Pornography: Postmodern Genocide" in Stiglmayer, A. *Mass Rape: The War Against Women in Bosnia-Herzegovina* 187-88 and Patel, K. "Recognizing the Rape of Bosnian Women as Gender-Based Persecution" (1994) 60 *Brooklyn Law Review* 929,952.

<sup>196</sup> The context within which the word 'victim' is used here suggests that women fall within an inferior class.

### 5.3 Acknowledgement, apology and compensation

McDougall<sup>197</sup> and Coomaraswamy<sup>198</sup> both submitted reports founded on years of investigation and recommends that the Japanese government should assume responsibility and:

1. Acknowledge its violation of international law.
2. Make a public apology in writing to individual women.
3. Pay compensation to individual women.
4. Amending educational curricula to reflect true historical realities.
5. Full disclosure of related documents.
6. Identify and punish, as far as possible, involved perpetrators.

During the interviews, the women described the importance of receiving full apologies, the necessity to receive compensation for the harms they suffered and the importance of access to medical services and counseling<sup>199</sup>.

The rehabilitation and reintegration of women who were raped and sexually abused needs to be addressed with special focus on restoring the women's sense of self worth and dignity. In this regard women should be given assistance to re-establish themselves in their homes, specialist medical services, counseling and psychiatric treatment. The international community could channel these needed support systems via established organizations like the International Red Cross Society.

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<sup>197</sup> McDougall, G. (1998) UN Special Rapporteur on Violence against Women: *Comfort Women: An unfinished ordeal*. UN Human Rights Commission.

<sup>198</sup> Coomaraswamy, R. (1996) UN Special Rapporteur on Violence against Women: *On the wartime sex Slavery*. UN Human Rights Commission.

<sup>199</sup> See: Dalfopol, U : *A Feminist Appraisal of the Dayton Peace Accords* <<http://www.law-lib.utoronto.co/Diana/fulltext/dolg.htm>> [accessed on 06/10/2001].



#### 5.4 International pressure

Parker correctly submits that Japan's refusal to compensate victims directly could be attributed to lack of pressure from other countries, especially the United States and China for political and economic reasons.<sup>200</sup> Kim<sup>201</sup> states that "it does seem the Japanese government wants these old ladies (victims of the Nanjing Massacre) to die one by one until the whole thing blows over."

It is submitted that the international community needs to stand together and support victims of human rights violations. First, this sends a clear message to offenders that their violations of human rights will not be condoned. Secondly, the holding of a particular government accountable will ensure that economic compensation is economically viable and other forms of compensation are executable.

In the final chapter the various conclusions in this research paper will be set out. Suitable recommendations will also follow.



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<sup>200</sup> Parker, K. (2000) "The other Holocaust: Nanjing Massacre, Unit 731, Unit 100, Unit 516" at page 17.

<sup>201</sup> Kim, E quoted in Parker, K. (2000) "The other Holocaust: Nanjing Massacre, Unit 731, Unit 100, Unit 516" at page 17.

## CHAPTER 6

### Conclusions and Recommendations

#### 6.1 Conclusions

This research paper has shown that rape and violent sexual abuse of women in armed conflict has a long history. Systematic rape aims to destroy an entire ethnic group. It is a planned act with the intent to defeat the opposition during armed conflict and therefore occurs as a direct consequence of war. It has also been shown that there are other forms of sexual violence against women committed by both enemy and friendly forces.<sup>202</sup>

International instruments and legal responses have been slow and or ineffective to curb the sexual abuse of women or to afford them a remedy.<sup>203</sup> The introduction of the permanent international tribunal and the subsequent trials under the jurisdiction of the ICTY and ICTR have been welcomed.<sup>204</sup>

The focus on international incidence of systematic rape, sexual slavery and slavery-like practices during armed conflict has shown that not enough is being done to protect women simply because of the fact that they are women. With respect to the Comfort Women of Japan, it must be mentioned that fifty years after the events, those women interviewed during the International Commission of Jurists mission emphasized that the horrors they experienced did not end when the rapes ended. They have had to live with the emotional and psychological pain for the rest of their lives and their feelings of torment and great sense of loss remains overpowering.<sup>205</sup>

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<sup>202</sup> See par 1 to 12 of chapter one *supra* and accompanying footnotes.

<sup>203</sup> See par 2.1 to 2.8 of chapter two *supra* and accompanying footnotes.

<sup>204</sup> See par 2.9 of chapter two *supra* and accompanying footnotes.

<sup>205</sup> See par 3.1 of chapter three *supra* and accompanying footnotes.

In Nuremberg rape did not feature prominently during the trials notwithstanding the fact that there was widespread incidence of rape by both enemy and friendly forces.<sup>206</sup>

In Uganda there appears to have been a reluctance by the international community to intervene and prevent the sexual abuse of women and children.<sup>207</sup>

Although there were some developments in international law, rape was still not recognized as a crime under international law. The genocide in both Yugoslavia and Rwanda displayed a planned systematic rape calculated at exterminating an entire ethnic group. The two international tribunals have been at the forefront of progress in respect of their statutes and in the interpretation of the provisions of the statutes through their decisions. The most significant development relates to a conviction of genocide for the commission of sexual violence.

