

Symposium The Yugoslav Crisis: New International Law Issues

Rape and Sexual Abuse of Women in International Law

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I. Introduction: Rape in Armed Conflict

This paper will consider the international legal response to rape and other forms of sexual abuse committed against women during the course of an armed conflict: its incidence, impact and consequences. Although both men and women can be and are raped, causing severe injury for both, in terms of numbers rape is essentially a crime committed against women. Further, women suffer from particular after-effects in rape that are not shared by men.

Women are raped in all forms of armed conflict, international and internal, whether the conflict is fought primarily on religious, ethnic, political or nationalist grounds, or a combination of all these. They are raped by men from all sides – both enemy and ‘friendly’ forces. There have been reports of rapes and other forms of sexual abuse committed by members of United Nations peacekeeping forces;¹ women are not free from interference even from those who are in the territory with an international mandate to restore international peace and security. International media attention has been directed towards the widespread rapes, torture and forced pregnancies in the former Yugoslavia.² The ‘mobilization of shame’ which has been

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1 E.g., E. Van den Haag, *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 Somali girls by Italian troops serving with the UN forces; *The Guardian* 19 February 1994.

2 See especially, Amnesty International, *Bosnia-Herzegovina, Rape and Sexual Abuse by Armed Forces* (January 1993); Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Report Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992,

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identified as the primary means of enforcing international humanitarian law has to some extent been activated in this instance.³ Nevertheless, the international response in itself carries the risk that violent offences against women will be perceived as something exceptional, peculiar to this particular conflict. The reality is that rape and violent sexual abuse of women in armed conflict has a long history.⁴

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.⁵ After the liberation large numbers of foreign domestic working women in Kuwait were attacked and subjected to sexual violence from subsequently returning Kuwaitis;⁶ women in Rwanda who are caught up in the vicious civil war in that country;⁷ women in Kashmir who have suffered rape and death under the administration of the Indian army.⁸ The following has been reported concerning a civil conflict in South America.

[T]hroughout 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. Often, the same woman is the victim of violence by both sides;⁹

Liberian women have been repeatedly raped in the ethnic violence of that country's civil war¹⁰ and women from East Timor have been raped as well as killed since the occupation by Indonesia commenced in 1975.¹¹ Another example which occurred

E/CN.4/1993/50 (10 February 1993); European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, Warburton Report, E/CN.4/1993/92, Women Living Under Muslim Laws, Compilation of Informations on Crimes of War against Women in Ex-Yugoslavia (3 December 1992, updated 11 January 1993). On 15 April 1994 the Commission of Experts established pursuant to SC Res. 780, 1992 stated in a Press Release, SC/94/8 that it had evidence of a large number of violations of international humanitarian law in the territory of the former Yugoslavia.

- 3 Roling, 'Aspects of the Criminal Responsibility for Violations of the Laws of War', in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979) 200.
- 4 S. Brownmiller, *Against Our Will. Men, Women and Rape* (1975).
- 5 Middle East Watch, *A Victory turned Sour, Human Rights in Kuwait since Liberation* (September 1991).
- 6 '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.
- 7 Africa Watch, *Rwanda, Talking Peace and Waging War: Human Rights since the October 1990 Invasion* (27 February 1992).
- 8 Jammu and Kashmir Council for Human Rights, Torture, Rape and Death (June 1992); Asia Watch, *Human Rights Crimes in Kashmir: A Pattern of Impunity* (June 1993) 95-112.
- 9 Americas Watch and the Women's Rights Project, *Untold Terror: Violence Against Women in Peru's Armed Conflict* (1992) 1.
- 10 S. Swiss, *Liberia: Women and Children Gravely Mistreated* (May 1991); S. Swiss, *Liberia: Anguish in a Divided Land* (1992); Huband, 'Where There Are Any Little Girls They Should Be Raped', *The Guardian* 21 May 1993.
- 11 McCrum, 'Mass Resistance', *The Guardian Weekend* 19 February 1994, 24. Women in East Timor have also been forcibly sterilized in large numbers as one of the ways 'the enemy has of making

longer ago, but which has only recently received serious attention, was the continued sustained rapes of the so-called 'comfort women' by the Japanese military during the Second World War.¹²

Numerous other examples could have been cited but this selection illustrates that women are attacked in conflicts across the globe by men of all colours, religions, nationalities and ideologies.

