

# **Gender Violence: The Hidden War Crime**



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## **Women, Law and Development International**

Women, Law and Development International (WLDI) is a non-governmental organization committed to the defense and promotion of women's rights globally. Through capacity building for advocacy and issue and strategy development, WLD works to build the capacity of women around the world to be advocates for their own rights.

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## *Preface*

Women have traditionally suffered as victims of war. Although rape has been widely used as a weapon of war, most governments tended to regard violence against women largely as a private matter between individuals. It was not until the United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women in December 1993 that the alarming global dimensions of violence against women was explicitly acknowledged by the international community. The relentless work of women activists and scholars worldwide has increasingly drawn attention to the nature, severity and magnitude of the problem of violence against women in situations of armed conflict.

In her 1995 report to the UN Human Rights Commission, the Special Rapporteur on violence against women noted that in situations of armed conflict *"rape is the symbolic rape of the community, the destruction of the fundamental elements of a society and culture – the ultimate humiliation of the male enemy."* The report stressed the need to hold the perpetrators of such crimes fully accountable. Women and children comprise the majority of the refugee and displaced population in times of war and they continue to suffer sexual abuse in refugee camps. The problem and the logistical complications of finding appropriate mechanisms within the human

rights framework to address the issue of violence against women in situations of armed conflict continue to confront the international community.

Women, Law and Development International works actively with women's rights advocates, activists and monitors at the national, regional and international levels. It articulates issues that are relevant to women and communicate those ideas to UN, government, media and other audiences. It also supports the work of the Special Rapporteur in examining the problem of violence against women in situations of armed conflict.

This report is intended to serve as a resource for both governments and NGOs around the world. Women, Law and Development International hopes that this report will serve as a resource for both the UN and the human rights community in addressing the issue of violence against women in situations of armed conflict.

Margaret A. Schuler  
Executive Director, WLD International  
March, 1998

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## *Introduction*

The main focus of this report is on sexual violence directed at women in armed conflict. The report looks at the international law against sexual assault, the international mechanisms available for its enforcement and some reasons that these laws and mechanisms thus far have so spectacularly failed to redress—let alone prevent—violence against women during armed conflict.

Why is sexual violence against women during war so widespread? This paper argues that it is because the warring factions, civilians and, until recently, international law and the international community itself, have shared the same gender-based and gender-biased concepts of “honor” that the Special Rapporteur on violence Against Women has analyzed in her previous reports.

The Special Rapporteur has drawn attention to the ways in which families and whole communities conceptualize honor in terms of the chastity of “their” women:<sup>1</sup>

A key component of community identity, and therefore the demarcation of community boundaries, is the preservation of communal honour. Such honour is frequently perceived, by both community members and non-community members, as

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<sup>1</sup> See, e.g., Preliminary Report submitted by the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/1995/42 at paras.59-61 (hereafter “Preliminary Report”); Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/1997/47 at para. 8 (hereafter “Report on Violence in the Community”).

residing in the sexual behaviour of the women of the community.<sup>2</sup>

If attitudes towards female sexuality are often the cause of violence against women, it becomes important for society to 'protect' its women from the violence of 'the other'.<sup>3</sup>

These gender specific concepts of honor—of women as the vessels of community honor and men as its protectors—find their ultimate expression in time of war. The need to protect "our wives and daughters" is a potent rallying cry—and propaganda tool—for military and political leaders seeking to ready nations for war. The symbolism of rape lends itself easily to racist and genocidal appeals. Men of the rival nationality, tribal group or ethnicity routinely are portrayed as sexually voracious marauders.<sup>4</sup> Women of the rival group are branded, simply, "whores," thereby suggesting that sexual access to them can be had with impunity.<sup>5</sup>

International law has not been immune from these discriminatory notions of honor. Like domestic laws that protect only "chaste" or "honest" women, international law, too, has drawn a legal link between criminal sexual assault and the morality of the victim.

Until recently, international humanitarian law has addressed sexual assault in terms of women's honor. The 1907 Hague Convention Respecting the Laws and Customs of War on Land and its accompanying Regulations do not mention rape or other forms of sexual assault at all. Instead, Article 46 of the Conven-

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<sup>2</sup> Report on Violence in the Community at para. 8.

<sup>3</sup> Preliminary Report at para. 61.

<sup>4</sup> See, e.g., Ralph Manheim, trans., Adolph Hitler, *Mein Kampf*, Houghton Mifflin, Boston (1943) at 325 ("With satanic joy in his face, the black-haired Jewish youth lurks in wait for the unsuspecting girl whom he defiles with his blood, thus stealing her from her people.")

<sup>5</sup> See, e.g., Susan Brownmiller, *Against Our Will: Men, Women and Rape*, Ballantine, New York (1975) at 54 (hereafter "Brownmiller") (describing a Jewish woman in the Kovno ghetto in Lithuania who was literally "branded" by German officers, who tattooed the words "Whore for Hitler's Troops" on her arm). As the Special Rapporteur has noted in her Report on Violence in the Community, in the legal codes of many societies, prostitutes "are seen as being outside the boundaries of what could constitute rape, as 'unrapable' . . ." (para. 34).

tion's Regulations states obliquely that "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. . . ."<sup>6</sup>

The Geneva Convention itself carries forward the notion of sexual assault as a violation of women's honor:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack of their honour, in particular against rape, enforced prostitution, or any form of indecent assault. . . .<sup>7</sup>

Even the Red Cross has drawn a link between criminal assault and the morality of the victim. In its 1958 Commentary on the Fourth Geneva Convention, the Red Cross applied the word "immoral" to any woman who had been coerced into what is now termed sexual slavery.

The [Convention] listed as examples [of violations] certain acts constituting an attack on women's honour, and expressly mentioned rape, enforced prostitution, i.e., the forcing of a woman into immorality by violence or threats, and any form of indecent assault.<sup>8</sup>

Attempts to eradicate violence against women in general, and violence against women in time of armed conflict in particular, need to focus on breaking the legal link between *sexual assault* and the *victim's morality*. The crime of rape dishonors the perpetrator, not the victim. Laws that treat crimes of sexual assault as dishonoring the victim will inevitably discourage victims

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<sup>6</sup> Hague Convention Regulations Respecting the Law and Customs of War on Land, October 8, 1907, in International Committee of the Red Cross, *International Law Concerning the Conduct of Hostilities: Collection of Hague Conventions and Some Other Treaties* (1989) (emphasis added).

<sup>7</sup> The 1949 Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 75 U.N.T.S. 287 (emphasis added).

<sup>8</sup> Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 206 (Jean S. Pictet et al. eds., & Ronald Griffin et al. trans. 1958).

from coming forward, and will inevitably encourage perpetrators to believe they can act with impunity.

In international law, the legal link between sexual assault and the victim's morality is no longer explicit. The statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, for example, lists rape as a crime against humanity, without any kind of reference to honor or morality.

This change in international law (which is also reflected in the UN Declaration on the Elimination of Violence Against Women and other international documents of the past five years) is, of course, a positive development. It will never be enough, however, to provide effective redress for victims of sexual violence in time of armed conflict.

While international tribunals are important, unless the reality of war or the reality of international tribunal funding changes fundamentally, the numbers of those indicted and prosecuted will represent a minuscule percent of those who could be tried. The Yugoslavia and Rwanda Tribunals have jurisdiction restricted to these two particular conflicts. To date, they have indicted only a small percentage of those who could be indicted for war crimes or other offenses within their respective jurisdictions. The proposed International Criminal Court, should it become a reality, will never be able to bring to justice all of those who could be held responsible for serious violations of international law.

The relatively small number of prosecutions that can be brought internationally is not an argument against international tribunals. It is, rather, an argument that if prosecution is to be effective, it must take place at the national as well as the international level. In fact, all criminal tribunals, whether international or national, necessarily operate after the fact. The ultimate goal is the elimination of violence and not merely its prosecution.

Combating sexual violence during time of war will require breaking the link between sexual assault and victim morality at the *national* level. It will require changing many countries' domestic law, and changing the way that members of many communities think about victims of sexual assault.



In domestic law, as the Special Rapporteur made clear in her Report on Violence in the Community,<sup>9</sup> in many countries the legal link between sexual assault and the victim's morality is still very clear. This legal link reflects an underlying view of women as complicit in their own sexual violation. As long as such a view is shared widely by the members of a community, then sexual assault will remain a potent weapon against that community in the event of armed conflict.

Gender-based violence in wartime takes many forms. It has not only propaganda value but also concrete military significance, the full range of which has long been recognized by generals, but is only beginning to be documented by prosecutors and historians. While much more research needs to be done on the military uses of sexual violence, it is possible to make some preliminary observations.

*Rape* has been used:

- to terrorize civilian populations<sup>10</sup> and induce civilians to flee their homes and villages;<sup>11</sup>
- to humiliate rival armies by showing control over "their" women;<sup>12</sup> and
- as a "perk" for soldiers, and an inducement to courage on the battlefield.<sup>13</sup>

*Forced prostitution* has been used:

- as a morale booster for soldiers and officers<sup>14</sup> and

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<sup>9</sup> Report on Violence in the Community, *supra*, at para. 34.

<sup>10</sup> Brownmiller, pp. 1-140, *passim*.

<sup>11</sup> This is part of the *modus operandi* of "ethnic cleansing." See generally, *War Crimes in Bosnia-Herzegovina*, Vol. II, Human Rights Watch (1993), pp. 20-23 (hereafter, "Human Rights Watch")

<sup>12</sup> Brownmiller, pp. 1-140, *passim*.

<sup>13</sup> Theodore Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 Am. J. Int'l. L. 1, 30 (1992) ("During the Second World War, rape was tolerated and, horrifyingly, was even utilized in some instances as an instrument of policy. . . . Moroccan mercenary troops fought with Free France forces in Italy on 'terms [which] included [as a spur to masculine courage] license to rape.'") (Quoting Michael Walzer, *Just and Unjust Wars* 133(1977)).

<sup>14</sup> See generally the Special Rapporteur's Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issues of military sexual slavery in wartime, E/CN.4/1996/53/Add.1

- as a way to make women feel responsible for their own violation.<sup>15</sup>

*Forced impregnation* and *Forced Pregnancy*<sup>16</sup> have been used:

- to deepen the humiliation of rape victims and
- to produce babies of the ethnicity of the rapists<sup>17</sup>

The most cynical and sinister accounts of the wartime purposes of gender-based violence do not come from feminist activists. Rather, they come from male social scientists and historians, who postulate that gender-based violence may be the engine driving war-making—or perhaps, even the reason for war itself:

In pre-agricultural societies, violence may well have been a route to sexual success, especially in times of turmoil. In many different cultures the captives taken in war have tended

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<sup>15</sup> Brownmiller at 62 and 76, discussing Japanese War Ministry instructions on how to deal with bad publicity resulting from press accounts of one commander's how-to instructions on rape. According to the soldier quoted in the foreign press, the commander told troops: "In order that we will not have problems, either pay them money or kill them in some obscure place after you finish." Brownmiller notes that paying money to a rape victim "tr[ies] to turn an act of rape into an act of whoring in which the victim shares responsibility."

<sup>16</sup> By forced impregnation, I mean an impregnation that results from an assault or series of assaults on a woman perpetrated with the intent that she become pregnant. See generally my article, *Recognizing Forced Impregnation as a War Crime Under International Law: A Special Report of the International Program of the Center for Reproductive Law & Policy*, New York (1993). The Special Rapporteur explained forced pregnancy in para. 34 of her Report on Violence in the Community as the extension of abortion restrictions to cases of rape. I understand this to mean that a warring faction or individual who detains a rape victim who has become pregnant until she can no longer obtain a lawful abortion under local law would be guilty of forced pregnancy; the Recommendations that accompany this report urge States to criminalize forced pregnancy.

<sup>17</sup> According to Human Rights Watch, one victim of rape in detention in Obudovac in North-Eastern Bosnia related that "[i]t was their aim to make a baby. They wanted to humiliate us. They would say directly, looking into your eyes, that they wanted to make a baby. . . ." Human Rights Watch at 215. The Special Rapporteur for the former Yugoslavia reported interviewing an Ethnic Croat woman who described being taunted in a similar manner, and also "being told that, if she were pregnant, she would be 'forced to stay there until six months of pregnancy.'" Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1993/50 (1993), at para. 41.

to be women rather than men. But echoes reach into modern times. Armies have often been motivated as much by the opportunities that victory would present for rape as they have been by patriotism or fear. Generals, recognizing this, turned blind eyes to the excesses of their troops and were sure to provide camp followers. Even in this century, access to prostitutes has been a more or less recognized purpose of shore leave in navies. And rape accompanies war still. . . .<sup>18</sup>

The range of uses of sexual assault in armed conflict provides a partial demonstration of the magnitude of the problem: sexual violence persists in armed conflict because it works. It makes the perpetrators feel dominant, and it makes the nation of the victims feel humiliated. Effective strategies against sexual violence in armed conflict require an understanding of this basic dynamic.

The recommendations in the final chapter of this paper spell out some of the legal changes that will be necessary at the domestic level. The Special Rapporteur's previous discussions of honor also provide guidelines for change. Statutory reform and the debate that surrounds it is one way to have an impact on the underlying attitudes about women that the current laws reflect. Another important tool for changing these attitudes is human rights training.

Training, whether for judges, prosecutors, or, especially, for military and law enforcement personnel also must reflect an appreciation of the dynamic of sexual violence in armed conflict. "Knowledge-based" training in this area (i.e., training that simply teaches that sexual assault is a serious violation of international law) is unlikely to be effective. To be effective, training must focus on skills and attitudes: the soldier must internalize a belief that raping civilians does not make him a dominant combatant, but an unprofessional hack. He must develop the skills to resist peer pressure and even superior orders to commit sexual atrocities. Strategies to prevent and redress sexual violence against women must take into account the reasons such violence persists. Only then can the goal of eradicating such violence be met.

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<sup>18</sup> Matt Ridley, *The Red Queen: Sex and the Evolution of Human Nature*, New York (1993), at 205.

## Structure of the Report

This report will answer several questions: which international, regional and national mechanisms protect civilian women against violence in armed conflict situations<sup>19</sup>?; why do women find difficulties in getting access to an effective legal recourse procedure?; and what improvements are necessary to prevent and protect women against state violence?

Women are subjected to violence at all times. In times of armed conflict, violence against women often intensifies. Women are subject to different forms of violence. First, they may be subject to gender-based violence which is directly targeted towards them because of their gender. Second, women may be subjected to violence that is not directly targeted to them but that affects them because women have special roles and responsibilities in society that makes them vulnerable to violence. For example, women often have the sole responsibility of the household. The performance of household duties include collecting of water, firewood and food. These duties often require them to cross minefields, or military areas. Injuries by a mine or by a stray bullet are not injuries that are directly inflicted because the person is a women but the chances that women are injured by either are greater because of their gender specific responsibilities.

This report mainly analyzes gender-based violence in the form of rape, sexual slavery and other sexual assaults, perpetrated or condoned by the state during armed conflict and will discuss why women are more vulnerable to such violence. The report discusses only violence by state actors and not by private actors. Many governments allow or ignore severe human rights and humanitarian violations committed by state agents in armed conflict situations. In conflict situations, sexual abuses often occur in connection with other human rights abuses that are equally harmful and destructive to women, but such other violations will not be covered in this report.

**Chapter One** analyzes the effects of war on women with particular reference to refugee women and internally displaced women in recent conflict situations.

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<sup>19</sup> It is beyond the scope of this report to discuss the situation of female combatants.

**Chapter Two** discusses the sources of humanitarian law and international and regional human rights law and refugee law. It analyzes which provisions of these instruments provide protection against gender-based violence in times of armed conflict. The report analyzes the difference in protection for women affected by an internal conflict and those who suffer violence in an international conflict.

This chapter also describes the protection of refugee women against forced return (refoulement) and the right to asylum enshrined in the different instruments. The report looks at the different protection standards applicable to internally displaced women and refugee women. Further, the report discusses the right of states to take derogatory measures in a state of emergency. A derogation clause has been included in some international and regional human rights instrument to safeguard the right of national governments to deal effectively with national emergencies. It discusses the principle of non-derogability and the obligation for states to respect the non-derogable rights recognized under the different instruments and the obligation not to take measures of obligation that conflict with any other treaty or principle of customary international law.

Chapter Two also analyzes the obligation of states to protect the right to an effective remedy embodied in international and regional human rights instruments and humanitarian law. It describes why women are often deprived of their right to compensation. The report will look at the case of the "comfort women" and their claim for reparation for the atrocities committed by the Japanese army and other officials during World War II. The report also describes several national asylum regimes and the difficulties refugee women face in getting equal access to refugee status determination procedures. Lastly, Chapter One discusses the different declarations, resolutions and recommendations issued by United Nations bodies that are evidence of an increased attention to violence against women in armed conflict situations.

**Chapter Three** discusses how the international, regional and national legal standard should be applied and how they are applied in reality. It provides examples of adequate and inadequate application of international legal standards by national

governments, United Nations bodies and other actors. It discusses why the UN and states fail to apply the legal standards.

**Chapter Four** analyzes the International Ad Hoc tribunals for Rwanda and Yugoslavia and their efficacy in bringing justice to sexually abused women. This chapter also discusses to what extent the proposed International Criminal Court (ICC) can provide women legal redress against sexual abuse and ultimately increase their chances for achieving justice.

**Chapter Five** provides conclusions and recommendations addressed at countries of origin, host countries, international non-profit organizations, profit-making organizations and the relevant organs of the United Nations. The recommendations provide detailed information about what changes are needed to prevent and protect women against gender-based violence committed in times of armed conflict.