Although rape is not included in either the Genocide Convention or in the ICTR statute as a form of genocide, the trial chamber nevertheless argued for its inclusion in the *Akayesu* decision. The conviction of a woman<sup>208</sup> charged with rape constitutes another landmark in the development of international law.<sup>209</sup>

The South African experience must be seen as a warning to human rights organizations as the country already displays a rape culture during *peacetime*. There is a dire need to educate and take effective legal steps to stem the tide of indifference towards the rights of women.<sup>210</sup>

There have been concerted attempts by the international community to combat the problem of sexual slavery, sexual violence and rape. There has been some

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<sup>206</sup> See par 3.2 of chapter three *supra* and accompanying footnotes.

<sup>207</sup> See par 3.3 of chapter three *supra* and accompanying footnotes.

<sup>208</sup> *Nyiramahusuko and Ntahbali* decision. See n 23 *supra*.

<sup>209</sup> See par 3.4 and 3.5 of chapter three *supra* and accompanying footnotes.

<sup>210</sup> See par 3.6 of chapter three *supra* and accompanying footnotes.

success in seeking compensation but not enough to justify the pain and suffering experienced by the victims.<sup>211</sup>

## 6.2 Recommendations

In reaching post-war settlements, governments should have a very clear responsibility through specifically named ministries, to monitor and provide progress reports to Human Rights Watch Groups on the reintegration and rehabilitation of those who have experienced gross violations of their human rights. In addition, these ministries should be responsible for ongoing assessments of those still traumatized by war. The United Nations is in a pivotal position to ensure compliance with the above. The consequence of non-compliance could be the international condemnation of that offending country with appropriate measures which would not further exasperate the plight of the victims. It is submitted that even where the offending country happens to be a super-power like the United States of America, that sustained trade and economic sanctions would inevitably ensure compliance.

An obligation to develop human rights education programs and other public education campaigns should be placed on governments, as they are necessary in order that populations as a whole are sensitized to the impact of human rights violations on individuals and on societies. There cannot be any rehabilitation in any meaningful sense if the truth of a country's past is not acknowledged and the legacy of war is not addressed. The concept is similar to the South African Truth and Reconciliation Commission (TRC) experience but without the blanket amnesty which was given to perpetrators of human rights violations in South Africa. The truth must be revealed but not at the expense of the victims – perpetrators must be prosecuted wherever feasible.

In South Africa we did not see many prosecutions and it is submitted that this was due largely to the fact that the 'veiled' purpose of the TRC was to afford

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<sup>211</sup> See par 5 to 8 of chapter four and chapter five *supra* with accompanying footnotes.

blanket amnesty to both sides of the Apartheid system. Further, there was an apparent lack of expertise and evidence to try the perpetrators of human rights offences. Finally, it could be argued that the judiciary was not fully representative of the victims of Apartheid<sup>212</sup> in that most judges were still white males.

The lessons to be learnt from the above is that a truth and reconciliation committee must not be used as a political tool simply to assist in the transition from a repressive regime to a democratic order. Evidence of human rights abuses must be protected and prosecutors must be trained to try these offences. The judiciary must be selected from members of the international tribunals who have a proven track record for deciding these matters.

For any war crimes tribunal to become effective, the enormous legal and practical questions relating to the identification, arrest and detention of accused persons, the collection and presentation of evidence, the rules of evidence and the procedures to be followed, would all have to be resolved. It must be noted, however, that for the prosecution of rape as a war crime to be effective, the legal rights of any accused should not be sacrificed. The focus of the tribunal should include the provision for compensation and support to those who have suffered and not only the prosecution and punishment of wrongdoers.

The rape of women in the former Yugoslav and in the Rwandan conflicts has been condemned and some perpetrators have been prosecuted. Buss<sup>213</sup> rightly argues that events such as these fail to meaningfully challenge the gendered nature of humanitarian law in which violence against women will always seem secondary to the prevailing dictates of military necessity.

Humanitarian law and its application by the ICTY defines women in such a way that rape becomes accepted as a normal part of war and women remain marginal figures whose suffering is seen as regrettable but inevitable. Thus,

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<sup>212</sup> Most victims of Apartheid were Black South Africans.

<sup>213</sup> Buss, D. (1998) *Women at the Borders: Rape and Nationalism in International Law*, 6(2) *Feminist Legal Studies*.



while the ICTY represents an attempt to specifically address wartime violence against women, it presents women in problematic ways that ignore or erase their experiences.

Up until now, the legal measures taken have all been reactive. Positive *preventative* steps to implement humanitarian law in armed conflict situations should be considered. There should be a stronger commitment to prevent armed conflict, thus eradicating the conditions conducive to the occurrence of such offences.

Women's rights within the international community need to be recognized as fundamental human rights. Steps to enhance the accountability of governments for violence against women are as much an integral part of the counter-attack on the war against women as are the more publicised and dramatic responses to events in the former Yugoslavia and in Rwanda.

The possible reason for the above omission may be attributed to the fact that prior to Rwanda and Yugoslavia, there has been a reluctance to try rape as a crime against humanity.

It is submitted that an encouraging precedent had been set in the trials in Rwanda and Yugoslavia where rape has been tried as a crime against humanity. The international community needs to follow this precedent, which would ensure that the War on Women does not continue.

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