Rape in war is not merely a matter of chance, of women victims being in the wrong place at the wrong time. Nor is it a question of sex.¹³ It is rather a question of power and control which is 'structured by male soldiers' notions of their masculine privilege, by the strength of the military's lines of command and by class and ethnic inequalities among women'.¹⁴ Radhika Coomaraswamy has identified a number of reasons for sexual violence against women, two of which are especially applicable to rape in armed conflict: violence against women may be directed towards the social group of which she is a member because 'to rape a woman is to humiliate her community'.¹⁵ Complex, combined emotions of hatred, superiority, vengeance for real or imagined past wrongs and national pride are engendered and deliberately manipulated in armed conflict. They are given expression through rape of the other side's women. For the men of the community rape encapsulates the totality of their defeat; they have failed to protect 'their' women. Second, studies have indicated the connection between militarization of the nation State and violence against women.¹⁶ Other connections have been drawn between 'normal' peacetime attitudes towards women and rape in armed conflict; one that has been controversial in the context of the former Yugoslavia is the direct causal link that has been made by Catharine MacKinnon between pornography in that country and the mass rapes of Muslim women.¹⁷ The connection between pornographic projections of women and the use

[our] ethnic identity disappear'. J. Taylor, *Indonesia's Forgotten War The Hidden History of East Timor* (1991) 159, quoting a letter from East Timor.

- 12 Won Soon Park, "Comfort Women", Justice and International Law', paper delivered at the NGO Forum, World Conference on Human Rights, Vienna June 1993; Panel of Lawyers for the 'Philippine Comfort Women', "Philippine Comfort Women" Compensation Suit' (1993); U. Dolgopol and S. Paranjape, *Comfort Women. The Unfinished Ordeal* (Preliminary Report of a Mission, International Commission of Jurists, 1993).
- 13 Feminists have different views on whether rape should be analysed primarily as a crime of violence or as a sex crime; see R. Graycar and J. Morgan, *The Hidden Gender of Law* (1990) 342-347. In armed conflict rape occurs in the overall context of violence; rape which may not be associated with violence, such as date rape, is not at issue.
- 14 Enloe, 'The Gendered Gulf', in C. Peters, (ed.), *The 'New World Order' at Home and Abroad Collateral Damage* (1992) 93, at 97.
- 15 Coomaraswamy, 'Of Kali Born: Violence and the Law in Sri Lanka', in M. Schuler (ed.), *Freedom from Violence: Women's Strategies from Around the World* (1992) 49.
- 16 See Chinkin, 'Women and Peace: Militarism and Oppression', in K. Mahoney and P. Mahoney (eds), *Human Rights in the 21st Century: A Global Challenge* (1993) 405.
- 17 MacKinnon, 'Turning Rape into Pornography', *Ms Magazine*, July/August 1992; MacKinnon made similar statements in a speech at the NGO Forum, World Conference on Human Rights, Vienna, June 1993.

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as war propaganda of these and other media images can be readily accepted,¹⁸ but to identify these as the sole, or even major cause of the abuse of women throughout that area is simplistic and misleading.

Licence to rape has been included as a term of employment for mercenary soldiers. In determining why such a condition is repugnant, Walzer discounts the utilitarian argument that it acts as a spur to military courage. Instead he goes to the heart of the matter:

Rape is a crime, in war as in peace, because it violates the rights of the woman who is attacked. To offer her as bait to a mercenary soldier is to treat her as if she were not a person at all but a mere object, a prize, a trophy of war. It is the recognition of her personality that shapes our judgment.¹⁹

Rape has also been directed as an instrument of war. In the former Yugoslavia rape has been 'massive, organized and systematic'.²⁰ It was 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 the entire ethnic group.'²¹

II. The Consequences of Rape

The consequences of rape continue beyond the actual attack or attacks, often lasting for the rest of the women's lives.²² As well as the degradation, pain and terror caused at the time, the fear engendered remains long after. This fear is also experienced by other women who were not themselves attacked but are aware that they might have been, or might be in the future.²³ Rape centred within a community undermines the well-being and secure existence of the community.²⁴ For

18 Cf. Farmanfarmanian, 'Did You Measure Up? The Role of Race and Sexuality in the Gulf War', in C. Peters (ed.), *The 'New World Order' at Home and Abroad Collateral Damage* (1992) 111.

19 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* (2nd ed. 1992) Ch. 8.

20 SC Res. 820, 17 April 1993.

21 Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Report Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1993/50 (10 February 1993).

22 This section is largely repeated from Chinkin, 'Peace and Force in international Law', *supra* note 1. It is deliberately repeated as I think it is essential that we, academic lawyers, do not forget the reality of such events for their survivors.

23 Cf., 'The effect of rape is greater than just the effects on victims of actual assaults. Living with fear, being constantly watchful, ... over a long period of time damages all women.' 'Women Against Rape in Ohio', cited in G. Ashworth, *Of Violence and Violation: Women and Human Rights* (1985).