## CHAPTER ONE

### *How War Affects Women*

Both men and women face similar human rights abuses during times of armed conflict, but women are also subjected to gender-based violence, including rape, sexual mutilation and forced prostitution. Sexual violence has been practiced against women during armed conflicts since the beginning of warfare, but until recently the international community perceived and accepted such gender-based abuse as an inevitable and widespread byproduct of war.<sup>20</sup>

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<sup>20</sup> In the last few decades gender-based abuse against women has been documented in the following armed conflicts: during World War II, Russian, German and Japanese soldiers systematically abused women; during the war for independence in the 1970s, Pakistani soldiers sexually abused Bangladeshi women; also in the '70s, Turkish soldiers abused women in Cyprus during the occupation and also during the 1960s and '70 s Vietnamese women were sexually abused in the Vietnam conflict; during the 1980s and '90s, when the Peruvian government tried to suppress the Maoist Shining Path organization, security forces raped Peruvian women; and also in the '80s and '90s, Kenyan sol-

Rape and other forms of sexual abuse have been explicitly or implicitly prohibited by most international and regional human rights and humanitarian laws for decades. Almost every country in the world has ratified and signed one or more of these instruments, and therefore has obligations under multiple treaties to protect women against sexual violence during armed conflict. Yet, according to the Special Rapporteur on Violence Against Women, "rape remains the least condemned war crime," although throughout history, the rape of hundreds of thousands of women and children in all regions of the world has been a bitter reality."<sup>21</sup>

In general, women are not directly involved in warfare. While violent conflicts have always affected civilians, the patterns of contemporary armed conflict have changed dramatically over the last few decades, showing many more civilian victims than in past wars. Often the distinction between combatants and civilians is not observed by warring parties who take the battle to the streets often fighting in villages, towns and cities, from home to home, even targeting civilians. Increased aerial bombardment since World War I has also resulted in an increased number of civilian war victims. Even humanitarian resources such as relief convoys, health clinics and feeding centers, once safe from attack, are now treated as legitimate military targets by rebels and soldiers. Modern warfare is less a matter of grinding struggles between professional armies than of conflicts between the military and civilians within the same country, or between hostile groups of armed civilians. Internal conflicts often last longer and have a greater impact on the civilian population than international wars.<sup>22</sup>

In the broadest sense, men and women suffer equally from armed conflicts. Both face threats from aerial bombardments, mines and other arms, and both can be subject to arbitrary arrest and detention, torture, extra-judicial killings and disappear-

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diers raped Somali women refugees who were living in camps to which they had fled as a result of Somalia's long civil war.

<sup>21</sup> Preliminary report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Commission on Human Rights, Fiftieth session, November 1994, U.N Document E/CN.4/1995/42.

<sup>22</sup> UNICEF, *The State of the World's Children*, 1996.



ances. In addition, civilians often experience economic or social losses. For instance, people lose their jobs because their places of employment close down, or infrastructure is destroyed or a food shortage arises.

However, despite the commonalities in how war affects men and women, war does have a different impact on women. Women may be subjected to various forms of violence directed at them because of their gender and because they are more vulnerable due to the gendered division of roles and responsibilities.<sup>23</sup> It is difficult to find detailed information that women experience warfare in other distinct ways. This is not surprising since men traditionally compile the data and treat women under the rubric of men. The unique suffering of women thus remains hidden.<sup>24</sup> Women have special needs and problems that reflect their gender and age. Although not all women experience armed conflict the same way, some issues are common to all women. Most women around the world have primary responsibility for daily survival of the family.

Women are in charge of the household, whether it is peacetime or wartime. Naturally, during times of armed conflict, the performance of these responsibilities can involve great risks to their lives. For example, in order to collect firewood, water, food or meet other basic needs, women are often forced to leave the relatively safer environment of their house, village or refugee camp. Outside the camps women are vulnerable to attacks of bandits, soldiers or other refugees. In the camps, women are sometimes forced to submit to sexual contact in return for assistance or food. In one detention center in Hong Kong, passes to the clinic were issued by detention leaders who asked for bribes or sexual favors in return.<sup>25</sup> To fulfill their familial responsibilities, women may also have to cross minefields or are exposed to

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<sup>23</sup> Executive Committee of the High Commissioner's Programme, Forty-fourth session, *Note on Certain Aspects of Sexual Violence Against Refugee Women*, U.N. Document A/AC.96/822, 12 October 1993.

<sup>24</sup> Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, International and Comparative Law Quarterly, Volume 46, Part 1, January 1997.

<sup>25</sup> Susan Forbes Martin, *Issues in Refugee and Displaced Women and Children*, Expert Group Meeting on Refugee and Displaced Women and Children, EGM/RDWC/1990/WP.1, 25 June 1990.

shelling and bombing. Furthermore, women's reproductive capacity makes them particularly vulnerable to shortages of food, medicine, reliable birth control and medical treatment.<sup>26</sup>

Although rape is the type of abuse most well-known, many other forms of gender-based violence are used to control, demean and silence women during war, including sexual threats, sexual exploitation, sexual assaults and forced prostitution.<sup>27</sup> The subordinate role that women play in most cultures and the lesser value placed on women's lives are additional factors that may contribute to abuse that is targeted to women. For instance, the Taliban in Afghanistan recently decided to curtail girls' access to education in the regions under their control and to prohibit women's employment except in the medical field.<sup>28</sup>

The Declaration on the Elimination of Violence Against Women, adopted by the UN General Assembly in December 1993, defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty."<sup>29</sup> Gender-based violence constitutes a type of harm that is either particular to the person's gender, such as female genital mutilation, forced prostitution, rape and other sexual abuses or that affects women disproportionately.<sup>30</sup>

In all phases of armed conflict, whether international or internal, the perpetrators of sexual violence may include fellow refugees, members of other clans, military personnel of the host country, family members, bandits, smugglers, border guards, police, and irregular forces.

Violence against women can occur at any or all stages of armed conflict: prior to flight, during flight, in the country of

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<sup>26</sup> Susan Forbes Martin, *Refugee Women*, 1991.

<sup>27</sup> UNHCR, *Reproductive Health in Refugee Situations: An Inter-agency Field Manual*, December 1995.

<sup>28</sup> United Nations Fund for Children (UNICEF), *The State of the World's Children*, 1996.

<sup>29</sup> United Nations Declaration on the Elimination of Violence Against Women, A/C.3/48/L.5, 23 February 1994, (hereinafter DEVAW), art. 1.

<sup>30</sup> Statistics around the world show that rape and most other forms of sexual abuse are directed mostly towards women.

asylum, during repatriation movements and during reintegration phases. During 1996, the office of the UN High Commissioner for Refugees was involved in several large-scale refugee situations on two different continents where widespread sexual violence against women and girls was one of the main causes of the flight of refugees.<sup>31</sup> In the conflict in the former Yugoslavia, for example, the use of rape as an instrument of persecution resulted in the flight of many Bosnian families to safer areas. The findings of the Special Rapporteur of the Commission on Human Rights stated:

Rape of women, including minors, has been widespread in both the Rwandan and the Yugoslavia conflict. There have been rapists among all ethnic groups and there are rapists among the armed forces of all parties to the conflict. In addition, rape has been deliberately used as an instrument of ethnic cleansing.<sup>32</sup>

Migration within and across borders is one of the most visible consequences of armed conflict. For instance, in the former Yugoslavia, more than three million people were forcibly displaced by the war.<sup>33</sup> In Africa, the Zairian armed forces were involved in internal forced displacements of Zairian Tutsi, in what is known as "Operation Café."<sup>34</sup> Overall, human rights abuses committed in the context of the armed conflict were the main cause of population displacement.<sup>35</sup>

Furthermore, mass displacements can also trigger armed conflicts by causing instability throughout the region. For instance, the ethnic tensions in Rwanda and Burundi resulted in

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<sup>31</sup> Executive Committee of the High Commissioner's Programme, Forty-fourth session, 12 October 1993, U.N. Document A/AC.96/822, Note on Certain Aspects of Sexual Violence Against Refugee Women.

<sup>32</sup> Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, (E/CN.4/1993/50).

<sup>33</sup> UNHCR, *The State of the World's Refugees*, 1995.

<sup>34</sup> United Nations Economic and Social Council, E/CN.4/1996/66, *Report of the Special Rapporteur on the Situation of human rights in Zaire*.

<sup>35</sup> Displacements of populations due to human rights violations in armed conflict occurred in Chechnya (Russian Federation), Colombia, Former Yugoslavia and Tajikistan.

the mass exodus of 1.2 million Rwandan refugees to Zaire. This exacerbated an already violent situation and resulted in armed conflict between rebel groups, supported by the Rwandan Peoples Front (RPF), and the Zairian armed forces, which drove large numbers of Zairian refugees into Rwanda.<sup>36</sup> The developments in the Great Lakes region and in other regions of the world reflect the danger the internal problems pose for neighboring countries and/or regions. One of the reasons for an increase in the total number of refugees and internally displaced people is the increase in internal conflicts on account of ethnic, religious or communal hostilities. These situations are exacerbated by the ready accessibility of land-mines, arms and other weapons.<sup>37</sup>

Female victims of sexual abuse may either stay in their houses or flee in search of a safer place. As long as these fleeing women stay within the borders of their country of origin they are considered internally displaced persons (IDPs). However, when they do cross international borders they are considered refugees. The distinction between IDPs and refugees bears implication with regard to which laws protect them against gender-based violence.

The number of refugees worldwide is almost 18 million and the estimates number of IDPs is between 20 and 30 million, but the estimates are often fragmentary and unreliable.<sup>38</sup> According to the US Committee for Refugees the total number may be much higher.<sup>39</sup> The majority of refugees and IDPs are women and children.<sup>40</sup> The fact that the majority of refugees and IDP are women should increase the focus of attention to women and children. Nowadays, the policies and strategies concerning refugees often ignore the fact that women and girls have special needs with regard to assistance and protection.

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<sup>36</sup> United Nations Economic and Social Council, E/CN.4/1997/6/Add.1, *Report of the Special Rapporteur on the Situation of Human Rights in Zaire*.

<sup>37</sup> UNHCR, *The State of the World's Refugees*, 1995.

<sup>38</sup> UNHCR Home page, <http://www.unhcr.ch>, 8 October 1997.

<sup>39</sup> U.S Committee for Refugees, *World Refugee Survey 1997, An Annual Assessment of Conditions Affecting Refugees, Asylum Seekers and Internally Displaced People*, 1997.

<sup>40</sup> Refugee Review, *Refugee Women and Rape*, University of Minnesota (Refugee Studies Center), Winter/Spring 1997.

During flight women are subjected to gender-based violence when they cross military lines or borders. Border guards in Kenya have been known to abduct women and girls who tried to cross borders in order to rape or otherwise sexually abuse them.<sup>41</sup> Single women are more vulnerable during flight because they lack the protection of their family, community or clan.<sup>42</sup>

Women who arrive in a country of asylum may still not be safe from sexual abuse. In the country of asylum, women are often unable to speak the language, find themselves in unfamiliar surroundings, and are deprived of the traditional protection mechanisms provided by their community, clan or family. They often arrive without any resources and are totally dependent on others for their basic needs. Many refugee women end up in the crossfire of civil wars in the country of refuge or asylum. For example, in Rwanda, refugees were forced to return to Rwanda or flee to other neighboring countries after unrest broke out in former Zaire.<sup>43</sup> In the worst cases, refugee women have been forced to seek asylum in a third country, or return to their country of origin. Also, the overthrow of an established government in the country of asylum precipitate the forced departure of large groups of civilians previously supported by such regime.<sup>44</sup> Domestic violence in refugee settings arises due to a combination of increased tensions, the dynamic environment, changing roles, and past traumatic experiences of the refugees themselves.<sup>45</sup>

Repatriation often causes refugees to move to areas undergoing continual instability and even, at times, open armed con-

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<sup>41</sup> Human Rights Watch/ Africa Watch/ Women's Rights Project, *Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women Refugees in North Eastern Kenya*, Vol. 5, No. 13, 1993.

<sup>42</sup> Susan Forbes Martin, *Issues in Refugee and Displaced Women and Children*, Expert Group Meeting on Refugee and Displaced Women and Children, EGM/RDWC/1990/WP.1, 25 June 1990.

<sup>43</sup> United Nations Economic and Social Council, E/CN.4/1996/66, Report of the Special Rapporteur on the Situation of Human Rights in Zaire.

<sup>44</sup> Executive Committee of the High Commissioner's Programme, *The Personal Security of Refugees*, EC/1993/SCP/CRP.3, 5 May 1993.

<sup>45</sup> Susan Forbes Martin, *Issues in Refugee and Displaced Women and Children*, Expert Group Meeting on Refugee and Displaced Women and Children, EGM/RDWC/1990/WP.1, 25 June 1990.

flict. For example, Cambodian refugees returned to a country which was still fighting against the notorious Khmer Rouge, which forced people off their land and spread terror in the villages.<sup>46</sup> The protection of repatriating women is an issue that has received little attention until recently. The Note on Refugee Women and International Protection submitted to the 41<sup>st</sup> session of the UNHCR Executive Committee states:

Most of the protection issues facing refugee women during the refugee experience may occur in situations of voluntary repatriation, particularly where such return is spontaneous and unassisted.<sup>47</sup>

The actual return holds great danger for many refugee and displaced women. Returning women can be subject to physical and sexual abuse while crossing the border back into their home country or traversing the area between displaced persons camps and their home community. In this tense and unstable situation gender-based violence often occurs with impunity. Governments may fail or be unwilling to guarantee support or protection to returning civilians. The actual decision to return is frequently made by camp leaders and there may be little opportunity for women to express their views individually or as a group. In addition, women are not always given enough information to make an informed choice in situations where choice is an option.<sup>48</sup>

It is often difficult to determine how many women have been sexually abused, this difficulty makes it harder to provide appropriate care to victims of sexual violence. In order to determine how many women have been or are still subjected to gender-based violence, humanitarian relief organizations have to conduct research which is often costly and considering the need for quick response often impossible. The fact that most victims have a desire to remain silent about the abuse further diminishes the

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<sup>46</sup> Lawyers Committee for Human Rights, *Seeking Shelter: Cambodians in Thailand*, 1987.

<sup>47</sup> Note on Refugee Women and International Protection, Executive Committee, UNHCR, Geneva, 1992.

<sup>48</sup> For more information see; Susan Forbes Martin, *Return and Reintegration: The Experiences of Refugee and Displaced Women*, September 1992.

likelihood that they will receive adequate assistance.<sup>49</sup> In virtually all cultures women are reluctant to talk about experienced sexual violence unless they are reasonably confident that they will get a sympathetic hearing or when they are obliged to seek medical care. Victims often feel guilty and ashamed. In some cultures victims of sexual abuse are abandoned or even physically abused by family members. In these societies, sexual abuse is often considered an abuse of family honor instead of a violation of a woman's dignity. In addition, the abuse often occurs in precisely those places that are most inaccessible to outsiders, which makes the gathering of data and provision of care that much more difficult. Violence within camps is often tolerated through a conspiracy of silence. Women decline to report such violence for fear of recriminations by authorities or other refugees.<sup>50</sup> The silence surrounding the atrocities committed against women is also characteristic within the international community itself.<sup>51</sup>

Women are singled out for violent treatment for a variety of reasons. First, because of a woman's sexuality and gender. Second, a woman is subject to violence because of her relationship to a man. Third, violence is directed against women because of the social, religious or ethnic group to which she belongs.<sup>52</sup> Women are also subjected to violence because they happen to be at the wrong place at the wrong time. Cultural biases toward women that exist during peacetime exacerbate the exploitation of women during wartime. Violence against women is also used as a means of terrorizing the civilian population and maintaining military control. In some countries, states use sexual abuse as a tactic of social control to intimidate women and men; to secure information about male relatives; to demoralize men for failure

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<sup>49</sup> Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, Human Rights Watch Women's Rights Project, 1995.

<sup>50</sup> Elizabeth G. Ferris, *Refugee Women and Violence*, World Council of Churches, Geneva, (Paper prepared for conference on refugees, Institute of Social Studies, The Hague), August 1990.

<sup>51</sup> Ruth Seifert, *War and Rape: Analytical Approaches*, Women's International League for Peace and Freedom, April 1993.

<sup>52</sup> Radhika Coomaraswamy, Of Kali Born: Women, Violence and the Law in Sri Lanka, in *Freedom from Violence: Women's Strategies From Around The World*, 1992.



to "protect their women," and to punish women for not conforming. Women may be abused not because of their own political involvement but because of the activities of male relatives.

Furthermore, sexual abuse is used as a tool of genocide. In Bosnia-Herzegovina and Croatia, the Serbian army used rape and other sexual abuse as a military strategy to destroy the non-Serbian population. Serb soldiers practiced three forms of genocidal rape, which aimed to destroy the non-Serbian population, according to author Beverly Allen.<sup>53</sup> First, Serbian soldiers engaged in ethnic cleansing by entering the homes of women, raping them, often in public view, and then leaving. As news of the terrifying events spread throughout the village, residents eager to escape harm accepted offers for safe passage to new locations, abandoning their homes for Serbian occupation. Second, people held in concentration camps were sporadically raped, often as part of torture that led to death. Third, women were arrested, detained, and systematically raped, in rape death camps for weeks or months at a time. Women who became pregnant were continuously raped, tortured, and detained until the latter stages of their pregnancy. They were only released when safe abortion was impossible. Those who did not become pregnant were often murdered.

Rape and other sexual abuses are also used as propaganda. Women are portrayed as victims and the abuses are blamed on the enemy and used to instill anger and hate. Neither party has any intention of prosecuting the perpetrators for the abuse.<sup>54</sup> In some instances, sexual abuse functions as a means of sexual gratification for male soldiers, as was the case with so-called "comfort women" during World War II.<sup>55</sup> The consequences of sexual abuse profoundly affect women and their families. Physi-

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<sup>53</sup> Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia*, 1996.

<sup>54</sup> Lourdes Sajor, *Women in Armed Conflict Situations*, Division for the Advancement of Women, DPCSD: Expert Group Meeting on Measures to Eradicate Violence Against Women, MAV/1993/WP.1, 21 September 1993.

<sup>55</sup> Thousands of women were forced to have sex with Japanese soldiers to satisfy their sexual desires. See: *Testimonies of the Global Tribunal on Violations of Women's Human Rights*, Center for Women's Global Leadership, Prepared for the United Nations World Conference on Human Rights, June 1993.



cal consequences, such as wounds, pregnancy and sexually transmitted diseases (STDs) are often accompanied by feelings of guilt, fear, and low self-esteem. Some women who lose their self-esteem believe that they no longer deserve a husband and family.<sup>56</sup> For married women their relationship with their husbands often changes dramatically after the abuse. Survivors of sexual abuse often experience severe psychological reactions as well, including mood swings, emotional instability, attempted suicide, numbness, nightmares, sleep difficulties, passivity, intense fear, and suspicion. Women who were impregnated due to rape and forced to give birth often have feelings of alienation and distancing towards the fetus. Several studies show that during the war in the former Yugoslavia, most women abandoned their babies after birth.<sup>57</sup>

The particular needs of women and girls require special attention in four areas. First, women and girls need protection against sexual abuse and exploitation, physical attacks, and sexual discrimination. The juridical protection women have through international declarations and conventions should be actively applied. Second, access to assistance is another need sought by refugee and IDP women. Appropriate assistance may consist of a range of issues from food, water, and medical care to education and skills training. Third, durable solutions, such as repatriation, settlement in a country of asylum or resettlement in a third country, are sorely needed. Governments, international organizations and UN agencies should develop clear strategies in order to protect returning, resettling or settling women. Fourth, women need to be included in decision-making processes regarding assistance and protection in order to make programs and strategies more sensitive to their needs.

More than 50 countries today are embroiled in armed conflict. Some countries have seen conflict for decades, while others are only recently affected by internal or international conflict.