24 For a discussion of 'spirit injury' to individuals and the community within the former Yugoslavia see Wing and Merchan, 'Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America', 25 *Columbia Human Rights Law Review* (1993) 1-48.

survivors,²⁵ rape carries the risk of sexually-transmitted diseases, including of course AIDS.²⁶ It also can result in pregnancy. Women have to face the prospect of bearing the child of the invader (of their State, their community and their bodies), or of seeking an abortion at a time of intense social dislocation and when scarce medical supplies are directed as a priority to military personnel. This same factor reduces availability of treatment of sexually-transmitted diseases. Abortion is restricted under the teachings of a number of religions, or women have been forcibly detained to prevent abortion. Other women have been so badly internally injured that they will never be able to bear the children they would have chosen to have; infertility and loss of virginity make women unmarriageable in some societies. Still others have been unable to bear their shame and have committed suicide. Where the effects of conflict have caused shortages of food and shelter, and priority health care is directed towards the military, child bearing can impose an impossibly high additional material, as well as psychological, burden upon their mothers. This can be further exacerbated by the child-being seen by family or compatriots as 'proof' of the woman's collaboration with the enemy, or of her immoral behaviour. Women fear they have become unacceptable to their families and communities, a fear which may be enhanced where the rape was committed publicly in the presence of members of these communities. Public rape terrorizes and traumatizes the civilian population. There is also only just beginning to be some understanding of the psychological damage caused by the trauma of violent sexual abuse.²⁷

III. International Legal Responses

A. Substantive Law

One response has been to call municipal and international legal systems into play, which in turn raises the questions of the adequacy of legal norms and the effectiveness of their implementation.

A number of substantive international legal regimes are currently applicable. States are liable for harm done to individuals which constitutes violation of the laws

25 The use of the word 'survivor' rather than victim is deliberate; the strength, courage and inner resources these women have drawn upon in overcoming their trauma is truly remarkable. For the dangers inherent in labelling people as victims see Minow, 'Surviving Victim Talk', 40 *UCLA Rev* (1993) 1411.

26 The general medical condition of survivors is often low. 'In our work, in addition to psychological disturbances, depression ... we have noticed many psychosomatic and secondary syndromes and illness. All sorts of tumors, bronchitis, epileptic attacks, anorexia and similar illnesses seem to occur more often than would be normal.' M. Belic and V. Kesic, *Interim Report, Centre for Women War Victims* (1993).

27 'Torture and rape destroy feelings of human dignity, self worth and physical integrity, as well as the capacity to think and act clearly. Witnessing or experiencing rape and torture can impair a woman's ability to participate fully in family life, community and society.' S. Swiss, *Liberia: Anguish in a Divided Land* (1992) 4. S. Swiss is the Director of the Women's Rights Program at Physicians for Human Rights and an MD.

and customs of war by troops under their authority and command,²⁸ for violations of internationally guaranteed human rights, including genocide and torture, and for wrongdoing to aliens under the normal principles of State responsibility. These different legal regimes allow for analysis of rape through different lenses: violations of the laws of war, violence against women as a violation of women's human rights, and protection of ethnic groups against genocide.²⁹ In addition to State responsibility there is individual criminal responsibility for the commission of war crimes and crimes against humanity. The plea of superior orders is not available as a defence to such actions.³⁰

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.³¹ The currently applicable laws of war are contained within the 1949 Geneva Conventions,³² the 1977 supplementary Protocols,³³ and in the body of law arising from the judgment of the Nuremberg Tribunal and the Military Tribunal for the Far East.³⁴ Unfortunately, in these documents the position with respect to rape is ambiguous. Rape was not included in the listed war crimes in Article 6 of the Nuremberg Charter, although the list was specifically stated not to be exhaustive.³⁵ The Fourth Geneva Convention provides protection for civilians in international armed conflict and specifically provides that women should be protected against rape.³⁶ This provision is almost exactly reiterated in Protocol I.³⁷ It is noticeable

28 For the view that the emphasis on military necessity ensures that this body of law is thoroughly gendered see Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law', 12 *AYBIL* (1992) 265-278.

29 I owe this insight to Karen Knop, University of Toronto Law School, in a letter to me dated 15 December 1993.

30 This was spelled out in the Charter Annexed to the Agreement for the Establishment of an International Military Tribunal, 5 UNTS 251, Article 8. Superior orders may be considered in mitigation of punishment.

31 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.

32 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, 12 August 1949.

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

34 Charter of the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946, TIAS 1589.

35 Charter Annexed to the Agreement for the Establishment of an International Military Tribunal, 5 UNTS 251, Article 6 included 'murder, ill-treatment or deportation to slave labour ... of civilian population of or in occupied territory, ... killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.

36 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'.

37 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. For a discussion of other

that these provisions do not impose a blanket prohibition against sexual abuse, but rather oblige States to offer women protection against attacks on their honour and to accord them special respect.³⁸ Article 4 of the Fourth Geneva 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'. 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.³⁹ In non-international armed conflict, 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. It is easy to interpret these Articles so as to include rape, but it is nevertheless unfortunate that it is not spelled out as an explicit prohibition. For this reason the affirmation by the World Conference on Human Rights in Vienna in 1993 that 'violations of the human rights of women in situations of armed conflict [with no distinction drawn between international and non-international armed conflict] are violations of the humanitarian principles of international human rights and humanitarian law' is to be welcomed. The Declaration and Programme of Action continues that violations, including systematic rape and sexual slavery 'require a particularly effective response'.

The same is true of the enforcement provisions. States are under an obligation to make grave breaches of the Geneva Conventions and Protocols subject to the jurisdiction of their own courts and punishable by severe penalties. Rape is not however explicitly listed as a grave breach of the Convention, although acts wilfully committed and causing great suffering or causing injury to body or health do constitute grave breaches. Protocol I includes among its list of grave breaches 'degrading practices involving outrages upon personal dignity based upon racial discrimination' but makes no reference to gender discrimination.

War crimes, that is violations of the laws or customs of war, are not the only possible legal regime for the prosecution of rape committed during international armed conflict. There is also the concept of a crime against humanity and, it has been argued in the context of the former Yugoslavia, genocide. A crime against humanity was defined in the Nuremberg Charter as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political,

relevant articles see Y. Kushalani, *Dignity and Honour of Women as Basic and Fundamental Rights* (1982) Ch. 5.

38 Cf. Hevener, 'An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective', 8 *Human Rights Quarterly* (1986) 70. Hevener analyses treaties according to the assumptions that are made of the role of women. She identifies treaties as being either protective, corrective, non-discriminatory or mixed. This is a protective provision where what is needed is an absolute assertion of all women's right to be free from sexual attack and abuse.

39 For the drafting history of Article 76 see M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts* (1982) 467-470.

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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.

A number of points require special mention. First, although crimes against humanity were established as a separate category from war crimes, the crimes in question were inevitably associated with the occurrence of the Second World War. This association between armed conflict and crimes against humanity has been continued in the case of the former Yugoslavia. Second, despite the enormous incidence of rape of civilian populations during the Second World War, prosecutions of crimes against humanity were limited to persecutions on racial, political or religious grounds, in accordance with the wording of Article 6. These words import a requirement of discriminatory behaviour into the concept of crimes against humanity, which is equally well provided by the gender discrimination inherent in violent crimes against women. Thirdly, for actions to come within the category of crimes against humanity they had to be committed against a civilian population, not against individual civilians. Fourthly, in contrast to war crimes, it has been necessary to establish systematic government planning for crimes against humanity. Crimes against humanity are not easily established in light of these restrictive requirements. Nevertheless, 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.⁴⁰

Genocide is defined in Article II of the Genocide Convention.⁴¹ 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;⁴² deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;⁴³ imposing measures to prevent births within the group;⁴⁴ or forcibly transferring children of the group to another group.⁴⁵ At first sight 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 other ethnic groups rape becomes genocidal. This categorization has been further supported by allegations that impregnated women were forcibly detained until it was too late to abort.⁴⁶

40 Control Council for Germany, Official Gazette, 31 January 1946 at 50 cited Meron, *supra* note 31.

41 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly, 9 December 1948, 78 UNTS 277.

42 *Ibid.*, Article II(a) and (b).

43 *Ibid.*, Article II(c).

44 *Ibid.*, Article II(d).

45 *Ibid.*, Article II(e).

46 See Preliminary Statement, *Kadic v. Radovan Karadzic*, Civil Action No. 43, CN 1163, United States District Court, Southern District of New York.

Despite this impressive body of formal prohibition, the incidence of rape in armed conflict has been widely ignored, underplayed or tolerated. Rape is too frequently regarded as an unfortunate but inevitable side-effect of conflict, or as an anticipated bonus for soldiers on all sides. Rape did not figure prominently at Nuremberg, 'not because the Germans were not guilty of rape, but because the allied forces, especially the Russians and the Moroccan forces under French control, were also guilty of many rapes'.⁴⁷ Rape was also largely invisible in the trials of the Japanese war criminals.