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<sup>56</sup> Elizabeth G. Ferris, *Refugee Women and Violence*, World Council of Churches, Geneva, (Paper prepared for conference on refugees, Institute of Social Studies, The Hague), August 1990.

<sup>57</sup> American Journal of Orthopsychiatry, *Rape, Torture, and Traumatization of Bosnian and Croatian Women: Psychological Sequelae*, Vol. 65(3), 1995.

For example, in Angola, where hopes for peace have been renewed, fighting has been going on for 30 years. The following list indicates some countries where armed conflicts are ongoing: Afghanistan, Iraq, Cyprus, Tibet, Cambodia, Tajikistan, Rwanda and Burundi, Somalia, Sierra Leone, the Democratic Republic of the Congo (formerly Zaire), Turkey, Burma, Sudan, and Liberia.

## CHAPTER TWO

### *Legal Standards*

#### **International Law**

Over the past four decades a number of international instruments have been devised to give women throughout the world protection against sexual violence during wartime and a recourse afterwards if such violence is practiced. International law governing the area of human rights and humanitarian law stems from several main sources: treaties and conventions (both international and regional), *jus cogens* (or customary law), and a body of authoritative interpretations and policies. Together, all three serve as the primary sources of international law. Treaties and conventions, which are promulgated by the United Nations (in the case of international treaties or conventions), are ratified by states. The instruments are binding only on those states which ratify them. *Jus cogens* is a body of international customary law consisting of norms that are binding on all states whether or not explicitly accepted by them and are derived from the general and consistent practice of states. These norms are often ex-

plained and discussed in the decisions of international and regional tribunals. In addition to these binding sources of international law, the United Nations and its constituent bodies, as well as regional and subject specific organs, such as the Inter-American Court on Human Rights, frequently produce decisions, reports, policy statements, declarations, recommendations or proposals for new standards of behavior by the international community. While these documents do not impose on states the same formal obligations as may be found in the primary sources of international law, they can serve as authoritative interpretations of those primary instruments. This is particularly the case where the interpretative statement is made by a body charged with overseeing the implementation of the primary instrument. The documents also are an expression of international consensus on a particular issue. Such growing consensus may eventually lead to the determination of a new binding norm and a consequent state obligation not to violate that norm.<sup>58</sup> In this matter, international law develops to reflect changes in the understanding of and areas of agreement on various issues by the international community. Rape and other sexual violence against women in times of armed conflict are prohibited in various international laws which are binding on states.

#### **Humanitarian Law**

Humanitarian law provides regulations for the conduct of hostilities and seeks to protect victims of armed conflicts. The sources of humanitarian law are the Conventions of The Hague, Geneva Conventions (1949) and the two Additional Protocols (1977), and decisions of international tribunals and customary law.<sup>59</sup> Many provisions of the laws of war, or international humanitarian law, have acquired the status of customary law, binding on all parties to a conflict whether or not they have ratified the Conventions or the Protocols. The International Court of Justice, for example, has ruled that the guarantees laid down in common article 3 of the Geneva Conventions on non-

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<sup>58</sup> Ian Brownlie, *Principles of Public International Law*, Fourth Edition, 1990.

<sup>59</sup> Humanitarian law, including the Hague Convention, the Geneva Conventions and the Additional Protocols, is also referred to as the "laws of war" or "law of armed conflict."

international armed conflicts also apply, as customary law, to international armed conflicts.<sup>60</sup>

International and national conflicts are a major cause for displacement. For instance, the International Committee of the Red Cross (ICRC) noted that violations of the Geneva Conventions and the Additional Protocols cause the majority of involuntary displacements.<sup>61</sup> Often, displaced women are more susceptible to rape and other sexual attacks during armed conflicts. This chapter analyzes the relevant provisions of humanitarian law and their effectiveness in protecting all civilian women in situations of international and internal armed conflicts.

The norms of humanitarian law, or the law of armed conflict, differ depending on whether the conflict is international or internal. The principle of sovereignty plays an important role in humanitarian law. Consequently, civil or internal conflicts are considered to be mainly within domestic jurisdiction and are therefore given less attention under the law of armed conflict.<sup>62</sup> Although Additional Protocol II covers non-international conflicts, the provisions apply only to a minority of today's internal conflicts.<sup>63</sup>

Sexual violence against women, in particular rape by soldiers or others who act with the support or encouragement of a state agent, has been prohibited by humanitarian law for more than a century.<sup>64</sup> The fundamental principle governing the rights of women during armed conflicts is that of non-discrimination:

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<sup>60</sup> *Nicaragua v. the United States of America*, merits, I.C.J. Reports, 1986.

<sup>61</sup> United Nations Economic and Social Council, E/CN.4/1997/42, *Human Rights and Mass Exoduses*, Report of the High Commissioner of Human Rights.

<sup>62</sup> Theodor Meron argues in; *Human Rights in Internal Strife: Their International Protection*, 1987, that it is in fact human rights law actually offers more protection to civilians in civil or internal conflicts.

<sup>63</sup> Article 1 describes the forms of internal armed conflicts covered by Protocol II.

<sup>64</sup> Lieber Instructions (1863); The Hague Convention (1907), although this convention does not explicitly protect women against rape, art. 4 provides a general prohibition of torture and other atrocities against combatants and civilians. Article 46 of the Hague Convention stipulates respect for the lives of person and rights of the family, under the right interpretation this can be considered to cover rape.

male and female civilians have equal rights.<sup>65</sup> In addition, in armed conflicts, women as members of the civilian population benefit from rules in international humanitarian law that impose limits on the conduct of hostilities.<sup>66</sup> To ensure that women enjoy the same rights as men, however, they sometimes have to be granted special protection, taking account of factors such as physical and psychological differences, increased vulnerability in certain circumstances and specific needs. The special protection provided to women in humanitarian law thus supplements the general protection to which the entire civilian population is entitled.<sup>67</sup>

Some scholars doubt whether the special protection provisions in the laws of war provide sufficient protection to civilian women against sexual violence (including rape, forced prostitution, forced pregnancy, sexual slave labor and other forms of sexual abuse). According to Judith Gardam and Hilary Charlesworth, the special provisions are, as a practical matter, often regarded as less important than others and their infringement is not taken seriously. The provisions are expressed in terms of protection rather than prohibition. Further, both authors conclude that the provisions mainly protect women in terms of their relationship with others (e.g. as pregnant women or mothers), not as individuals in their own right.<sup>68</sup> They argue that humanitarian law does not take into account the way women experience warfare. Even where the law technically provides explicit protection against rape and other sexual abuse, it is more seen as a

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<sup>65</sup> Fourth Geneva Convention, art. 27(1); Protocol I, art. 75(1) protect women against discrimination in international armed conflicts; Fourth Geneva Convention common art. 3(1) and Protocol II, art 2(1) and 4 protect women against discrimination in non-international armed conflicts.

<sup>66</sup> Article 48, Additional Protocol I protect female civilians in international armed conflicts, and provides that the Parties to a conflict "shall at all times distinguish between the civilian population and the combatants and between civilian objects and military objectives." In non-international armed conflict, female civilians derive similar protection under article 13 of Protocol II.

<sup>67</sup> For more information on special protection provisions for women see, Françoise Krill, *The Protection of Women in International Humanitarian Law*, Extract of the International Review of the Red Cross, November-December 1985.

<sup>68</sup> Of the 34 provisions supposedly providing protection to women, 19 of them are primarily intended to protect children.

crime against honor or decency, ignoring the violent nature of sexual abuse.<sup>69</sup>

Indeed, humanitarian law and its interpreters until recently regarded rape and other sexual abuse as crimes against honor or decency.<sup>70</sup> The Fourth Geneva Convention,<sup>71</sup> Article 27(2) states:

Women shall be especially protected against any attack on their honor, in particular, against rape, enforced prostitution, or any form of indecent assault.<sup>72</sup>

However, article 147 of the Fourth Geneva Convention defines "grave breaches" as including "torture or inhuman treatment" and "willfully causing great suffering or serious injury to body and health." Even a single act can constitute a grave breach. Rape and other sexual abuse are recognized as torture

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<sup>69</sup> Judith Gardam and Hilary Charlesworth, *Legal Protection of Women in Situations of Armed Conflict [draft]*, 1996; see also Judith Gardam, *Women and the Law of Armed Conflict: Why the Silence?*, International and Comparative Law Quarterly, Volume 46, Part 1, January 1997; Catherine Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, Human Rights Quarterly, Volume 17, 1995.

<sup>70</sup> For other explicit prohibitions of rape and other forms of sexual abuse in international conflicts see also, Article 75(2)(b) of Additional Protocol I to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 3, 16 ILM, (hereinafter Protocol I), prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any other form of indecent assault," these acts are prohibited at any time and in any place whatsoever, whether committed by civilians or by military agents; Article 76(1) of Protocol I provides that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault"; for explicit prohibitions of sexual abuse in the context of non-international armed conflicts see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 609, 16 ILM, (hereinafter Protocol II), art 4(2)(e).

<sup>71</sup> Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, (hereinafter Fourth Geneva Convention).

<sup>72</sup> Article 4 of the Fourth Geneva Convention states that "persons protected by the Convention are 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". Therefore, nationals in a non-international conflict are not protected under Article 27.

and cruel, inhumane or degrading treatment.<sup>73</sup> As such, they are banned both by customary international law and humanitarian law. Torture is specifically barred by the laws of war.<sup>74</sup>

The United Nations established an ad hoc tribunal to enforce humanitarian and human rights law and prosecute gender-based abuses of women during the war in the former Yugoslavia.<sup>75</sup> A 1993 report by the UN Commission of Experts, charged with investigating war crimes in the former Yugoslavia, recognizes rape as a war crime defined as "any violation of the law of international armed conflict, sufficiently serious and committed with the requisite intent to be regarded as a crime," when inflicted against persons or property on the other side of the conflict. Even a single act can constitute a war crime.<sup>76</sup> The perpetrators, as Nuremberg jurisprudence had previously made clear need not necessarily be a soldier.

However, Gardam and Charlesworth argue that despite the current understanding that rape is implicitly included in article 147, either as torture or inhuman treatment, or as an act willfully causing great suffering or serious injury to body or health rape should be explicitly recognized as a grave breach of the Geneva Conventions.

The recognition of rape as a war crime and as a grave breach of the Geneva Conventions does require an effective in-

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<sup>73</sup> The ICRC declared that the grave breach of Article 147 covers rape, ICRC, Aide-Memoire, 3 December 1992; The U.S. Department of State also declared that rape is a war crime or a grave breach under customary international law and the Geneva Conventions and can be prosecuted as such.

<sup>74</sup> Article 147, Fourth Geneva Convention; Article 75(2)(a), Protocol I (applicable to international conflicts). In addition, article 85 of Protocol I provides that the acts described as "grave breaches" in the Conventions are also grave breaches of Protocol I if committed against protected persons in the power of an adverse party.

<sup>75</sup> The Commission created by the victors after the First World War recognized rape as a war crime that should lead to criminal responsibility (however, no prosecutions for rape resulted during the Nuremberg Tribunal, but there were prosecutions for rape by the International Military Tribunal at Tokyo). See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 American Journal of International Law, July 1993.

<sup>76</sup> Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 American Journal of International Law, July 1993; Beth Stephens, *Women and the Atrocities of War*, ABA's Human Rights, Vol. 20 (no. 3), Summer 1993.



vestigation, prosecution and punishment of the perpetrators of these crimes.<sup>77</sup> For instance, Article 146 (Fourth Geneva Convention) and customary international law, requires that HCPs are under the obligation to search persons alleged to have committed, or to have ordered to be committed, grave breaches of the laws of war and to prosecute or extradite them.<sup>78</sup>

In non-international conflicts women receive special protection against sexual abuse under article 4(2)(e) of Protocol II. This article expressly forbids "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault," in the context of non-international armed conflicts. Article 1 of the same protocol limits the applicability of the provisions:

Protocol II applies to all armed conflicts not covered by article 1, Protocol I, and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1 of Protocol II excludes internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, from being armed conflicts. It is important to note that nowadays more and more internal wars fall outside the criteria, and are therefore, not covered under Protocol II. Consequently, it is mostly Common Article 3 to the Geneva Conventions that is the only relevant law applicable in internal wars. Although there is no explicit referral to rape or other sexual abuse in Common Article 3, its prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment," is now regarded by the international com-

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<sup>77</sup> Dorothy Q. Thomas and Regan E. Ralph, *Rape in War: Challenging the Tradition of Impunity*, SAIS Review, Winter-Spring 1994; Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, August 1995.

<sup>78</sup> The Torture Convention also requires signatories to either prosecute torturers or extradite them to a country that will do so.

munity as including rape.<sup>79</sup> It is clear that although humanitarian law prohibits rape both in international and national conflicts, it does not provide the same avenues for legal redress for rape and other sexual abuses. However, according to the ICRC, states should prosecute with equal vigor persons guilty of rape in times of non-international armed conflict or internal disturbances.<sup>80</sup>

The regulations applicable to refugee women in international armed conflicts are basically similar to those regulations applicable in times of peace. All the fundamental rights and freedoms enshrined in international and regional human rights law also protect refugee women in armed conflicts. Refugee women can also be protected under the non-derogable rights and customary laws applicable to all human beings at all times,<sup>81</sup> although a war may affect their status within the host country.

Refugee women are protected against forced repatriation to their country of origin by the principle of non-refoulement laid down in international humanitarian law.<sup>82</sup> International humanitarian law does not, however, contain explicit protection against non-refoulement cases where women fear gender-based persecution. But because rape and other forms of sexual abuse are recognized as torture, women are protected against refoulement under the Torture Convention, which prohibits refoule-

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<sup>79</sup> Article 3 of the Geneva Conventions, which sets forth the minimum standards applicable to non-international conflicts, also bars "violence to life or persons, in particular murder of all kinds, mutilation, cruel treatment, and torture."

<sup>80</sup> International Committee of the Red Cross, *Women and War*, 1 August 1995.

<sup>81</sup> In addition, pregnant women and mothers derive special protection to the same extent as the nationals of the state concerned, art 38 Fourth Geneva Convention, likewise occupying powers shall not hinder the application of preferential measures...which may have been adopted prior to the occupation in favor of.....expectant mothers, and mothers of children under seven years old," article 50 Fourth Geneva Convention.

<sup>82</sup> Article 4, Fourth Geneva Convention, protect those persons "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 45 provides "protected persons shall not be transferred to a Power which is not a party to the Convention....In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

ment of a person when this person fears torture, either during peacetime or wartime.<sup>83</sup>

Although none of the provisions of humanitarian law specifically refer to refugee women and their protection, the provisions do regulate the policies regarding refugees in times of armed conflict. Article 44 of the Fourth Geneva Convention, states that refugees shall not be treated as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy state, when these refugees do not, in fact, enjoy the protection of any government.<sup>84</sup> Protocol I recognizes acts described as grave breaches in the conventions as grave breaches under the Protocol when committed against refugees.

Humanitarian law<sup>85</sup> provides the legal framework for humanitarian action by organizations such as UNHCR, the ICRC and others.<sup>86</sup> These organizations undertake humanitarian activities to provide support and assistance to individuals in need. Recently humanitarian aid was given in cooperation with military support. For instance, UNHCR's mandates in Cambodia, Northern Iraq, Somalia, the former Yugoslavia and Rwanda were pursued with international military assistance. Recent events in Cambodia and the former Yugoslavia demonstrate that women have been subjected to sexual abuse by United Nations peacekeeping forces. These incidents raise the complex legal is-

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<sup>83</sup> Article 3 of the Torture Convention provides that "no State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that she would be in danger of being subjected to torture."

<sup>84</sup> Other provisions relevant provisions in the Fourth Geneva Convention, art. 6, "Dispersed Families"; art. 44, "Refugees"; art. 70, "Offenses committed before occupation. Relevant provisions in Protocol I are, art. 73, "Refugees and Stateless Persons"; art. 74, "Reunion of Dispersed Families"; art. 85, "Repression of Breaches of this Protocol"; art. 88, "Mutual Assistance in Criminal Matters"; art. 89, "Cooperation."

<sup>85</sup> In addition to the Charter of the United Nations (1945), the UN General Assembly Resolution 46/182 (1991), and the 1951 Refugee Convention and its Protocol (1967).

<sup>86</sup> Other humanitarian agencies are the UN Department of Humanitarian Affairs (DHA) established by the Secretary General in 1992; UNICEF; The World Food Program (WFP); The World Health Organization (WHO) and governmental and non-governmental organizations.

sue of to what extent the United Nations is bound by the laws of armed conflict. The UN itself is not a party to the Geneva Conventions nor its protocols. However, most of the provisions of humanitarian law are codified as customary law and applicable to all parties to the conflict, even those who did not ratify the Geneva Conventions and the Additional Protocols. This means that the United Nations should also be bound by the customary principles of the law of armed conflict. The legal position of the United Nations is very controversial, however, and needs urgent clarification.<sup>87</sup> In the meantime, the peacekeeping forces remain under the responsibility of the countries from which they originate.

Humanitarian law does not admit derogations on the basis of a public emergency. A recent meeting of experts in Finland, convened by the Institute for Human Rights, adopted a Declaration of Minimum Humanitarian Standards, recognizing that international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of armed conflict.<sup>88</sup> The declaration affirms minimum humanitarian standards, which are applicable in all situations, including internal and international conflicts, and which cannot be derogated from under any circumstances. The standards reflect existing international law and are considered to be binding on all. The declaration covers all possible situations such as disturbances, tensions and other emergencies, regardless whether it is peacetime or wartime. Therefore, it does not matter whether the armed conflict is covered by humanitarian law because states are obliged to guarantee the fundamental rights and freedoms enacted in the declaration. These standards must be respected whether or not a state of emergency has been proclaimed, allowing no derogations. It remains to be seen how the Minimum Standards are enforced in times of armed conflict.

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<sup>87</sup> For more information on military participation in UN humanitarian operations see: A UNHCR Handbook for the Military on Humanitarian Operations, January 1995.

<sup>88</sup> Commission on Human Rights, Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/1996/80, 28 Nov 1996.

The lack of an effective enforcement mechanism could explain in part why states continue to violate the minimum standards.

Humanitarian laws include provisions that oblige states to pay compensation in case of violations of the regulations. For example, article 3 of The Hague Convention provides for the obligation of the contracting party to pay indemnity in case the regulations are violated. The Four Geneva Conventions also include similar obligations for state parties. For example, article 148 of the Fourth Geneva Convention states that "no high contracting party shall be allowed to absolve itself or any other high contracting party of any liability incurred by itself or by another high contracting party in respect of breaches referred to in article 147."<sup>89</sup> Article 55 of the Fourth Geneva Convention states that the Occupying Power "shall make arrangements to ensure that fair value is paid for any requisitioned goods." Finally, Protocol I, article 91 states that "a party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation."