This silence by international law enforcement agencies denotes a double irony for women. Feminist writers have argued that the distinction drawn in international law between public acts of the State and private actions has been an important factor in its failure to address denial of human rights to women.⁴⁸ Violence against women for example has not been readily viewed as torture, or as being imputable to the State, because of its widespread commission by private actors within the private arena of the home.⁴⁹ Yet rape in international armed conflict, which is largely committed by military agents of the State under public authority, has also been ignored.⁵⁰

B. Law Enforcement

However, in the context of the former Yugoslavia there has been widespread pressure to ensure that this long silence is broken. The substantive law on rape in armed conflict has now become entangled with the question of arenas for its application. Condemnation of violations and calls for compliance have been made within international political fora, notably the Security Council,⁵¹ the Human Rights Commission,⁵² the Commission on the Status of Women,⁵³ and the Committee on the Elimination of Discrimination Against Women.⁵⁴ Proceedings have been commenced against Yugoslavia (Serbia-Montenegro) in the International Court of

47 Laber, 'Bosnia: Questions about Rape', 40 *NY Rev* (25 March 1993) 3. For examples of rape in the Second World War see S. Brownmiller, *supra* note 4, at 43-78.

48 See Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85 *AJIL* (1991) 613, at 625-630.

49 MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in K. Mahoney and P. Mahoney (eds), *Human Rights in the 21st Century: A Global Challenge* (1993) 21; K. Tomasevski, *Women and Human Rights* (1993).

50 Cf. Arzt, 'Genocidal Rape in Bosnia-Herzegovina and Croatia and the Role of International Law', paper delivered 8 April 1993.

51 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.

52 Commission on Human Rights, E/CN.4/1993/L.21. 22 February 1993.

53 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) para. 19.

54 *Ibid.*, para. 20. See also Chinkin and Werksman, *CEDAW* No. 12, 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).

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Justice by Bosnia-Herzegovina.⁵⁵ Yugoslavia (Serbia-Montenegro) has counter-claimed in similar terms.⁵⁶ Since under Article 34 of the Statute of the Court only States can be parties before it, this litigation will deal with the question of the responsibility of the State under the relevant treaties and customary international law. The options for the prosecution of individuals alleged to have committed such crimes are the domestic courts of any State, or an international war crimes tribunal on the precedent of Nuremberg.

Criminal proceedings have been commenced in domestic courts, for example in Germany, France and by a Bosnian military tribunal in Sarajevo. In the United States civil proceedings have been commenced under the Alien Torts Claims Act⁵⁷ and the Torture Victim Protection Act⁵⁸ against Radovan Karadzic, who has command authority over the Bosnian-Serb military forces.⁵⁹ These claims rely upon the jurisprudence following the case of *Filartiga v. Pena-Irala*.⁶⁰ There Judge Kaufman accepted civil jurisdiction within the United States for offences violating the law of nations, in that instance torture, irrespective of where the offence had been committed and the nationalities of the accused and victim. While there may be concerns about the extension of United States' extra-territorial jurisdiction, there are advantages for the plaintiffs in such civil actions. Jurisdiction can be established for the violation of international law provided personal service can be achieved.⁶¹ *Amicus* briefs from interested third parties, including non-governmental organizations, which set out many aspects of the issue can be admitted. A default judgment may be entered against an absent defendant on the basis of the burden of proof appropriate in civil cases. While it is highly unlikely that any award of damages would ever be forthcoming, the proceedings prevent free access to the United States for the defendant and allow a domestic court to assert its understanding of customary international law.⁶²

55 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.

56 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.

57 28 USC para. 1350; 28 USC para. 1331.

58 Pub. L. No. 102-256, 106 Stat. 78 (1992).

59 *Kadic v. Radovan Karadzic*, Civil Action No. 43, CN 1163, United States District Court, Southern District of New York; *Jane Doe I and Jane Doe II v. Radovan Karadzic*, Civil Action No. 93 Civ. 0878 PKL, United States District Court, Southern District of New York.

60 630 F. 2d 876 (1980), United States Court of Appeals, 2nd Circ.

61 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.

62 In the *Filartiga* case the federal district court subsequently entered a default judgment for \$5 million punitive damages for each plaintiff, 577 F. Supp. 860 (1984).