### **Human Rights Law**

The relevant international human rights instruments for the protection of women in armed conflicts situations are the Universal Declaration on Human Rights (UDHR),<sup>90</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>91</sup>, the Convention to Eliminate All Discrimination Against Women (CEDAW)<sup>92</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>93</sup> All these international human rights instruments prohibit violence against women, regardless whether it is perpetrated in times of

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<sup>89</sup> Article 148 is a common provision in all four conventions, art 51 I Convention, art. 52 II Convention, art. 131 III Convention.

<sup>90</sup> Universal Declaration of Human Rights, General Assembly, A/RES/17 A (III), 10 December 1948, (hereinafter UDHR).

<sup>91</sup> The International Covenant on Civil and Political Rights, General Assembly, res. 2200A (XXI), 16 December 1966, (hereinafter ICCPR).

<sup>92</sup> The Convention to Eliminate all Discrimination Against Women, A/RES/34/180, 18 December 1979, (hereinafter CEDAW).

<sup>93</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly, A/RES/39/46. 10 December 1984, (hereinafter Torture Convention).

war or peace. The Universal Declaration on Human Rights, although not binding in itself, can be seen as an authoritative interpretation of the United Nations Charter. It outlines the minimum standards, internationally recognized in subsequent treaties binding for states upon ratification. The standard practice of states is to consider both the norms of the Universal Declaration and the Covenants as binding.

As mentioned earlier, this report focuses on gender-based violence against women in armed conflicts perpetrated and condoned by the state. In international law, state responsibility arises when a state acts wrongfully in a matter of international proportions. It is the responsibility of governments to carry out exhaustive and thorough investigations into allegations of gender-based violations of human rights by a state agent, and to identify, bring to justice and punish the perpetrators.<sup>94</sup> Even though international law makes the state directly accountable for violations of women's rights by agents of the state, such crimes often goes unpunished, thereby permitting violators to act with impunity.

Although most international human rights instruments do not contain provisions that specifically refer to gender-based violence against women, they do have provisions that implicitly include gender-based violence. Most of these provisions are discussed in WLDI's two previous reports, which were also prepared to support the work of the Special Rapporteur on Violence Against Women.<sup>95</sup> Therefore, in this report, only a short summary will be given of these provisions before discussing other instruments that might offer additional protection against gender-based violence in armed conflict situations. First of all, gender-based violence in times of armed conflict violates women's right to be free from torture, prohibited under several interna-

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<sup>94</sup> The right to equal protection for the law is enacted in ICCPR, art. 2(1), 3, 14, 26; CEDAW, art.1, 2, 3, 4, 15.

<sup>95</sup> Women, Law and Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements*, 1996; Women, Law and Development International, *State Response to Rape: Current Status and Needed Improvements*, 1997.

tional human rights instruments.<sup>96</sup> For example, article 1 of Torture Convention defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

When rape and other forms of abuse is inflicted by, or at the instigation of, or with the consent or acquiescence of, a state agent or other person acting in an official capacity, it does constitute torture.<sup>97</sup> The Torture Convention obligates its signatories to extradite or prosecute torturers found within their territory.<sup>98</sup> The UN Special Rapporteur on Torture stated in 1992 that he views rape during detention as a form of torture.<sup>99</sup>

Sexual violence in conflict situations is a grave violation of the fundamental human right to mental and physical integrity as protected under the ICCPR, the Torture Convention and the UDHR.<sup>100</sup> Gender-based violence, such as rape and other forms of sexual abuse violates a women's right to physical and mental health as protected under CEDAW, ICCPR and the UDHR.<sup>101</sup> and the right not to be subjected to degrading treatment or punishment.

Women in armed conflict situations are often subjected to a form of sexual slavery or forced prostitution. For example, thousands of women from Korea, Indonesia, China, the Philippines, and some western countries were abducted by the Japanese and used as "comfort women" for Japanese soldiers during World War II. Unfortunately, during World War II, most of the human rights instruments were not yet in effect and therefore women

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<sup>96</sup> Torture Convention, art. 1; UDHR, art. 5; ICCPR, art. 7.

<sup>97</sup> Beth Stephens, *Women and the Atrocities of War*, ABA's Human Rights, Vol. 20 (no. 3), Summer 1993.

<sup>98</sup> Torture Convention, art. 4 and 5.

<sup>99</sup> In 1991, the United States Department of State instructed U.S. embassies around the world to report rapes in detention as torture in their annual reports.

<sup>100</sup> ICCPR, art. 7; Torture Convention; UDHR, art. 5.

<sup>101</sup> CEDAW, art. 12; ICCPR, art. 12(1); UDHR, art. 25.



were not protected against sexual slavery in the same extent as they are now. Currently, sexual slavery is prohibited under several international human rights instruments.<sup>102</sup> For example, article 1 (2) of the Slavery Convention explicitly prohibits slavery and defines it as: "All acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery..." Under ICCPR and CEDAW, slavery and forced prostitution in times of armed conflict constitute a basic violation of the right to liberty and security of person.<sup>103</sup>

In the event that an act of gender-based abuse results in death during the conflict, it violates a women's fundamental right to life.<sup>104</sup> Violations of the right to life, as well as death threats and harassment, occur in almost all armed conflicts. According to the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, in most conflict around the globe, women were killed indiscriminately but also for their relationship to men being persecuted by security forces.<sup>105</sup>

Further, during armed conflicts, a woman might be held captive and be subjected to sexual abuse simply because she is related to a persecuted man, for sexual gratification or ethnic cleansing.<sup>106</sup> For example, in the former Yugoslavia, Bosnian Muslim women, mostly civilians, were held in rape camps for months. The women were sexually abused by Serbian soldiers with the goal of impregnating rape victims and forcing them to bear "Serbian" children as a means of ethnic cleansing. Besides the fact that the sexual abuse is in violation of women's human rights, detention not subjected to judicial control is a violation of

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<sup>102</sup> see also the International Labor Organization (ILO) Convention No. 29, 1930, concerning the Abolition of Forced Labor.

<sup>103</sup> See ICCPR, art 9 (right to liberty and freedom) and art. 23 (prohibits forced marriage); CEDAW, art. 6 requires states to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

<sup>104</sup> See UDHR, art. 3; ICCPR, art. 6

<sup>105</sup> Report on Extra-judicial, Summary or Arbitrary Executions, submitted to the Commission on Human Rights by the Special Rapporteur, E/CN.4/1997/60, 24 December 1996

<sup>106</sup> For example, in the former Yugoslavia, Bosnian women were held in 'rape camps' in order to forcibly impregnate them for purposes of ethnic cleansing.



a woman's right to liberty and security.<sup>107</sup> Furthermore, detention of women in an unknown location without official charges is also in violation of the Declaration on the Protection of All Persons from Enforced Disappearance.<sup>108</sup>

Rape and sexual violence also violates women's right to be free from discrimination based on sex, as enshrined in international human rights treaties. For example, the ICCPR explicitly prohibits sex discrimination under art. 2(1) and art. 26. In addition, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) seeks to remove all such discrimination. Article 1 of CEDAW bans:

any distinction, exclusion or restriction made on the basis of sex, which has the purpose or effect of impairing or nullifying the recognition of enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field.

Although violence is not expressly mentioned in article 1, the CEDAW Committee has interpreted the definition of discrimination (article 1) to include gender-based violence precisely because gender-based violence has the effect or purpose of impairing or nullifying the enjoyment by women of human rights, such as the right to life and liberty.<sup>109</sup> In 1992, Recommendation No. 19, adopted by the CEDAW Committee, deals entirely with violence against women and explicitly states that gender-based violence is a form of discrimination, which seriously inhibits a woman's ability to enjoy rights and freedoms on an equal basis with men.<sup>110</sup>

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<sup>107</sup> See ICCPR, art. 9; UDHR, art. 3; see also DEVAW, art. 3.

<sup>108</sup> Declaration on the Protection of All Persons from Enforced Disappearance, GA res.47,133, A/47/49, 1992, art. 10.

<sup>109</sup> The CEDAW Committee is the body established to monitor the implementation of CEDAW.

<sup>110</sup> Recommendation No. 19 is not explicitly binding upon states, but expresses a growing international consensus that states have the duty to take legal measures necessary to protect women from violence by the states. It specifically asserts that gender-based violence is a human rights violation that inhibits women's ability to enjoy rights and freedoms on a basis of equality with men (paras. 1, 6, 7). It urges states to take all appropriate and effective measures to

The international human rights instruments do not include specific provisions protecting refugees in general or refugee women in particular. However, the instruments contain provisions that provide protection to everybody, including refugee women. For example, ICCPR, article 2 requires of all states to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of national origin. CEDAW, also establishes standards that are important for refugee women, including:

- suppression of all forms of traffic in women and exploitation of prostitution (Article 6)
- nationality (Article 9)
- equality before the law (Article 15)

When women fail to get refugee status, based on the principles laid down in the Refugee Convention, they still have explicit protection against *refoulement* under the ICCPR, article 7 and under the Torture Convention.<sup>111</sup> Most general human rights instruments include a prohibition on torture which have been interpreted to include an implicit prohibition on *refoulement* where the person is at risk of torture. Article 3 of the Torture Convention contains an explicit prohibition on *refoulement*.

No State Party shall expel, return (“*refouler*”) or extradite a person to another state where there are substantial grounds for believing that she would be in danger of being subjected to torture.

The ICCPR and the Torture Convention both include an explicit prohibition of *refoulement* if the woman is at risk of suffering the human rights violation that the instrument is seeking to prevent. According to the Human Rights Committee, each right of the ICCPR must be guaranteed without discrimination between aliens and citizens. The Committee also declared that

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overcome all forms of gender-based violence whether private or public (para. 11).

<sup>111</sup> See also UN Declaration on the Protection of All Persons From Enforced Disappearances, art. 8; UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 5.

arbitrary expulsions are prohibited by Article 13.<sup>112</sup> Article 7 of ICCPR has also been interpreted to include an implicit protection against refoulement where the person is at risk of torture:<sup>113</sup> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>114</sup>

Several international human rights instruments have jurisdiction over abuses committed in times of armed conflict. For example, the Optional Protocol to the ICCPR allows individuals, who claim that any of their rights have been violated under the Covenant, to submit communications to the Human Rights Committee. Similarly, pursuant to article 22 of the Torture Convention, individuals may submit written communications to the Committee Against Torture. Under article 14 of CEDAW, individuals and groups of individuals, who claim that their rights enumerated under the Convention have been violated may submit written communications to the CEDAW Committee after they have exhausted all domestic remedies.

Most international human rights instruments recognize the individual's right to remedy, including compensation and this right is also recognized as such by the international community. In traditional international law, states have state responsibility only towards the injured state.<sup>115</sup> Basically this means that when the offending state violates the fundamental rights of a national of another state the offending state is only liable to the state of

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<sup>112</sup> Human Rights Committee, General Comments under the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/21/Rev. 1/Add. 1, 21 November 1989.

<sup>113</sup> The Special Rapporteur on Torture confirmed that rape in detention constitutes torture (see above).

<sup>114</sup> The Human Rights Committee, in its General Comment 20 of 1991 on Article 7 said: States Parties must not expose individuals to the danger of torture or cruel....upon return to another country by way of extradition, expulsion or refoulement.

<sup>115</sup> According to the International Law Commission have all parties to a multilateral treaty the right to claim compensation, when the violated right arises from such a treaty or a rule of customary law and has been created or is established for the protection of human rights and fundamental freedoms, *Yearbook of the International Law Commission*, Vol. II, 1987. A similar conclusion was drawn by the International Court of justice in the Barcelona Traction Judgment, *Belgium v. Spain*, ICJ Reports, 1970.

which that national belongs. The national has no individual right to claim reparation.<sup>116</sup>

As stated above the individual right to compensation is granted to the victim of the fundamental rights abuse. The definition of victims can be defined as follows: victims are persons who:

individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. The term victim also includes, where appropriate, the immediate family or dependents of the victim and persons who have suffered harm in intervening to assist the victims in distress or to prevent victimization.<sup>117</sup>

Some international human rights instruments include provisions relating to the right of every individual to an "effective remedy" by competent national tribunals for acts violating human rights which are granted to her by the constitution of the law. Article 8 of the UDHR and article 2(3) of the ICCPR both include the right to an effective remedy. Article 9 (5) of the ICCPR includes a more specific provisions providing for an "enforceable right to compensation," and article 14 of the Torture Convention and article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance embody "an enforceable right to fair and adequate compensation."

Women can enforce their right to compensation recognized in the different international instruments through the judicial bodies established under the different international instruments. Under most of these treaties individuals have the right to file a complaint with the judicial body.<sup>118</sup> Most of these judicial bodies who are allowed to receive individual complaints developed case law in which they established that states have an obligation to ensure the victim compensation in case they violate his/her fundamental rights. Unfortunately, CEDAW, an important instrument to fight discrimination against women lacks specific provi-

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<sup>116</sup> Nigel Rodley, *The Treatment of Prisoners Under International Law*, 1987.

<sup>117</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, 29 November 1985.

<sup>118</sup> For example, under the Optional Protocol to the ICCPR the Human Rights Committee may receive individual complaints.

sions to protect women against violence. The judicial body of CEDAW has no authority to receive and examine individual complaints concerning violations of the CEDAW provisions.

Although not legally binding, DEVAW an instrument that strictly deals with violence against women includes several remedial and reparational measures (article 4) that should form part of a policy to eliminate violence against women. These include:

- exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private actors
- provide of access to the mechanisms of justice and to just and effective remedies for the harm suffered
- development of preventive approaches and ensuring that the revictimization of women does not occur because of gender-insensitive laws, enforcement practices and other interventions
- ensuring specialized assistance, such as rehabilitation, treatment, counseling, health and social services etc.

The United Nations General Assembly issued several resolutions demanding states who planted mines on territories of other states to pay compensation to those states for the losses caused by those mines.<sup>119</sup> The Security Council additionally reaffirmed that Iraq is liable under international law for the direct losses, damage and injury to Kuwait and its nationals, corporations and third countries, as a result of Iraq's unlawful invasion and occupation of Kuwait.<sup>120</sup> For this purpose the Security Council created a Fund and established a Commission to administer the Fund. Initially the submission of claim was a right mainly reserved to governments on behalf of its nationals. It became clear that this principle would deprive a high number of individuals from any form of reparation because they lacked a government who would file a claim on their behalf (e.g. stateless persons, Palestinians etc.) In order to meet the needs of those

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<sup>119</sup> General Assembly resolutions 35/71 of 5 December 1980, 36/188 of 17 December 1981, 37/215 of 20 December 1982, 38/162 of 19 December 1983, 39/167 of 17 December 1984 and 40/197 of 17 December 1985.

<sup>120</sup> Security Council resolution 687, 3 April 1991.

persons, the Commission deemed it necessary that an appropriate person, authority or body was to be appointed to submit claims on behalf of those persons. Meanwhile, the Security Council did not grant the right to compensation to Iraq's own nationals for the losses and damage inflicted upon them during the invasion and occupation of Kuwait. The Commission states that claims of individuals may include serious personal injury, including physical and mental injury arising from sexual assault. It is unknown whether the Commission awarded compensation to a victim's claim for gender-based abuses such as sexual assault.

### **Refugee Law**

Refugee women are protected under the Convention relating to the Status of Refugees<sup>121</sup> and the Protocol relating to the Status of Refugees.<sup>122</sup> According to international refugee law a distinction must be made between people who flee their homes but stay within the borders of their country of residence or nationality, and people who flee their homes and cross national borders. Not all persons who flee are considered refugees. According to the Convention relating to the Status of Refugees, a refugee is only a person who:

...has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>123</sup>

IDPs are those who have fled for reasons similar to refugees but who have not crossed a border and remained within the borders of their country. Because IDPs are not considered refugees they are not entitled to the special protective regime ac-

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<sup>121</sup> The Convention relating to the Status of Refugees, General Assembly, Res. 429 (V), 28 July 1951, (hereinafter the Refugee Convention).

<sup>122</sup> Protocol relating to the Status of Refugees, General Assembly, No. 8701, Vol. 606, 4 October 1967, (hereinafter the Refugee Protocol).

<sup>123</sup> The Refugee Convention, art. 1.A.2.

corded to refugees under international refugee law, including the Refugee Convention, Protocol I Relating to the Status of Refugees<sup>124</sup> and the UN Declaration on Territorial Asylum.<sup>125</sup> Since IDPs remain within their own national borders, it is often a government that has caused their displacement that has the responsibility for their protection.<sup>126</sup>

They are, however, entitled to enjoy, in full equality, the same rights and freedoms protected under domestic and international human rights law, just like any other human being.<sup>127</sup> They are entitled to protection against gender-based violence under the same international human rights instruments as all women who reside in states that are signatories to the relevant laws and protocols.

Refugee women may still be subjected to gender-based violence. Refugee camps are often attacked by the military of the host country, which of course has serious consequences for the whole refugee population. Furthermore, women are subjected to gender-based violence by soldiers, bandits, and even male refugees. Attacks against women by military forces or other state agents violates fundamental human rights such as the right to freedom from torture, the right to mental and physical integrity, the right to life, the right to security of person and the right not to be subjected to discrimination on the basis of sex. The Refugee Convention lacks explicit provisions on the question of the physical safety of refugees. However, the General Assembly declared in 1989 that "the protection of human rights and fundamental freedoms provided for in international instruments

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<sup>124</sup> Protocol I Relating to the Status of Refugees, U.N.T.S No. 891, Vol. 606, 31 January 1967, (hereinafter 1967 Protocol).

<sup>125</sup> Universal Declaration on Territorial Asylum, Res. 2312 (XXII), 14 December 1967, (hereinafter UN Declaration on Territorial Asylum).

<sup>126</sup> Guy Goodwin Gill, *Refugee Identity and the Fading Prospect of International Protection*, 1996. See also James C. Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection*, *Journal of Refugee Studies*, Vol. 8, No. 3, 1995.

<sup>127</sup> Human rights prohibitions of discrimination and guarantees of equal protection continue to apply in situations of armed conflict (whether non-international or inter-state conflict). Furthermore, the rights to be free from torture etceteras is also applicable.



should also be ensured for individuals who are not nationals of the countries in which they live.”<sup>128</sup>

Although, the Refugee Convention does not contain provisions that explicitly prohibit sexual abuse or any other physical violence it does include provisions that provide refugee women access to legal recourse on equal footing as nationals. For example, article 16 of the Refugee Convention guarantees refugees free access to the courts of law and the same treatment that nationals would receive who reside within states that are party to the Convention.

Although the right to seek asylum is embodied in the UN Declaration on Human Rights and the Declaration on Territorial Asylum,<sup>129</sup> gender is not currently a basis for persecution leading to a right to asylum under the Refugee Convention and its Protocol. However, the Refugee Convention includes the right of non-refoulement (non-return). This is one of the most important provisions of the Refugee Convention.<sup>130</sup> Article 33 (1) states:

No Contracting State shall expel or return (“refouler”) a refugee in any matter whatsoever to the frontiers of territories where her life or freedom would be threatened on account of her race, religion, nationality, membership of a particular social group or political opinion.

However, the principle of non-refoulement in practice does not protect refugee women equally as men. Women do not have equal access to, or face difficulties during, refugee status determination procedures and therefore, are not protected, equally to men, against refoulement. Under the Refugee Convention

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<sup>128</sup> General Assembly, Res. 144, UN Doc. No. A/40/53: Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, 13 December 1989.

<sup>129</sup> See art. 1, Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 14 December 1967, Res. 2312 (XXII). While the purpose of the draft convention was to enhance the protection to those falling within the existing definition of a refugee, its most noteworthy achievement was the expanded definition of refugee status for purposes of entitlement to international legal protection. Meanwhile, most states considered it a sovereign right of a state to grant asylum.

<sup>130</sup> Refugee Convention, art. 42 prohibits states to make reservation to the non-refoulement provision.



women do not have an explicit right to a fair refugee status determination procedure. The fact that the Refugee Convention does not explicitly recognize the specifics of gender-based persecution or particularities of refugee women or of womanhood as a whole, makes it harder for women to fit the criteria of refugee. Even when rape or other forms of sexual violence are committed for reasons of race, religion, nationality, political opinion or membership of a particular social group, women still face difficulties getting refugee status.

Protection against refoulement is available to:

- refugees recognized under the Refugee Convention;
- asylum seekers whose claims have not yet been considered, and;
- persons who have fled their countries and are entitled to protection under the OAU Convention or the Cartagena Declaration, or who are otherwise in need of international protection.<sup>131</sup>

In light of the state practice since 1951, a strong case can be made that non-refoulement now includes non-rejection at frontiers, and further, that non-refoulement of refugees has crystallized as a fundamental principle of customary international law from which no state should withdraw.<sup>132</sup> Guy Goodwin-Gill, a scholar, argues that a new class of refugees is recognized in customary international law. He believes that the obligation of states to observe the principle of non-refoulement now extends to persons outside the Refugee Convention's definition of refugee insofar as they may be said to lack governmental protection against harmful events beyond their control.<sup>133</sup> Other scholars, however, argue that there is neither extensive and uniform state practice nor *opinio juris* sufficient to say that customary law ex-

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<sup>131</sup> It is generally accepted that protection against refoulement also applies to persons arriving at the border, even in situations of a large scale influx of refugees. Besides, the right to seek asylum is protected under Article 14 UDHR.

<sup>132</sup> G. Goodwin Gill, *The Refugee in International Law*, 1983.

<sup>133</sup> G. Goodwin Gill, *Non-Refoulement and the New Asylum Seekers*, 26(4) Virginia Journal of International Law, 1986.

tends the refugee definition outside the scope of the Refugee Convention.<sup>134</sup>

Not all countries provide protection and assistance based on refugee status. For example, India did not ratify the Refugee Convention but allows Sri Lankan Refugees to enter its territory and remain there without having refugee determination procedures. In most developing countries assistance and protection is provided to anyone that crossed the border. However, in order to receive protection and assistance women may still have to register with the authorities. Due to cultural habits, language problems or unequal access to information, women often have problems complying with the registration requirement.<sup>135</sup>

## **Regional Law**

### **Regional Human Rights Law**

Similar to international human rights instruments, regional human rights instruments provide protection against gender-based violence in times of armed conflict. The regional human rights instruments discussed in this report are the American Convention on Human Rights,<sup>136</sup> the Inter-American Convention on the Prevention and Eradication of Violence Against Women,<sup>137</sup> the American Declaration on the Rights and Duties of Man,<sup>138</sup> the African Charter of Human and People's Rights,<sup>139</sup>

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<sup>134</sup> K. Hailbronner, *Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?*, 26(4) Virginia Journal of International Law, 1986; James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 International & Comparative Law Quarterly 348, 1984.

<sup>135</sup> Susan Forbes Martin, *Refugee Women*, 1991.

<sup>136</sup> American Convention on Human Rights (Pact of San Jose), 22 November 1969, (hereinafter American Convention).

<sup>137</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, OEA/ser.L/II./7.4, CIM/doc, 9 June 1994, (hereinafter Convention of Belem Do Para).

<sup>138</sup> The American Declaration on the Rights and Duties of Man, 17, OEA/ser.L/V/II.50, Doc., 65 rev. 1, corr.2 (1970) (hereinafter ADRDM).

<sup>139</sup> African Charter of Human and People's Rights, June 1981, (hereinafter African Charter).

and the European Convention for the protection of Human Rights and Fundamental Freedoms.<sup>140</sup>

As stated, most instruments do not include explicit provisions that prohibit gender-based violence against women. However, through broader interpretation of these instruments, gender-based violence is prohibited under the right to freedom from torture as embodied under all regional instruments.<sup>141</sup> Gender-based violence is also implicitly prohibited under the right to mental and physical integrity as embodied in all regional instruments.<sup>142</sup> When the gender-based abuse results in death of the woman, it is a violation of her right to life also enshrined in regional instruments.<sup>143</sup>

The failure of states to protect women against state violence in times of armed conflict, and to provide women effective means to redress state violence, also violates women's right to equal protection of laws as enacted in the regional instruments. According to regional human rights instruments, states are required to ensure that all persons subject to their jurisdiction enjoy equal protection of the law.<sup>144</sup>

Gender-based violence is rooted in gender discrimination, and violates well-established principles of regional human rights law. The fundamental right to gender equality is enshrined in all regional human rights instruments.<sup>145</sup>

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem Do Para), is the first regional treaty (South Ameri-

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<sup>140</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, (hereinafter European Convention).

<sup>141</sup> European Convention, art. 3; African Charter, art. 4 and 5; American Convention, art. 5(1).

<sup>142</sup> American Convention, art. 5(1); African Charter, art. 4, 5; European Convention, art. 3.

<sup>143</sup> European Convention, art. 2; African Charter, art. 4; ADRDM, art. 1.

<sup>144</sup> American Convention, art. 1 and 24; African Charter, art. 2, 3, 18 and 19; European Convention, art. 14; Convention of Belem Do Para, art. 4; ADRDM, art. 1.

<sup>145</sup> American Convention, art 1(1); European Convention, art. 14; African Charter, art. 2 and 18(3).

can and the Caribbean) on violence against women. This Convention defines violence against women as:

Any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere.

This convention specifically prohibits physical, sexual and psychological violence perpetrated or condoned by the state or its agents regardless of where it occurs.<sup>146</sup> The Convention of Belem Do Para also includes a provision that "State Parties shall take special account of the vulnerability of women to violence by reason of... their status as refugees or displaced persons. Similar consideration shall be given to women... affected by armed conflict or deprived of their freedom."<sup>147</sup>

As outlined above, women in armed conflicts are sometimes subjected to forced sexual slavery and prostitution. These forms of gender-based violence are explicitly prohibited by regional human rights instruments.<sup>148</sup> Forced prostitution and slavery in armed conflict often involves detention of female civilians, which is a violation of their right to liberty enacted in all regional human rights instruments.<sup>149</sup> Regional instruments also embrace the right to life, which is violated when women in armed conflict die because of gender-based abuse by state actors.<sup>150</sup>

To enhance the protection of refugees, the principle of non-refoulement and the right to asylum are also embodied in regional human rights instruments. For example, the American Convention explicitly prohibits forced return under certain circumstances. Article 22(8) states:

In no case may an alien be deported or returned to a country, regardless of whether or not it is her country of origin, if

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<sup>146</sup> Convention of Belem Do Para, art. 2; the right to physical and mental integrity and right to be free from torture are also enacted in article 4 of this convention.

<sup>147</sup> Convention Belem Do Para, art. 9

<sup>148</sup> American Convention, art. 6; European Convention, art. 4; Convention of Belem Do Para, art. 2; African Charter, art. 5.

<sup>149</sup> American Convention, art. 7; Convention of Belem Do Para, art. 4; African Charter, art. 6; European Convention, art. 5.

<sup>150</sup> American Convention, art. 4; Convention of Belem Do Para, art. 4; African Charter, art. 4; European Convention, art. 2.

in that country her life or personal freedom is in danger of being violated because of race, nationality, religion, social status, or political opinion.

The right to seek asylum is also embodied in the American Convention, Article 22(7). A Convention on Asylum was adopted at the Sixth International Conference of American States on 20 February 1928 and Convention on Territorial Asylum was adopted at the Tenth Inter-American Conference in 1954. Article 1 of this convention also considers it a sovereign right of states to grant or refuse asylum.

Unlike other regional instruments, the European Convention does not explicitly provide for a right to seek asylum or for a duty of non-refoulement although the right to non-refoulement is implicitly recognized under article 3 of the European Convention.<sup>151</sup> However, the European Court of Human Rights has found an implicit right not to be returned to a risk of torture in Article 3 of the European Convention.

The African charter, on the other hand, includes the right to seek asylum:<sup>152</sup>

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

According to the Special Rapporteur on Zaire, IDPs in Africa have the right to seek asylum, yet African nations are more reluctant to allow refugees into their territory:

Like international human rights instruments, regional treaty bodies also have jurisdiction over rape and other sexual abuses committed during armed conflict. Article 25 of the European Convention provides that the European Human Rights Commission "may receive petitions ... from any person ... or group of individuals [who claim] to be the victim of

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<sup>151</sup> *Kirkwood v. United Kingdom*, the European Commission stated that if conditions in a country are such that the risk of serious treatment and the severity of that treatment fall within the scope of article 3, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility... of the contracting State which so decides. Article 3 in conjunction with Article 1, requires State Parties to protect everyone within their jurisdiction from the risk of being subjected to such treatment.

<sup>152</sup> African Charter, art. 12(3).

a violation by one of the High Contracting Parties (HCPs) of the rights set forth in this Convention." This provision only allows claims against HCPs rather than against individuals, provided that states have accepted the jurisdiction of the Commission.<sup>153</sup>

Article 44 of the American Convention also allows any person, group of persons, or non-governmental organization (NGO), or any State Party accepting the competence of the commission (art. 45) to submit communications to the Inter-American Commission on Human Rights complaining of a violation of the Convention. The Commission and States Parties that recognize as binding the Court's jurisdiction may submit a case to the Inter-American Court of Human Rights (art. 61). If the Court finds that there has been a violation of a right or freedom protected by the American Convention, the Court can rule that the injured party be ensured the enjoyment of the right or freedom that was violated, and remedy the breach with compensation. Lastly, the African Commission on Human and Peoples' Rights receives communications of State Parties and others when rights of the African Charter are believed to have been violated.<sup>154</sup> The Commission shall only consider those communications that are sent after domestic remedies are exhausted.

The regional human rights mechanisms also recognize the individual right to remedy. For example, the Inter American Court held in an Advisory Opinion that the purpose of modern human rights treaties in general, and the American Convention in particular is the protection of the basic rights of individual human beings. Therefore, the states parties have legal obligations towards all individuals within its jurisdiction.<sup>155</sup> Also most regional human rights include provisions relating to the right of

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<sup>153</sup> In *Cyprus v. Turkey*, the Commission found that Turkey had violated the prohibition against torture and inhuman or degrading treatment contained in the Convention. The Commission found that Turkey was responsible for the rapes and its failure to prevent them. The Commission also stated that the rapes constituted "inhuman treatment" under article 3 of the Convention.

<sup>154</sup> African Charter, arts. 47 and 55.

<sup>155</sup> Inter-American Court of Human Rights, Advisory Opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights, Series A, Judgments and Opinions, No. 2.

every individual to an "effective remedy" by competent national tribunals for acts violation human rights which are granted to her by the constitution of the law. For example, article 25 of the American Convention includes the right to an effective remedy. Some of the regional human rights instruments include more specific provisions providing for an "enforceable right to compensation," like article 5(5) European Convention. In addition, the American Convention (article 63(1)) includes the right of an individual to claim compensation. Although the African Charter does not specify the individual right to an effective remedy, including the right to claim compensation, it does oblige states to promote and ensure human and people's rights (article 25). Despite the fact that states have an international obligation to enact national laws that protect the individual right to an effective remedy, states often lack these provisions and ignore the recommendations and views of the international judicial bodies in this regard.

Women can also enforce their right to compensation recognized in the different regional instruments through the judicial bodies established under the instruments. Under most of these treaties individuals have the right to file a complaint with the judicial body.<sup>156</sup> Most of these judicial bodies who are allowed to receive individual complaints developed case law in which they established that states have an obligation to ensure the victim compensation in case they violate his/her fundamental rights. A milestone decision in this regard was the Inter-American Court's judgment in the Velasquez Rodriguez case, which clearly established the obligation for state parties to the American Convention, to prevent human rights violations, to carry out investigations in case such a crime is committed, to punish the perpetrators and to ensure the victim compensation.<sup>157</sup>

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<sup>156</sup> For example, under the American Convention the Inter-American Court is competent to receive individual complaints. And the European Convention allows individuals to file a complaint with the European Court for Human Rights.

<sup>157</sup> Velasquez Rodriguez, Inter-American Court of Human Rights, (ser. C) No. 4. (Judgment of July 1988), Honduras.



## Regional Refugee Law

Regional refugee instruments discussed in this report are the Cartagena Declaration,<sup>158</sup> the Convention on Asylum,<sup>159</sup> Convention on Political Asylum,<sup>160</sup> The OAU Convention governing the specific aspects of refugee problems in Africa,<sup>161</sup> Resolution 14 (1967) on asylum to persons in danger of persecution, and Recommendation 293 (1961) on the right of asylum.

Most regions have instruments that specifically deal with refugees.<sup>162</sup> Like the UN Refugee Convention, none of the regional refugee instruments recognizes gender-based persecution or other gender-specific issues. Most of the regional refugee instruments, however, do expand the refugee definition beyond the scope of the 1951 Refugee Convention, and thereby increase the opportunity for women to claim refugee status, whether or not the status can be based on gender-based persecution.

The first binding regional arrangement was established by the Organization of African Unity (OAU) in 1969. In addition to respecting the 1951 UN Refugee Convention, state parties to the OAU Convention governing the specific aspects of refugee problems in Africa<sup>163</sup> broke new ground by extending protection to all persons compelled to flee across national borders by reason of any man-made disaster, whether or not they can be said to fear persecution:

The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole part of her country of origin or nationality is compelled to leave her place of habitual residence in order to

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<sup>158</sup> Cartagena Declaration, 1984.

<sup>159</sup> Convention on Asylum of 20 February 1928 (Havana).

<sup>160</sup> Convention on Political Asylum of 26 December 1933 (Montevideo).

<sup>161</sup> OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa.

<sup>162</sup> The Asian region does not have regional refugee instrument, but does have "Principles Concerning Treatment of Refugees", adopted by the Asian-African Consultative Committee in 1966.

<sup>163</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, U.N.T.S 14,691, 20 June 1974, (hereinafter OAU Convention), art. 1.



seek refuge in another place outside her country of origin or nationality.<sup>164</sup>

This refugee definition is more pertinent to the developing world.<sup>165</sup> The OAU definition acknowledges the reality that fundamental forms of abuse are not always the fault of the government of the refugee's state of origin, but may also be inflicted by external states, which dominate or occupy the territory of the state of origin. The OAU refugee definition recognizes as refugees persons who fled circumstances of generalized danger.<sup>166</sup> Two other features of the OAU Convention are different from international refugee law:

- a refugee women does not need to demonstrate linkage between her personal status and the inflicted harm in order to be considered a refugee;<sup>167</sup> and
- a refugee woman may flee a serious disruption of public order "in either part or the whole" of her country of origin.<sup>168</sup>

These additional features of the OAU Convention improve the chance for a woman who flees the violence of an armed conflict to be determined a refugee. Women usually encounter problems under the 1951 Refugee Convention claiming refugee status based on gender persecution in armed conflicts. But under the OAU Convention women do not have to prove that the violence was directed at them because of their personal status.<sup>169</sup>

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<sup>164</sup> OAU Convention, art. 1(2)

<sup>165</sup> The 1951 Refugee Convention was primarily drawn up to deal with the situation of displaced persons in Europe immediately after World War II. Today the situation has changed and many people who need protection do not fall within the definition of a refugee as enacted in the 1951 Refugee Convention.

<sup>166</sup> James C. Hathaway, *The Law of Refugee Status*, 1989.

<sup>167</sup> International refugee law links refugee status to abuse resulting from some form of personal or group characteristic (race, color, religion, social group or political opinion)

<sup>168</sup> International refugee law requires persons to seek protection within a safe part of their own country before looking for refuge abroad.

<sup>169</sup> For more information on the OAU and the OAU Convention, C.J. Oloka-Onyango, *The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugees and Internally Displaced Women in Africa*, *Denver Journal of International Law and Policy*, Vol. 24:2, 3, 1996.

The fact that they were compelled to flee the external aggression or occupation is enough to establish refugee status. Moreover, they do not have to seek protection in their own country but are allowed to cross borders, even if there are "safe areas" in their country of origin. This is a very important feature because in most developing countries personal financial resources and domestic infrastructure can make that requirement impossible to fulfill. In addition, it could mean that women are not required to cross military lines and unsafe areas that expose them to even more violence. The OAU Convention is the only refugee instrument that includes specific measures relating to the security of refugees.<sup>170</sup> As of this writing, no cases are known of women bringing a gender-based asylum claim before a national authority in any of the state parties to the OAU Convention.

In 1984, ten American states adopted the Cartagena Declaration in which states recognize refugees as people fleeing generalized violence and oppression, similar to the OAU Convention.<sup>171</sup> The definition was approved by the 1985 General Assembly of the Organization of American States (OAS). The Cartagena Declaration refugee definition falls somewhere between the definition in the Refugee Convention and the OAU Convention. Although it expands the persecution standards by allowing refugee claims based on actions of external powers and recognizes indeterminate harm with no relation to personal status, it does require the applicants to show that "their lives, safety or freedom have been threatened."<sup>172</sup> It also recognizes refugee status when people flee massive violations of human rights and domestic conflict. As with the OAU Convention, the author knows no cases where a woman was granted refugee status based on gender persecution under the Inter-American system.

The Council of Europe has also introduced standards of refugee protection that go beyond the Refugee Convention. The Council recommended that member governments liberally apply

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<sup>170</sup> Preamble of the OAU Convention.