In Resolutions 808 and 827 the Security Council, acting under Chapter VII of the United Nations Charter, established an International Criminal Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁶³ The Tribunal has been accorded jurisdiction over war crimes, genocide and crimes against humanity. Since a prevailing principle is that of *nullum crimen sine lege*, the definition of each offence relies upon pre-existing customary and conventional humanitarian law.⁶⁴ In addition, all the parties to the conflict have largely accepted the application of the Geneva Conventions and Protocols to it.⁶⁵ Thus the Tribunal can determine whether grave breaches of the Geneva Conventions have been committed. As already stated these do not explicitly include rape, although as a matter of interpretation it can be readily included. The Tribunal also has jurisdiction over violations of the laws or customs of war.⁶⁶ These include 'employment of ... weapons calculated to cause unnecessary suffering'. If rape is correctly regarded as a weapon of war in the way described above, it can readily be brought within this prohibition. The definition of crimes against humanity follows that of the Control Council Law No. 10 and therefore includes rape. The Secretary-General'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.

The purpose of the International Tribunal is to put an end to the commission of war crimes in the former Yugoslavia and to provide effective measures for bringing to justice those responsible for them. In accordance with the requirements for Chapter VII action, the Security Council has stated that the establishment of the International Tribunal will help to restore and maintain international peace in the area. There are enormous legal and practical questions relating, *inter alia*, to the identification, arrest and detention of accused persons, the collection and presentation of evidence, and the rules of evidence and procedure to be followed, which will have to be resolved for the Tribunal to become effective. While the practical and deterrent effect of such a Tribunal may be questioned, the importance of an authoritative public articulation of the relevant norms of international law

63 In SC Res. 808, 22 February 1993 the Security Council requested the Secretary-General to prepare a report on the establishment of such a tribunal. The Secretary-General's report was adopted in SC Res. 827, 25 May 1993.

64 The report of the Secretary-General states that international humanitarian law as embodied in the Geneva Conventions of 12 August 1949, the Hague Convention (IV), the Genocide Convention and the Nuremberg Charter are without doubt customary international law; *ibid.*, at para. 35. Cf. Cassese, 'The Status of Rebels under the 1977 Geneva Protocols on Non-International Armed Conflict', 30 *ICLQ* (1981) 416.

65 For the provisions which have been accepted see Memorandum of Understanding 27 November 1991 (concerning Croatia) and Addendum 23 May 1992; Agreement of 22 May 1992 (concerning Bosnia-Herzegovina). The former Yugoslavia was a party to the four Geneva Conventions and two Protocols.

66 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Hague Regulations, 18 October 1907.

cannot be understated.⁶⁷ In a decentralized legal system where principles of customary international law are generated through State practice and *opinio juris*, the conclusions of the Tribunal resting upon the authority of the Security Council will inevitably have normative and educative effect. It is for this reason that it is essential that rape is considered separately from the other charges and is explicitly condemned. It is not sufficient for it to be regarded as an add-on to other offences.

IV. International Legal Remedies: An Adequate Response to Rape?

Despite the importance of an affirmation of the illegality of rape in armed conflict, some reservations about the role of the Tribunal from the perspective of the survivors of rape must be expressed. Some of these can be addressed by sensitivity towards the process and procedures of the Tribunal, while others go directly to the inadequacies of international legal remedies in the case of rape.

The focus of the Tribunal is on punishing the wrongdoers, not on providing compensation and support to those who have suffered the harms described above. Admittedly this is a defect shared by municipal criminal legal systems, but these may be backed up by other domestic support services. A war crimes tribunal must be supplemented by long-term practical assistance from governments, such as medical care, shelter, support and counselling. Survivors of rape must be provided the space to specify their own needs within their own communities. Appropriate support must be made available to all concerned within the community to enable survivors to regain control of their own lives. The health and emotional needs of those who were not themselves raped must also be given consideration. Indeed it has been argued that to concentrate only upon the survivors of rape can be 'counter-productive by possibly stigmatizing and further traumatizing' those women.⁶⁸ It cannot be assumed that all women will share the same needs. For example, some who feel that crimes committed against them have been disregarded may feel a sense of empowerment in the establishment of the Tribunal,⁶⁹ while others may consider this a further intrusion into their lives, or fear the consequences of proceedings. Responses must take into account both individual preferences and the needs of the harmed society.⁷⁰ The traditional exclusion of women from decision-making with respect to the use of force must not be here continued.⁷¹

Those performing these tasks must receive adequate and relevant training, including psychological counselling. The international community must ensure that

67 Cf. Meron, 'The Case for War Crimes Trials in Yugoslavia', 72 *Foreign Affairs* (1993) 1.

68 M. Belic and V. Kesic, *supra* note 26, at 4.

69 Cf., 'Women who are raped by soldiers and government agents cannot call for help, press charges, or demand justice... I heard over and over again "who is there to carry the matter to?"' S. Swiss, *supra* note 10, at 4.