<sup>171</sup> See annual report of Inter-American Commission on Human Rights, 1984-85, OEA/Ser.L/II.66, doc. 10, rev. I

<sup>172</sup> Cartagena Declaration, Conclusion no. 3.

the definition of refugee as enacted in the Refugee Convention.<sup>173</sup> Member states are to recognize “de facto” refugees, that is, persons who either have not been formally recognized as Convention refugees (although they meet the criteria), or who are “unable or unwilling for... other valid reasons to return to their country.” Members states were advised not to expel de facto refugees. This recommendation has been implemented only in part. Europe does not have standards that expand the refugee definition, allowing persons to get refugee status, based on claims outside the scope of the Refugee Convention.<sup>174</sup>

The principle of non-refoulement to protect non-nationals against forced return to their country of origin is also embodied in regional refugee instruments. The OAU Convention declares that:

No person shall be subjected to measures such as rejection at the frontier, return or expulsion, which could compel her to return [to] or maintain in a territory where her life, physical integrity or liberty would be threatened.<sup>175</sup>

State parties to the OAU Convention agreed not to deny asylum and not to repatriate any person whose welfare would be threatened by return to her country. The OAU Convention also stipulates that the granting of asylum should not be interpreted as an unfriendly act by another state.<sup>176</sup> The broader definition of refugee in combination with the right to non-refouler, decreases the chance that a gender-based violence victim will be expelled from her country of refuge. The principle of non-refoulement is embodied explicitly under the Cartagena Declaration conclusion No. 5.

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<sup>173</sup> Council of Europe, Parliamentary Recommendation 773 (1976).

<sup>174</sup> In 1984, the European Parliament called upon member states to consider women in such situations as constituting a “particular social group” within the meaning of the Refugee Convention.<sup>174</sup> However, this was for those women who have faced harsh or inhumane treatment due to having transgressed social mores. No similar interpretations have yet been made regarding gender-based violence in armed conflict situations.

<sup>175</sup> OAU Convention, art. 2(3).

<sup>176</sup> Michael J. Schultheis, *Refugees in Africa: The Geopolitics of Forced Displacement*, African Studies Review, Vol. 32, No. 1, 1989. See Declaration of Cartagena for similar conclusion III (3).

In 1961, the Consultative Assembly of the Council of Europe adopted Recommendation 293, On the Right of Asylum, in which it recognizes the right of political refugees to seek asylum. The recommendation acknowledges that it is up to each sovereign state to grant or refuse asylum, but asserts it is desirable that states confer such rights only to the extent compatible with safeguarding their own legitimate interests. Resolution 14, Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers in 1967, states that member governments should, in humanitarian spirit, do all that is possible, individually and collectively, to assure to persons in danger of persecution the security and protection they need.<sup>177</sup>

Although the regional refugee law instruments expand the situations under which refugee status is recognized, all instruments still exclude IDPs. Internally displaced women like refugee women are only protected against gender-based abuse through explicit and implicit provisions found in regional and international human rights laws (described above). It is evident that internally displaced women should be equally entitled to freedom from discrimination and the right to equal protection guaranteed in regional human rights instruments.<sup>178</sup>

Refugee women and asylum seekers are still subject to gender-based violence. As described earlier, all refugee women are entitled to the protection of human rights and fundamental freedoms provided for in international human rights instruments. In addition, refugee women are entitled to the human rights embodied in the regional instruments. The international and regional refugee instruments require member states to adopt national legislation to protect the rights of refugees.<sup>179</sup> Of the three regional refugee instruments, only the OAU Convention is a legally binding document.

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<sup>177</sup> The Committee of Ministers also adopted the Declaration on Territorial Asylum on 18 November 1977, which states, "that member states reaffirm their right to grant asylum to any person who, having a well-founded fear of being persecuted.....as well as to any other person they consider worthy of receiving asylum for humanitarian reasons."

<sup>178</sup> American Convention, art. 1(1), 24; European Convention, art. 14; African Charter, art. 2, 3, 18(3), 19.

<sup>179</sup> Refugee Convention, art. 3, 16; Cartagena Declaration, Conclusion No. 1.

## State of Emergency and Non-Derogable Rights

International and regional human rights law is binding on all signatory states. However, a derogation clause has been included in some international and regional human rights instruments to safeguard the right of national governments to deal effectively with national emergencies.<sup>180</sup> In time of war or other public emergency, state parties have national jurisdiction to declare a state of emergency,<sup>181</sup> when the war or public emergency is threatening the life, independence or security of the nation.<sup>182</sup>

War and armed conflicts often result in the proclamation of a state of emergency. The power to take derogatory measures in an emergency situation is subject to the five following conditions:<sup>183</sup>

- notification;
- the rule of proportionality;
- consistency with other obligations under international law;
- derogation measures must be non-discriminatory; and,
- some rights are non-derogable even during an emergency.

States sometimes arbitrarily derogate from their obligations with respect to human rights in time of war. By doing so, states may violate women's rights and fundamental freedoms without a justifiable reason. In response to this trend, the author, Sir Humphrey Waldock has said, "The effectiveness of any human

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<sup>180</sup> ICCPR, art. 4; European Convention, art. 15; American Convention, art. 27; The African Charter includes no derogation clause which means that States Parties cannot derogate from the rights and freedoms enshrined in the Charter in times of war or other public emergency.

<sup>181</sup> There is no indication in the treaties of which national organ is competent to proclaim a state of emergency. The UN has established guidelines based on state practice.

<sup>182</sup> For instance, the ICCPR refers to 'a public emergency which threatens the life of the nation.' The European Convention refers to 'war, public danger or other public emergency that threatens the independence or security of a State Party'. The European Convention explicitly includes the case of war. The American Convention refers to times of war, public danger, or other emergency that threatens the independence or security of the state'.

<sup>183</sup> Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 1988.

rights convention is dependent on external supervision."<sup>184</sup> All treaties have established treaty bodies, which monitor the implementation of treaty provisions and whether or not state of emergency proclamations are justified in given circumstances.

At all times derogations must be consistent with other international law obligations, requiring State Parties not to take measures of derogation that conflict with any treaty or principle of customary international law. Such treaties include the Genocide Convention,<sup>185</sup> the Torture Convention,<sup>186</sup> the Geneva Conventions and relevant protocols (laws of war), regional and international refugee law, and other human rights instruments.

The most important principle in the regulation of human rights during states of emergency is the principle of non-derogability. According to this principle, even in situations of public emergency threatening the life of the nation, certain rights can never be suspended.<sup>187</sup> These non-derogable rights include important rights that protect women against gender-based violence.

The European Convention has four non-derogable rights, the ICCPR contains seven, and the American Convention supports eleven non-derogable rights. The three treaties share four non-derogable rights in common: the right to life; the right to be free from torture and other inhumane or degrading treatment or punishment; the right to be free from slavery and servitude; and the principle of non-retroactivity of penal laws.<sup>188</sup> These funda-

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<sup>184</sup> Sir H. Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 1965.

<sup>185</sup> Article 1 of the Genocide Convention states that: genocide committed in time of peace or in time of war is a crime under international law (implicitly prohibits derogations in time of war).

<sup>186</sup> Article 2(2) of the Torture Convention states that: no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal or political instability or any other public emergency, may be invoked as a justification for torture.

<sup>187</sup> The list of non-derogable rights differs in each treaty.

<sup>188</sup> In addition, the ICCPR and American Convention recognize the right to legal personality; freedom of thought, conscience and religion; prohibition of imprisonment for breach of contractual obligations. The American Convention also recognizes the right of the family; right to a name; right of the child; na-



mental rights are regarded as general principles of law.<sup>189</sup> To the extent that gender-specific violence implies non-derogable rights, such as freedom from gender discrimination and torture, the right to be free from all forms of gender-based violence is itself non-derogable. Accordingly, freedom from gender-specific violence that breaches non-derogable rights must be guaranteed to all women, including displaced and refugee women, during armed conflicts. Despite the non-derogable right to be free from all forms of gender-based violence, women continue to be sexually abused and killed with impunity during armed conflicts. Because of the importance of non-derogable rights it would be against the spirit of the treaties if exceptions to non-derogable rights are allowed.<sup>190</sup>

Non-derogable rights are not effectively enforced, due to the weak enforcement mechanisms under the different treaties. Besides being limited in their jurisdiction most of the bodies can only submit reports of human rights violations in the context of emergencies, and offer recommendations. The bodies lack effective tools to force state parties to respect the human rights and fundamental freedoms embodied in the treaties.<sup>191</sup> Fortunately, in addition to the international bodies in charge of enforcement, several national, regional and international bodies, and international governmental and non-governmental organizations, have been contributing to the exposure of human rights abuses in states of emergency and building international public opinion for the protection of individuals. It is due to such pressure that governments have ended the states of emergency and returned to

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tionality and right to participate in the government. Not all these right are of same importance and relevance during times of armed conflict.

<sup>189</sup> These rights are recognized as having the character of peremptory norms of international law within the meaning of article 53 of the Vienna Convention on the Law of Treaties.

<sup>190</sup> Vienna Convention on the Law of Treaties, Article 75, May 23 1969; See also Inter-American Court, advisory opinion of 8 September 1987, 'Restrictions to the Death Penalty.

<sup>191</sup> Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 1988.

civilian rule and democracy, for example, in Argentina, Bolivia, Brazil, Ecuador, Peru and Uruguay.<sup>192</sup>

## **National Mechanisms**

This report discusses the right to reparation in national laws and the national asylum regimes. It does not discuss national laws that prohibit gender-based violence. National laws with regard to rape and other sexual abuses are discussed in WLDI's previous report "State Responses to Rape: Current Status and Needed Improvements."

## **Reparations**

As described earlier, international human rights law, humanitarian law and customary law obliges states to make sure that victims of fundamental human rights abuses or their families or immediate dependents have access to effective remedies and to take effective measures to avoid future recurrence of such violations.<sup>193</sup> This obligation to protect the right to effective remedies is of utmost importance in cases where the perpetrator is the state itself. Reparations can take the form of restitution in kind, compensation, satisfaction for damage and guarantees of non-repetition. With regard to remedies the report mainly focuses on the right to reparation in the form of compensation. It is only recently that the right to reparation for the victims of gender-based violence is deemed relevant, since this form of violence during times of armed conflict is only recently recognized as seriously infringing women's fundamental rights.

Despite the fact that states have an international obligation to enact national laws that protect the individual right to an effective remedy, states often lack these provisions and ignore the recommendations and views of the international judicial bodies in this regard. Meanwhile, human rights continue to be violated especially in conflict situations.

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<sup>192</sup> Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 1988.

<sup>193</sup> Final report on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, submitted by the Special Rapporteur, Mr. Theo van Boven, E/CN.4/Sub.2/1993/8



With respect to the obligation to provide the right to an effective remedy to victims of human rights violations, some countries enacted national legislation to guarantee effective remedies in case these rights are violated.<sup>194</sup> In some of these countries the individual right for compensation is only stipulated in the constitution.<sup>195</sup> Most national laws still lack provisions that guarantee just and adequate reparation to the victims and their families or dependants when human rights abuses are committed during times of armed conflict.

However, even in countries where the right to reparation is actually recognized women may still be deprived of these rights because the perpetrators enjoy impunity. There appears to be a lack of political will to address the issue of impunity. Many governments demonstrate no serious effort to reform police or judicial systems or to prosecute those responsible for abuse. Other reasons for the failure to provide effective reparation to victims are:

- limitations in time, including the application of statutory limitations;
- restrictions in the definition of the scope and nature of the violations;
- the failure on the part of the authorities to acknowledge certain types of serious violations; the operation of amnesty laws<sup>196</sup>;
- the restrictive attitude of the courts; the incapability of certain groups of victims to present and to pursue their claims; and
- the lack of economic and financial resources.<sup>197</sup>

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<sup>194</sup> The Law for the Protection of Victims of Offenses, Mexico, State of Puebla, 1995. Mexico amended various federal laws and provisions to provide the right to reparation; Czech Republic, sect. 43 and 12 Code of Criminal Procedure; Chile, Act No. 19.123.

<sup>195</sup> Constitution of Ukraine, art. 56; Constitution of Chile, art. 38(2); Constitution of Vietnam, art. 74 (1992).

<sup>196</sup> Laws in Sudan, Cambodia and Peru provided amnesty to guerilla groups, rebels and security forces despite gross human rights violations.

<sup>197</sup> Theo van Boven, Special Rapporteur, Report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study concerning the right to restitution, compensation and rehabilitation for

One of the most elaborate reparation schemes for damages inflicted during an armed conflict is that provided by the Federal Republic of Germany. Germany adopted various laws to provide individuals the right to an effective remedy after World War II. However, the right to remedies provided by the BEG<sup>198</sup> considered only those eligible to the right to remedy who resided in Germany and a few other categories such as, refugees, emigrants, and deported or expelled people. This principle of territoriality deprived many victims of the right to reparations. In order to meet the claims of those people many countries concluded "global agreements" with Germany.<sup>199</sup> The categories of damage covered by the BEG are loss of life, damage to limb or health and damage to liberty. The interpretation of the court did not specifically include gender-based violence as a violation allowing reparation claims. There are no cases known where German courts awarded compensation to a female victim for gender-based abuses, including sexual assault.

In the light of the right to compensation for gender-based abuses it is important to look at the case of "comfort women." It is only recently that female victims of the atrocities committed by Japan during World War II came forward.<sup>200</sup> After years of denying the Japanese government finally confirmed that the army and other state officials were directly involved in the recruitment, transportation and general supervision of sexual slaves or "comfort women" and that these acts severely injured the honor and dignity of many women.<sup>201</sup> Despite the fact that under international human rights and humanitarian law the Japanese gov-

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victims of gross violations of human rights and fundamental freedoms, E/CN.4/Sub.2/1993/8, 2 July 1993.

<sup>198</sup> Bundesentschädigungsschlussgesetz, (hereinafter BEG), adopted in 1965.

<sup>199</sup> Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, Northwestern University Law Review, Vol. 67, No. 4, 1972.

<sup>200</sup> These women are also referred to as "comfort women." Meanwhile, the Special Rapporteur on violence against women said that this phrase does not in the least reflect the suffering that women victims had endured during their forced prostitution and sexual subjugation and abuse in wartime, Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military slavery in wartime, E/CN.4/1996/53/ADD.1, 4 January 1996.

<sup>201</sup> Statement by the Chief Cabinet Secretary on 4 August 1994.

ernment is responsible for the crimes committed against the comfort women, the Japanese government denies that apart from moral obligations it has legal obligation towards the victims.

First of all, the Japanese government argues that the human rights treaties and the Geneva Conventions did not yet exist at the time that the violations occurred and that these instruments do not work retro-active. The Special Rapporteur on violence against women also argues that certain aspects of international humanitarian law are beyond any doubt part of customary law and that states may be held responsible for the violations of these international humanitarian law principles even though they were not signatories to the particular convention.<sup>202</sup> Yugoslavia cannot make the same argument in the 90s. In addition, the UN Secretary General argues that the rules of international humanitarian law are beyond doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise.<sup>203</sup>

Japan was a signatory to The Hague Convention and although this convention does not explicitly prohibit rape and other sexual assaults it can be interpreted as such. However, Korean individuals are unable to base their claim upon the Hague Convention because Korea was a colony of Japan's. As a consequence, application of the 1907 Hague Convention is precluded. Comfort women from the Philippines did base their claim upon the Hague Convention. The claimants argued that the breach of the Hague Convention was in part judged at the IMFTE in Tokyo where some Japanese military and civilian officials were convicted of war crimes, however, civil damages for rape and forced prostitution were not adjudicated, so the present claims survive.<sup>204</sup> The Hague Convention does contain an article that

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<sup>202</sup> Special Rapporteur on violence against women report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military slavery in wartime, E/CN.4/1996/53/ADD.1, 4 January 1996.

<sup>203</sup> Report of the Secretary General relating to the establishment of the International Criminal Tribunal for the former Yugoslavia, S/25704.

<sup>204</sup> David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, Occasional Papers/Reprints Series

recognizes the right to civil remedies. The Japanese government argues that although, article 3 of the Hague Convention contemplates civil damages, this right to compensation accrues to the benefit of the contracting states, not their citizens.

Another argument of the Japanese government to not recognize the individual claims is the argument that all individual claims for reparation are settled in its treaties with the Allied Powers and some of the Asian countries, including the Republic of Korea, Malaysia, Singapore and the Philippines.<sup>205</sup>

Contrary to the Japanese argument, the Special Rapporteur on violence against women argues that the bilateral treaties did not cover the individual claims of comfort women and that therefore the government of Japan remains legally responsible for the consequent violations of international humanitarian law. Moreover, she also argues that international human rights are examples of individual rights and that contrary to what the Japanese government believes, individuals can be a subject of rights and duties in international law.<sup>206</sup>

In its Resolution 1994/35, adopted on 4 March 1994, the UN Commission on Human Rights reaffirmed that "pursuant to internationally proclaimed human rights and humanitarian law principles, victims of gross violations of human rights should receive, in appropriate cases, restitution, compensation, and rehabilitation."

The Special Rapporteur of the Sub-Commission on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms also stated "there is no doubt that the obligation to provide for com-

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in Contemporary Asian Studies, School of Law, University of Maryland, Number 3, 1995.

<sup>205</sup> The Japan-Korea Settlement of Claims Agreement, article 2, 1965; Philippine-Japanese Reparations Agreement, article 6; The Democratic People's Republic of Korea, China, and Taiwan are not parties to such treaties, so individual claimants from these and other countries not a party to these treaties are unaffected by any treaty-based argument for denying compensation.

<sup>206</sup> Special Rapporteur on violence against women report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military slavery in wartime, E/CN.4/1996/53/ADD.1, 4 January 1996; see also Henkin, *The Internationalization of Human Rights, Proceedings of the General Education Seminar*, Vol. 6, No. 1, Fall 1977.

pensation as a means to repair a wrongful act or a wrongful situation is a well established principle of international law."<sup>207</sup> For example, article 8 of UDHR states "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 2(3) of the ICCPR includes similar rights and also states that "any person claiming an effective remedy shall have the right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state, so that the right of the individual to an effective remedy is an international norm." The regional human rights instruments also contain the right to compensation.<sup>208</sup>

In addition, Parker and Neylon argue that Japan through its elaborate system of comfort stations is most certainly in violation of *jus cogens* or a "peremptory norm" and consequently any treaty that purports to extinguish a *jus cogens* right contravenes international law.<sup>209</sup> Also, article 64 of the Vienna Convention states that a treaty is void if "it conflicts with a peremptory norm of general international law."

The main issue is whether governments have a legal authority to take away the individual claim to compensation through the conclusion of bilateral treaties. Traditionally, international law allowed states to conclude treaties which settles all individual claims for compensation, without their consent, without prior consultation, and without any particular regard for their interest.<sup>210</sup> The individual may lose her claim against the foreign government but she may still have the right to sue her own govern-

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<sup>207</sup> Theo van Boven, Special Rapporteur, Report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, E/CN.4/Sub.2/1993/8, 2 July 1993.