70 A. Wing and S. Merchan, *supra* note 24.

71 See Chinkin, *supra* note 1, at 212-5.

survivors do not become victims of, or become manipulated by, a well-meaning international reaction to the offences committed against them which fails to take account of their own concerns.⁷² It is important that fact-finding missions report their findings accurately and objectively and that research into the conflict reflects the complexities of its historical and ethnic origins. The fears of the Zagreb-based Centre for Women War Victims need to be taken seriously and responded to:

... we fear that the process of helping raped women is turning in a strange direction, being taken over by governmental institutions ... and male gynaecologists in particular. We fear that the raped women could be used in political propaganda with the aim of spreading hatred and revenge, thus leading to further violence against women and to further victimization of survivors.⁷³

The pain of women raped and abused in armed conflict has often been appropriated by males for propaganda purposes. Suzanne Gibson discusses the examples of how rape of women in France during World War One became 'transformed into a representation of France as an innocent female nation assaulted by a barbaric and brutishly male Germany' and British military conscriptors used the image of 'the Hun' violating their sisters. She concludes with a warning that must be borne in mind throughout any criminal proceedings:

... rape has not throughout most of recorded history, been a crime against women. It has significantly however been a heinous crime against men: a humiliation inflicted upon a nation, an affront to a man's pride as guardian of his women, ...⁷⁴

It is essential that prosecutions are brought against accused people from all sides. While the International Tribunal is unique in that it was established during the continuation of the conflict and is therefore untainted by notions of 'victor's justice', it must not be used to prosecute offenders from only one side. Prosecutions must be brought against the alleged perpetrators and those higher up in the chain of command.⁷⁵ It is essential that the message is made clear that rape of women is illegal and will be punished whoever is responsible for the commission of the offence.

72 J. Mertus, *Meeting the Health Needs of Women Survivors of the Balkan Conflict* (1993) has a list of recommendations for International Aid. Recommendation 3 states: 'International aid workers should take care to treat rape survivors with respect, patience and dignity. Many survivors feel that they are being victimized a second time by government authorities, journalists and other information seekers.'

73 M. Belic and V. Kesic, *supra* note 26, Annex.

74 Gibson, 'The Discourse of Sex/War: Thoughts on Catharine MacKinnon's 1993 Oxford Amnesty Lecture', 2 *Feminist Legal Studies* (1993) 179.

75 *In Re Yamashita*, 327 US 1, 66 S Ct 340 (United States Supreme Court 1946) the accused was charged that as 'commander of the armed forces of Japan ... unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities...'. Although Yamashita was not physically present during the commission of the atrocities he was found guilty.

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There are various aspects of the Tribunal's composition and procedure that must be considered. Only two women judges have been nominated to it.⁷⁶ While this is an advance on the composition of the International Court of Justice which has never had an elected woman judge, it is still far from the goal of 50% female judges sought by women's groups. Attention must be paid to gender distribution of all other personnel of the Tribunal, including prosecutors and investigators. Women may be fearful of retribution and publicity and thus be reluctant to testify before the Tribunal.⁷⁷ The Special Rapporteur has pointed out that there are many reasons why survivors may be reluctant to testify as to their experiences. These include 'severe traumatization, feelings of shame, lack of trust, fear of awakening bad memories as well as fear of reprisals against themselves and their families'.⁷⁸

A balance will have to be drawn between the rights of the accused to due process and the needs of the survivors. There has long been criticism in domestic criminal proceedings of the ways in which women in rape and other sexual abuse cases have been subject to intense and distressing personal questioning by investigators and defence lawyers. Procedural reforms have been introduced in some countries.⁷⁹ The international tribunal should draw upon these experiences in determining its procedures. As a minimum, all people involved in the work of the tribunal, and especially those involved in judicial, investigatory or prosecutorial work should receive gender sensitivity training.⁸⁰

There are other still more fundamental questions that need to be addressed. The jurisdiction of the Tribunal is limited to offences in the former Yugoslavia; it will not assist women who have been raped or will in the future be raped in other conflicts all around the world, although its effectiveness is likely to impact upon its future precedential value.⁸¹ Further, rape and sexual violence against women occurs along a continuum of seriousness. The widespread and systematic nature of the offences committed in the former Yugoslavia place these offences at the far end of the spectrum, as is recognized by their inclusion as crimes against humanity in the Statute of the Tribunal. The focus on these rapes and the failure to make explicit that

76 Among the judges selected are Gabrielle Kirk McDonald (USA) and Elizabeth Odio Benito (Costa Rica).

77 It is noticeable that one of the cases filed in the United States courts is a Jane Doe application.

78 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) para. 13.