<sup>208</sup> American Convention, art 10; ECHR, art 5.

<sup>209</sup> Karen Parker & Lyn Beth Neylon, *Jus cogens: Compelling the Law of Human Rights*, 12 Hastings International and Comparative Law Review, 411, 1989.

<sup>210</sup> Henkin, *The Internationalization of Human Rights, Proceedings of the General Education Seminar*, Vol. 6, No. 1, Fall 1977.

ment for the taking of private property without just compensation.<sup>211</sup>

Some individual claims are based upon the argument that Japan committed crimes against humanity. The claimants argue that the Japanese acts fall clearly within the definition of crimes against humanity as defined in article 6c of the Nuremberg Tribunal (IMT) which states:<sup>212</sup>

Crimes against humanity: namely, 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.

The Nuremberg Charter, the Tokyo Charter both declare that acts defined as crimes against humanity are acts that violate customary law. Also the UN Secretary General views the Charter of the International Military Tribunal as part of international customary law.<sup>213</sup> However, Japan's answer to this claim is that the reliance on the Nuremberg Charter does not give rise to civil liability. Additionally, Japan argues that it cannot be said that it is customary international law to have a right to compensation applicable for crimes against humanity. However, if we take a look at practices in some countries for example in the United States, a guilty verdict in a criminal trial usually affords civil liability.

Another potential legal ground for the plaintiffs is that the forced recruitment of women for sexual purposes is in violation with the International Convention for the Suppression of the White Slave Traffic (1910), and the International Convention for the Suppression of the Traffic in Women and Children (1921).

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<sup>211</sup> Both the Korean and Philippine constitutions have a just compensation clause which enables the victims of the Japanese atrocities to have a claim for the taking of their claims without just compensation against their own governments.

<sup>212</sup> See analog in the Charter of the International Military Tribunal for the Far East, article 5 (c), April 26 1946.

<sup>213</sup> Report of the Secretary General relating to the establishment of the International Criminal Tribunal for the former Yugoslavia, S/25704.



Both conventions were signed by Japan before World War II. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities recognized the atrocities committed by the Japanese during the war was a form of slavery.<sup>214</sup> Nonetheless, article 14 of the 1921 Convention permits nations to exclude its requirements with respect to "colonies, overseas possessions, protectorates or territories under its sovereignty or authority. Japan exercised this right towards Korea, Taiwan, and territory in Kwantung. However, Hsu argues that Japan implicitly acknowledged that the acts committed against the comfort women were violations of fundamental human rights, by signing the Convention.

The 1930 Convention Concerning Forced or Compulsory Labor (no.29) could be another ground for individual claims. Japan signed and ratified the Convention in 1932. The Japanese acts committed against the comfort women clearly falls within the definition of forced labor as stipulated in article 2 of the Convention "all work or service which is exacted from any person under the measure of any penalty and for which the said person has not offered himself voluntarily." However, this convention contains no article which includes an individual right to compensation or any civil remedy for that matter.

Karen Parker, an American attorney, argues that Japanese lawyers for the comfort women litigants should use *jus cogens* as the primary legal basis for the compensation claims against the Japanese governments because: (1) a treaty violative of *jus cogens* is void; (2) reliance on domestic law as a reason to violate *jus cogens* principles fails; (3) the statute of limitations is inapplicable to such claims; and (4) financial or procedural difficulties cannot be entertained as a means to obviate liability for a *jus cogens*.<sup>215</sup>

The Japanese national court system is so far the only available forum, although it may not be the best one for providing

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<sup>214</sup> Sub-Commission Discusses Contemporary Forms of Slavery, UN Press Release Doc HR/CN/470, 10 August 1993.

<sup>215</sup> Karen Parker, *Jus cogens and Compensation for War Crimes*, (paper prepared for the Symposium on War and Human Rights: Legal Analysis of Post-war Disposition, Japan Federation of Bar Associations), 10 December 1992; see also Karen Parker & Lyn Beth Neylon, *Jus cogens: Compelling the Law of Human Rights*, 12 Hastings International and Comparative Law Review, 411, 1989.

effective remedies and women face several barriers before it. First, compensation on a case-by-case basis may be unduly burdensome to the national courts system. Second, the national system may have discriminatory evidentiary rules in cases of gender-based violence. Third, comfort women may face language problems in the Japanese national courts and are often unfamiliar with the legal system. And last but not least, the Japanese court may be biased towards the claims of comfort women. In spite of the fact that the Japanese government has offered its sincere apologies and remorse to all comfort women it has as of yet not offered the victims of sexual slavery and forced prostitution an official legal right to compensation. Although Japan did create the Asian Peace and Friendship Fund for Women, Japan still denies that it has a legal responsibility to pay compensation to comfort women which is reflected in the fact that the Fund receives donations from the private sector. The victims of Japanese sexual slavery rejected the available funds and demanded that Japan accepts legal responsibilities for the violations committed during World War II.

### **Asylum Regimes**

The 1951 Refugee Convention and its Protocol imposes on countries the obligation to protect any individual found to have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.

Nowadays, many countries have laws in place to protect refugees. These countries have elaborate procedures to carry out determinations on an individual basis. However, refugee women often face difficulties in getting equal access to refugee status determination procedures. In the absence of such procedures or depending on the situation, there may be prima-facie group determinations. In addition, UNHCR can protect individuals or groups who fall within its competence based on its mandate. Nevertheless, a change in attitude toward refugees since the end of World War II can be detected. There is no longer a 'political' interest in supporting refugee relief as part of a strategy to fight communism. The refugee definition is interpreted more restrictively by the international community, accompanied by carrier



sanctions and visa restrictions. Instead of granting asylum to refugees, states tend to move in the direction of generalized temporary protection schemes. Of course, this change of attitude affects refugee women in a serious way.

Some countries have not signed the 1951 Refugee Convention and its 1967 Protocol nor any of the regional treaties concerning refugees. However, these countries may still allow refugees to enter and remain on its territory. For example, the government of India while not a signatory to the 1951 UN Refugee Convention or the 1967 Protocol, has generously granted fleeing Sri Lankan Tamils refuge in India.<sup>216</sup> Other countries are still in the process of enacting national laws regarding refugees. For example, refugee women and IDPs in the Commonwealth of Independent States (CIS) who fled their homes also face difficulties claiming their refugee status or receiving the necessary humanitarian aid because most CIS states lack the procedures required to determine whether asylum seekers qualify for refugee status. These states just started the process of drafting immigration and refugee laws, and began to establish relationships with UNHCR and other relief organizations such as the Organization of Migration (IOM), the Organization for Security and Cooperation in Europe (OSCE) and others.

According to international law states should provide asylum to refugees for humanitarian reasons, but the influx of refugees often creates tension between the receiving country and the country of origin.<sup>217</sup> The latest trend in the United States, Canada, Australia and Western-European countries is to close their borders to refugees and to reform their immigration and refugee laws to make it harder for refugees to claim asylum.

In some countries, refugee women are treated as illegal aliens and not admitted to procedures for the determination of refugee status. They are sometimes confined to camps and refused access to courts and legal aid. In other countries, female

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<sup>216</sup> U.S Committee for Refugees, *Conflict and Displacement in Sri Lanka*, March 1997.

<sup>217</sup> The right to seek asylum is embodied in the UN Declaration on Human Rights and the Declaration on Territorial Asylum. The right to seek asylum is not embodied in the 1951 Refugee Convention.

asylum seekers are routinely subject to detention for long periods while their applications are pending. The condition of detention in certain countries, particularly of women and children, are often incompatible with international standards. Both treaty and customary international law prohibit prolonged arbitrary detention. For example, both the Universal Declaration of Human Rights and the ICCPR prohibit arbitrary arrest, detention or exile.

The Guidelines on Detention of Asylum Seekers issued by UNHCR recommends that detention be limited to the time it takes to identify a person and the elements of his or her asylum claim, and call for special protection of populations at risk, including single and pregnant women. It also states that:

The right to liberty is a fundamental right, recognized in all the major human rights instruments, both at global and regional levels. The right to seek asylum is, equally, recognized as a basic human right. The act of seeking asylum can therefore not be considered an offense or a crime. Consideration should be given to the fact that asylum seekers may already have suffered some form of persecution or other hardship in their country of origin and should be protected against any form of harsh treatment.<sup>218</sup>

In the United States female asylum seekers are frequently jailed for months, and even years. According to a recent study by the Women's Commission for Refugee Women and Children, women asylum seekers are particularly at risk of neglect and abuse. The study found that the physical and psycho-social needs of this group are not addressed in the US. Inadequate translation assistance results in women being held in prison incommunicado, unable to voice their needs or concerns. Further, the remote location of most detention centers and prisons where women are being held undermines the ability of women to maintain the contact with their attorneys necessary to prepare their asylum cases.<sup>219</sup>

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<sup>218</sup> From the United Nations High Commissioner for Refugees Guidelines on detention of Asylum Seekers.

<sup>219</sup> Women's Commission for Refugee Women and Children, *Liberty Denied: Women Seeking Asylum in the United States*, April 1997.

A few countries accede to the 1951 Refugee Convention with a reservation. For example, Turkey excludes non-Europeans from recognition as refugees. The new regulations (1994) enacted to establish a system for refugee status determination require non-Europeans to file their asylum claims within five days of entering the country, and, for those arriving with improper documents, to file their claim with the police at the location nearest where they entered the country. It is clear that these requirements impose extreme barriers to refugee women. First, single refugee women face more abuses when traveling back to the dangerous border area in order to register. Second, these border police stations often lack female police officers to assist sexually abused women. Third, the five-day limit is too short for traumatized women. It is proven that sexually abused women often have tremendous feelings of shame. In addition, the social stigma attached to raped women often discourages them to reveal their experiences to anyone, let alone to strangers. The result of these regulations is that genuine refugee women, persons with a well-founded fear of persecution, particularly Iranians and Iraqis, have been denied official recognition as "asylum seekers" by the Turkish authorities often for failing to meet the five-day time limit or the geographic filing requirements. Turkey has forcibly repatriated refugees to their countries of origin in violation of the international legal norm of non-refoulement.<sup>220</sup> The principle of non-refoulement is a binding requirement on all countries whether or not they have ratified the Refugee Convention or attached reservations to it.

It is a matter for individual states to decide whether gender-based violence constitutes persecution. For a long time states did not consider sexual violence in times of armed conflict as persecution based on race, religion, nationality, membership of a particular social group or political opinion. Even where the basis for persecution would clearly fall into one of the defined areas, women face special problems in making their case to the authorities. As described earlier, sexually abused women may be reluctant to speak about their experiences, particularly to a male

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<sup>220</sup> Bill Frelick, Barriers to Protection: Turkey's Asylum Regulations, *International Journal of Refugee Law*, Volume 9, Number 1, January 1997.

interviewer. Sometimes, women who arrive as part of a family unit are not even interviewed or are cursorily interviewed about their experiences, even when it is they rather than their husbands who have been the targets of persecution. A wife may be interviewed primarily to corroborate the stories told by her husband. Often, when a man is granted refugee status, there is no guarantee that his wife or children will obtain that status as well. In most countries, accompanying family members are granted the same status as the head of household. This status is not automatic, however. Family reunification is not a right conferred on refugees by the Refugee Convention. Although it is recommended practice, it leaves much to the discretion of individual states. While many allow family members to immigrate, a number of countries grant family members a residency status that provides less protection against deportation than does refugee status. Should the family break up, the wife (who is more often joining the one granted refugee status) may find herself without any protection from return.<sup>221</sup>

The Refugee Convention does not explicitly recognize gender-based persecution. However, the adopted 1991 Guidelines on the Protection of Refugee Women recognizes gender-based persecution and the UNHCR Executive Committee stated in its Conclusion No.73 that it:

strongly condemns persecution through sexual violence, which not only constitutes a gross violation of human rights, as well as, when committed in the context of armed conflict, a grave breach of humanitarian law, but is also a particularly serious offense to human dignity.

In the same Conclusion the UNHCR Executive Committee:

Supports the recognition as refugees of persons whose claim is based upon well-founded fear or persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion. ...calls upon States and UNHCR to ensure the equal access of women and men to refugee status determination.

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<sup>221</sup> Report on Issues in Refugee and Displaced Women and Children, submitted by the Expert Group Meeting on Refugee and Displaced Women and Children, EGM/RDWC/1990/WP.1, 25 June 1990.

In line with the guidelines and the Conclusions of the UNHCR Executive Committee, some countries have changed their refugee status determination procedures with regard to female asylum seekers. Instead of ignoring gender-based persecution they now recognize that persecution of women often takes the form of sexual abuse. Canada was the first country to issue specific guidelines recognizing claims of women, based on their gender.<sup>222</sup> Soon afterwards the United States (1995) and Australia (1996) also issued similar guidelines. Although, none of these guidelines are legally binding, they do have an impact on the recognition of women's rights and the protection given to individual refugee women. Most often gender-based asylum claims arise in cases where the state fails to protect women against sexual abuses perpetrated by non-state actors and in cases where women were subjected to gender-based abuses committed by state actors.<sup>223</sup>

Although Europe and North America like to believe that they absorb most of the refugees produced by other countries, the majority of refugees find refuge in Africa and South Asia.<sup>224</sup>

Most states have a military code governing the conduct of armed forces. Soldiers and their commanding officers may be tried in a military tribunal for acts of rape and sexual violence<sup>225</sup> although these gender-based abuses are seldom punished by national military tribunals. An exception was the punishment of Japanese perpetrators of sexual abuse by a Dutch Military Tribunal established in Indonesia. The Military Tribunal prosecuted ten Japanese officers who committed war crimes against thirty-five Dutch women. More recently, a military court in

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<sup>222</sup> Canadian Guidelines on Women Refugee Claimants Facing Gender-Related Persecution, March 1993.

<sup>223</sup> The Refugee Law Center, Program on Women Refugees, *Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims To Protection in Canada and the United States*, based on the submissions by Deborah Anker, Nancy Kelly, John Willshire-Carrera, Mark Hutchins and Laura Stout, 1997.

<sup>224</sup> U.S Committee for Refugees, *World Refugee Survey 1997, An Annual Assessment of Conditions Affecting Refugees, Asylum Seekers and Internally Displaced People*, 1997.

<sup>225</sup> For example, rape is punishable by death or imprisonment under article 120 of the United States Uniform Code of Military Justice.

Switzerland, tried and sentenced a man who committed war crimes in the former Yugoslavia.<sup>226</sup>

### **Increasing Attention to the Protection of Women**

The founding of the United Nations and the emergence of independent states following decolonization were some of the important events in the political, economic and social liberation of women. In the 60s and 70s, more and more governments adopted laws and programs to protect women's rights. The impetus for this came in 1967 when the General Assembly adopted the Declaration on the Elimination of Discrimination Against Women.

In 1974, the General Assembly adopted the Declaration on the Protection of Women and Children in Emergency and Armed Conflict. The following reference to violence against women in armed conflict is made in this Declaration:

... all efforts shall be made by states involved in armed conflict to spare women and children from the ravages of war. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, degrading treatment and violence, particularly against that part of the civilian population that consists of women and children.<sup>227</sup>

The struggle for women's advancement gathered momentum with the proclamation of 1975 as International Women's Year and the convening, that same year, of the first major conference on the status of women. Held in Mexico City, the World Conference helped mobilize women around the world, and led to the elucidation of a three-part theme: equality, development and peace. In 1980 Copenhagen hosted the Second World Conference for Women.

1976 to 1985 was proclaimed as the United Nations Decade for Women. The impact of this decade resulted in the adoption by the General Assembly of the 1979 Convention to Eliminate All Forms of Discrimination Against Women, which constitutes

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<sup>226</sup> The Swiss released no information on their suspect.

<sup>227</sup> Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly res.3318 (XXIX), (hereinafter DPWCAC), A/9631, 14 December 1974.



an international bill of human rights for women. The decade also recognized their role in charting a route to disarmament and lasting peace.

In 1985, Nairobi hosted the third World Conference on Women and during the conference the Forward-Looking Strategies for the Advancement of Women were adopted which states:

Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade and should be given special attention.<sup>228</sup>

During the last two decades the United Nations High Commission for Refugees (UNHCR) focused more attention on the plight of refugee women. The policy on refugee women of UNHCR has been developing since the 1985.<sup>229</sup> In 1985 UNHCR acknowledged that refugee women have special needs, and its Executive Committee adopted a resolution on the protection of refugee women.<sup>230</sup> In 1987, the Executive Committee called upon the High Commissioner to report in detail on the particular problems of protection and assistance for refugee women and on concrete measures to address them. In February 1988, UNHCR established a Steering Committee on Refugee Women to define, oversee and coordinate a process of assessing, strengthening and reorienting existing policies and programs.

In July 1991, UNHCR prepared guidelines on the Protection of Refugee Women, to help governments, NGOs and staff of UNHCR to identify the specific protection issues and prevent

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<sup>228</sup> Nairobi Forward Looking Strategies, adopted at the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, held in Nairobi, July 1985.

<sup>229</sup> UNHCR was founded in 1951 and has the responsibility to provide international protection to refugees and, together with governments, seek permanent solutions to their problems.

<sup>230</sup> Conclusion No. 39, "Refugee Women and International Protection," adopted At the 36<sup>th</sup> session in 1985; Other Conclusions adopted by the Executive Committee of UNHCR that refer to refugee women and girls include: "General Conclusions on International Protection adopted at the 38<sup>th</sup> session in 1987; "Refugee Women," adopted at the 39<sup>th</sup> session in 1988; and a conclusion adopted at the 40<sup>th</sup> session in 1989 that addresses the physical safety and sexual exploitation concerns of refugee women and girls.

problems and risks facing refugee women.<sup>231</sup> The adopted UNHCR Guidelines on the Protection of Refugee Women address gender-based prosecution. The Guidelines state that determination of refugee status is fundamental for the provision of assistance and protection to refugees. More importantly, the Guidelines state that gender-based persecution can qualify as legitimate claims under the 1951 Refugee Convention. It also states that women who are attacked by military personnel can encounter difficulties in showing that they are victims of persecution rather than of random violence. Even victims of rape by military forces face difficulties in obtaining refugee status when the adjudicators of their refugee claim view such attacks as a "normal" part of warfare. The Guidelines do provide refugee women in refugee camps under the authority of UNHCR with a complaint procedure, allowing them to report gender-based violence to specially trained UNHCR staff. However, the Guidelines do not oblige states to recognize gender-based persecution and leave it open to states' own determination whether or not gender-based persecution is recognized. Women victimized because of the political activities of a male relative face particular difficulty demonstrating their claims to refugee status. Yet, in many conflicts, attacks on women relatives are a planned part of a terror campaign. The UNHCR Guidelines, however, do not provide refugee women with a formal monitoring and reporting procedure.