79 See, e.g., J. Temkin, *Rape and the Legal Process* (1987).

80 These points are among those emphasized in a letter to the Secretary-General of the United Nations, the United Nations Commission of Experts, the Security Council and the United Nations Office of Legal Counsel from the International Women's Human Rights Clinic, City University of New York, April 1993. The letter was widely circulated at the Annual Meeting of the American Society of International Law, April 1993.

81 The United Nations Compensation Commission established to hear claims arising out of the invasion in August 1990 and subsequent occupation of Kuwait by Iraq can award compensation for serious personal injury which includes physical or mental injury arising from sexual assault; Decision taken by the Governing Council of the United Nations Compensation Commission, 18 October 1991, S/AC.26/1991/3.

any rape committed in armed conflict is a war crime entails the risk of creating the assumption that 'lesser' rapes may still be committed with impunity.⁸²

V. Conclusion

The measures here proposed are reactive, where what is primarily needed are positive steps to implement international humanitarian law in international and non-international armed conflict. The obligations incurred and learned in peacetime need to be sufficiently strongly imbued so that they hold fast in the social disruption of armed conflict. Even more urgently, commitment to preventing armed conflict and thus to eradicating the environment conducive to the occurrence of such offences is needed.

The maintenance of international peace and security relates to social and economic justice and the observance of human rights in peacetime, as well as to enforcement action in response to a breach of the peace or an act of aggression.⁸³ This has been recognized by organs of the United Nations. The General Assembly has accepted it in the context of decolonization;⁸⁴ nor has the Security Council limited its understanding of acts detrimental to international peace and security to external acts but has recognized the interlocking relationships between systemic oppression, deprivation, terrorism and breach of the peace.⁸⁵ The Secretary-General has acknowledged the connection between armed conflict and sustained structural injustice in his analysis, 'Agenda for Peace'.⁸⁶

Despite the willingness of United Nations' organs to move beyond a narrow concept of the causes of international conflict, and in particular the recognition of the threat to international peace caused by apartheid and racial discrimination policies, the global denial of basic rights to women has not been similarly recognized.⁸⁷ This denial of rights has been largely ignored by mainstream human rights bodies which have failed to interpret their conventions in ways which are

82 'To single out rapes on account of their centrality to the policy of ethnic cleansing would serve to legitimate all other forms of rape in wartime.' Arzt, *supra* note 50.

83 United Nations Charter, Article 39.

84 The General Assembly Declaration on the Granting of Independence to Colonial Peoples states: 'The subjection of peoples to alien domination and exploitation constitutes a denial of human rights and is an impediment to world peace and cooperation'; G.A. Res. 1514, 1960.

85 See, e.g., SC Res. 216, 12 November 1965 (threat to the peace caused by the illegal racist minority regime in Southern Rhodesia); SC Res. 794, 3 December 1992, (widespread violations of humanitarian law and interference with delivery of relief supplies working against restoration of peace and stability in Somalia); SC Res. 688, 3 April 1991 (repression of the Iraqi population, most particularly the Kurds, creating a threat to peace and security in the region).

86 An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, A/47/277.

87 K. Tomasevski, *supra* note 49.

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relevant to women's lives.⁸⁸ Any rape of women in armed conflict is not the end of the spectrum, but it continues through to the constant attacks and sexual abuse of women in 'normal' peacetime conditions. Physical, psychological and economic violence against women is manifested in many forms but is a constant fact of life for millions of women.⁸⁹ It must be recognized that the climate of fear created through oppression and domination and the reality of violence is part of the patriarchal State structure and is a threat to international peace.⁹⁰ Thus recent steps within the international community to ensure that women's rights are recognized as human rights and to enhance the accountability of governments for violence against women⁹¹ are as much an integral part of the overall counter-attack on the war against women as are the more publicized and dramatic responses to events in the former Yugoslavia.

- 88 Bunch, 'Women's Rights as Human Rights: Towards a Re-Vision of Human Rights', 12 *Human Rights Quarterly* (1990) 486.
- 89 See *Women Challenges to the Year 2000* (1991) 65-78; *Violence Against Women in the Family* (1989); M. Schuler (ed.), *Freedom from Violence: Women's Strategies from Around the World* (1992).
- 90 Oppression of women is caused by 'the structural relationships of power, domination and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work and in all public spheres.' Bunch, *supra* note 88, at 491.
- 91 For example, the Declaration on Violence against Women, G.A. Res. 48/103 (December 1993); the Committee on the Elimination of Discrimination Against Women's General Recommendation No. 19 (11th session 1992) Violence Against Women, GAOR, 47th Session, Supp No. 38 (A/47/38); World Conference on Human Rights, Vienna Programme of Action, 25 June 1993, paras. 36-42.