In addition, a UNHCR Senior Coordinator for Refugee Women was appointed to improve UNHCR's strategies regarding refugee women. Another important instrument of UNHCR on the issue of women refugees is the Guidelines on the Prevention of and Response to Sexual Violence, adopted in 1995.

In May 1991, the UN Economic and Social Council adopted the resolution "Violence Against Women in All its Forms," (1991/18) in which it urged member states to adopt, strengthen and enforce legislation prohibiting violence against women, and to take appropriate measures to protect women from all forms of physical and mental violence. Such non-

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<sup>231</sup> UNHCR, "Guidelines on the Protection of Refugee Women," (Geneva: UNHCR, July 1991)



binding resolutions may prescribe principles of international law and be merely declaratory. However, the mere formulation of principles may elucidate and develop customary law. Resolutions on new legal problems provide a means of corralling and defining the quickly growing practice of states.<sup>232</sup>

In 1993, the World Conference on Human Rights was held in Vienna, Austria. The delegates at the conference declared:

The human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.

The Vienna Declaration and Programme of Action adopted at Vienna in states:

Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular, murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.<sup>233</sup>

Also in 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence Against Women (DEVAW).<sup>234</sup> DEVAW is the first human rights instrument to deal exclusively with violence against women. Although not legally binding on states, this instrument can be viewed as an authoritative interpretation of international law, and expresses the growing international consensus that states have the duty not to violate women's right to life, liberty and security of person, and right to be free from torture. (art. 3) Another authoritative interpretation of the General Assembly is the Universal Declaration of Human Rights.

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<sup>232</sup> Ian Brownlie, *Principles of Public International Law*, Fourth Edition, 1990.

<sup>233</sup> The Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights June 25, 1993.

<sup>234</sup> United Nations Declaration on the Elimination of Violence Against Women, A/C.3/48/L.5, 23 February 1994, (hereinafter DEVAW).

Another positive development was the appointment in March 1994, by the UN General Assembly of a UN Special Rapporteur on Violence Against Women whose mandate includes recommending "measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences"<sup>235</sup> These recommendations are made in her annual reports to the Commission on Human Rights.

In 1995 at the Fourth World Conference on Women in Beijing, the Platform for Action that was adopted reiterates the commitment of governments to protect women's human rights.<sup>236</sup> The document urges Governments and international and regional organizations to respect fully the norms of international humanitarian law in armed conflicts and take all measures required for the protection of women and children, in particular against rape, forced prostitution and any other form of indecent assault. Unfortunately, the Platform for Action hasn't been adopted by all states and many states adopted the Platform with reservations to various parts. The Platform in itself is not binding.

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<sup>235</sup> See UNCHR resolution L. 8/Rev.1, 1994, for full text adopted by the UN Commission on Human Rights.

<sup>236</sup> For more information regarding violence against women see Preliminary report submitted by the Special Rapporteur on Violence Against Women, E/CN.4/1995/42, 22 November 1994.

## CHAPTER THREE

### *Actual Application of Legal Standards*

Most international and regional human rights instruments and humanitarian laws are not adequately applied by states, UN agencies and other actors. Even if international or regional obligations are enacted in national laws it does not necessarily mean that those laws are enforced. In this section the paper provides examples of situations where the law was actually rightfully applied and examples where states or the United Nations failed to properly enforce the laws.

Most national laws prohibit rape and other sexual abuse against women although governments are often unwilling to prosecute perpetrators of gender-based violence, especially when the perpetrator is a state agent. In spite of national and international obligations of states to protect women against rape and other forms of sexual abuse, in times of armed conflict, gender-based abuses continue to occur. In Sudan, women continue to be subjected to gender-based abuses, imprisonment and torture by the "legitimate government." Civilians are the targets, not by-

standers, in the ethnic cleansing efforts of the Sudanese government.<sup>237</sup>

National laws are often ineffective in protecting women against gender-based abuses committed by state agents in conflict situations, because these crimes continue to be seen by military and political leaders as a private crime or the unfortunate behavior of a renegade soldier. Women often find only a deaf ear when they try to file a complaint. Their accusations are often fiercely denied by the perpetrators or completely ignored by the government. Also, women often fear repercussions when they reveal abuses perpetrated by state agents. There are cases known in which victims of gender-based abuse filed a complaint and receive "protection" from the same state agent who they accused.<sup>238</sup>

Moreover, in times of armed conflict the judiciary may be subject to government influence which affects its independence, or the judiciary has stopped to function properly as happened in Rwanda.<sup>239</sup> States may declare a state of emergency in times of armed conflict, allowing them to take derogatory measures. For instance, Peru applied state of emergency legislation in certain areas. In such areas the military customarily assume control of the population and set themselves up as the supreme authority, even above the duly elected and constituted civil authorities. As a consequence, they commonly perpetrate numerous human rights violations in these areas.<sup>240</sup> Several reports indicate that women living in areas subject to emergency legislation are subjected to abuse by soldiers, who generally act with absolute impunity.<sup>241</sup> Despite the principle of non-derogable rights which

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<sup>237</sup> Women's Commission for Refugee Women and Children, *Tired of Running*, Delegation to Kenya, Somalia, and Southern Sudan, March 1993.

<sup>238</sup> Human Rights Watch, *Untold Terror: Violence Against Women in Peru's Armed Conflict*, 1992.

<sup>239</sup> Human Rights Watch/Women's Rights Project, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, 1996.

<sup>240</sup> Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case 10.970, Peru, March 1, 1996.

<sup>241</sup> Amnesty International, *Women in the Front Line: Human Rights Violations Against Women*, March 1991; Amnesty International, *Peru: Human Rights in a Climate of*

prohibits states to suspend certain rights, women's non-derogable rights continue to be violated.

Although countries may have genuine intentions to prosecute perpetrators of sexual abuse, some are unable to do so, due to lack of financial resources, lack of properly trained lawyers, judges and other relevant staff, or lack of capacity. Rwanda recently passed national law in order to solve their incapacity to prosecute the atrocities committed during the civil war. The new law allows foreign lawyers to work in Rwanda.<sup>242</sup> Rwanda still lacks resources and although several countries donated money to rebuilt the system it is still insufficient to deal with the tens of thousands of people still present in the overcrowded prisons.

In addition to the above mentioned obstacles, rape victims, regardless of whether they were raped by a state agent or a non-state agent, are likely to face other obstacles. A previous WLD report analyzed the barriers rape victims face when trying to find legal redress through their national systems.<sup>243</sup> In short, women's right to equal protection of their rights before the law is often frustrated by narrow definitions of rape and sexual violence in national laws. Provisions enacted to protect women against sexual abuse are often not strongly enforced. Another major obstacle for victims of sexual violence is the existence of discriminatory evidentiary rules applicable in cases of sexual assault. Often, the social stigma attached to victims of sexual abuse discourages victims to report the crimes to the police. In some of the cases where the crimes are actually prosecuted, the perpetrators receive low sentences compared to similar crimes not involving sexual abuse. In addition, victims of sexual violence are often deprived of proper remedies such as compensation for damages, counseling and medical care.<sup>244</sup>

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*Terror*, London 1991; Report of the Special Rapporteur on the Situation in Peru, Resolution 1985/33, 1992.

<sup>242</sup> Human Rights Watch/Women's Rights Project, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, 1996.

<sup>243</sup> Women, Law and Development International, *State Responses to Rape: Current Status and Needed Improvement*, 1997.

<sup>244</sup> See for more information, Women, Law and Development International, *State Responses to Domestic Violence: Current Status and Needed Improvements*, 1996;

Despite the fact that internal and international armed conflicts often affect the political, judicial and social systems in a country, countries continue to have an international obligation to protect fundamental rights and freedoms of both nationals and non-nationals. If state agents commit crimes during the armed conflict, State Parties are obliged under both international human rights law and humanitarian law to investigate the crime and punish the perpetrators in order to bring justice to the victims.<sup>245</sup> For example, both the Genocide Convention and the Torture Convention oblige State Parties to prosecute perpetrators of the pertinent crimes committed in its territory before a competent tribunal, regardless whether the crime is committed in time of peace or war.<sup>246</sup>

Article 146 of the Fourth Geneva Convention states that any party to the Convention has the obligation to prosecute before its own court any offense that qualifies as a "grave breach" of that Convention or else to extradite the perpetrator for prosecution. According to the principle of international jurisdiction, a state may assert jurisdiction over a person within the state's territorial jurisdiction if he/she is accused of certain violations of the law of nations.<sup>247</sup>

Also, the Torture Convention requires any state party to either extradite alleged offenders to a State Party that has jurisdiction under the territoriality and nationality principles, or to itself take jurisdiction over the alleged offender.<sup>248</sup> Therefore, any state may prosecute perpetrators of rape who venture within its borders, when the rape qualifies as either genocide, a war crime, or official torture. Indeed, if the rape constitutes torture the state must either extradite or prosecute the alleged perpetrator.

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Women, Law and Development International, *State Response to Rape: Current Status and Needed Improvements*, 1997.

<sup>245</sup> Although armed opposition, gangs and rebels are not technically bound by international human rights and humanitarian law, these groups do, nevertheless, also have an obligation to respect certain humanitarian principles that are part of international customary law and are recognized by all civilized nations.

<sup>246</sup> Genocide Convention, art. 6; Torture Convention, art. 7.

<sup>247</sup> Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Texas Law Review 785, 817, 1988.

<sup>248</sup> Torture Convention, art. 7.



Although both international human rights law and humanitarian law both obliges states to investigate crimes committed during armed conflicts and prosecute and punish the perpetrators, there has been an unwillingness of states to exercise universal jurisdiction. For example, only a few Western European countries have arrested and prosecuted indicted war criminals from the former-Yugoslavia.<sup>249</sup> For example, a court in Denmark convicted one Croat, an Austrian court prosecuted one Bosnian Serb, who finally was acquitted.<sup>250</sup> The governments of Bosnia and Croatia have started to prosecute war criminals in their national courts. By mid 1994, Croatia reportedly charged over 2,000 individuals with violations of humanitarian law and with crimes against humanity, according to the Helsinki Watch human rights monitoring group.<sup>251</sup> But by the end of 1993, only fourteen cases had actually come to trial. Of those charged, 94 percent are Serbs and 3 percent Croats, which suggests that Croatia is not trying its own. In the Federal Republic of Yugoslavia, seven Croats were sentenced to death on June 26, 1992, but later handed over to Croatia as part of a prisoner exchange. The Serbian authorities arrested one Serbian, but he was later extradited to Bosnian Serb territory and is now a free man. The only Serbian soldier to come to trial in Yugoslavia so far on a charge of war crimes is Dusan Vukovic. However, after three days of trial the case was postponed indefinitely. Some people have already raised questions about the fairness of the trails of war criminals in the national courts. Defendants are claimed to have been beaten for confessions and charged war criminals who were found guilty have been sentenced to death.<sup>252</sup> In most cases

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<sup>249</sup> Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Texas Law Review 785, 817, 1988.

<sup>250</sup> The Yugoslavia Tribunal was also expected to serve as a catalyst for national trials of war criminals. The Yugoslavia Tribunal would start off with the indictment, but it would be the national courts that would prosecute war criminals on their territory.

<sup>251</sup> Human Rights Watch Helsinki, *War Crimes in the Former Yugoslavia*, June 1995.

<sup>252</sup> John F. Burns, *2 Serbs to Be Shot for Killings and Rapes*, N.Y. Times, 13 March 1993.

the prosecution of war criminals in national courts is neither effective nor objective.<sup>253</sup>

The failure of states to protect women's rights and freedoms as laid down in national law and international human rights instruments violates their right to equal protection in the enjoyment of rights. Equal protection requires states to ensure that violence by state agents be as thoroughly investigated and prosecuted as violence by non-state agents.<sup>254</sup>

However, when states fail to prosecute perpetrators for their crimes, women may still find justice through civil law suits before a national court. Some states have legislation in place that allows civil suits to be filed in that state's courts against individuals responsible for systematic rape committed outside its territory. In the United States, a statute initially passed in 1989 (now known as the "Alien Tort Claims Act") has been interpreted to allow civil damages suits under some circumstances against torturers and other violators of the law of nations. A class action suit has been filed in federal court in the United States under this statute on behalf of thousands of women and men, who have been raped and otherwise abused in Bosnia Herzegovina. The plaintiffs are seeking compensation and punitive damages.<sup>255</sup> Civil law suits against responsible war criminals offer victims an opportunity to make the criminals responsible for their crimes, even though, the monetary compensation may be hard to collect. Civil law suits in any country that allows such suits, will also limit the ability of war criminals to freely travel to different countries.<sup>256</sup>

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<sup>253</sup> Human Rights Watch Helsinki, *War Crimes in the Former Yugoslavia*, June 1995.

<sup>254</sup> See ICCPR, arts. 2(1), 3, 14, 26; CEDAW, arts. 1, 2, 3, 4, 15

<sup>255</sup> The case was filed under the Torture Victim Protection Act, which allows victims of gross human rights abuses to bring suit for acts committed in other countries if the court has jurisdiction over the defendant. The Alien Claims Act grants US districts courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

<sup>256</sup> In the United States, the Center for Constitutional Rights (a local NGO), represented plaintiffs in several civil suits, where rape was asserted as both a war crime and a crime against humanity and that it is a form of torture.



National laws of the host country are equally applicable to refugee women. The provisions prohibiting rape and other forms of sexual abuse should equally protect non-nationals. For example, under the ICCPR, State Parties have a duty to ensure that all individuals within its boundaries, regardless of citizenship, are free from human rights violations, including gender-based abuses.<sup>257</sup> Also, the ICCPR provides that all persons are equal before the law and are entitled to equal protection of the law.<sup>258</sup> The UNHCR guidelines on the protection of refugee women and the guidelines on prevention and response to sexual violence against refugees, although not binding, can also be used as guidelines by UNHCR staff and host countries to ensure equitable protection and assistance to refugee women.

Although the Refugee Convention does not include provisions on the question of the physical safety of refugee women, it requires states to provide refugee women free access to the courts of law and the same treatment that nationals would receive. In most cases refugee women and female asylum seekers face difficulties getting access to national mechanisms in the host country to fight sexual abuse. Refugee women are even at a greater disadvantage in seeking legal redress than nationals since they are often destitute, unable to speak the language and often located in a remote area, miles from the nearest court. Most countries lack a viable procedure through which refugee women can file a confidential complaint about sexual abuse by state officials without fearing reprisals. Even if a refugee woman is lucky enough to find her way to the police, she often finds herself without an interpreter.

The plight of Somali women in Kenya is a good example of how ineffective a national legal system can be for non-nationals seeking legal recourse. Many Somali refugee women in Kenya have been subjected to sexual abuse. Although most of these abuses were committed by unknown bandits (*shifitas*) a small number of women have been raped by Kenyan police authorities. A report produced by a London-based Somali human rights organization blamed UNHCR and the Kenyan authorities for

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<sup>257</sup> ICCPR, art. 2(1).

<sup>258</sup> ICCPR, art. 26.

ignoring the growing incidence of rape in the Somali camps, and for failing to provide women with adequate protection.<sup>259</sup>

UNHCR failed to fence the camps with barbed wire or thorn bushes to protect women from bandits at night. Despite the recommendation in the UNHCR guidelines on prevention and response to sexual violence against refugees to "avoid the establishment of camps within close proximity to the border of the country of origin, or in areas that are unsafe, e.g., subject to banditry," most refugee camps in Kenya are located close to the Somali border. Although, UNHCR recruited a Somali rape consultant who is training community workers and agency staff to help identify rape victims, in most refugee camps in Kenya, refugee women do not have access to female protection officers in the camps nor to a female gynecologist.<sup>260</sup> According to a Human Rights Watch report, the response of the Kenyan government has been wholly inadequate. They have not provided sufficient protection or security to the refugee camps and none of the sexual abuse complaints has been properly investigated nor prosecuted.<sup>261</sup> The gender-based violence against Sierra Leonean refugee women in Guinea, have according to officials from UNHCR partner agencies, scarcely been addressed by UNHCR protection officers.<sup>262</sup>

The Refugee Convention prohibits refoulement of refugee women with a well-founded fear of persecution. Yet some governments subject asylum-seekers to biased or obstructive practices, and in many cases people have been forcibly returned to a country where they risk human rights violations such as rape and

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<sup>259</sup> Women's Commission for Refugee Women and Children, *Tired of Running*, Delegation to Kenya, Somalia, and Southern Sudan, March 1993.

<sup>260</sup> Women's Commission for Refugee Women and Children, *Tired of Running*, Delegation to Kenya, Somalia, and Southern Sudan, March 1993.

<sup>261</sup> Human Rights Watch/Africa Watch/Women's Rights Project, *Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women Refugees in North Eastern Kenya*, Vol. 5, No. 13, 1993; Women's Commission for Refugee Women and Children, *Tired of Running*, Delegation to Kenya, Somalia, and Southern Sudan, March 1993.

<sup>262</sup> Women's Commission for Refugee Women and Children, *The Children's War: Towards Peace in Sierra Leone*, A field report assessing the protection and assistance needs of Sierra Leonean children and adolescents, March 26-April 16, 1997.

other sexual abuses. The report discussed earlier that women may face particular problems in obtaining refugee status.

The case of Catalina Mejia, a Salvadorian woman seeking asylum in the United States of America illustrates a difficulty faced by some victims of sexual abuse. Catalina Mejia worked as a dress maker in a province of El Salvador particularly affected by the eleven year-old conflict. She testified that during the search of her family's home by the military in 1983 a soldier ordered her outside at gunpoint, accused her and her family of being "guerrillas" and then raped her. She fled to the United States in 1985. Still traumatized by her experience, she was unable to explain all that had happened to her to the male lawyer who first assisted her. She was, however, later able to confide in a female attorney, receive counseling, and testify about her experience. The immigration judge presiding at her deportation hearing denied Catalina Mejia's application for political asylum in August 1988. The judge stated in her decision that "I have listened carefully to her lengthy testimony and observed her demeanor, and I find her to be altogether credible." But the judge concluded that Catalina Mejia had failed to establish "that she fears for her life or freedom, if deported to El Salvador." One of the reasons given by the judge for this decision was that the rape of Catalina Mejia by a soldier was not an act of persecution but "was more because she was a female convenient to a brutal soldier acting only in his own self-interest."<sup>263</sup>

In 1993 and 1995 respectively, Canada and the USA issued specific guidelines supporting the claims of women based on their interpretation of the protection given to "refugees" under the terms of the Refugee Convention. The guidelines, although not legally binding, have had a major impact on the recognition of women's rights, and on the protection given to individual refugee women. In both Canadian and US asylum systems, rape is now recognized as a serious human rights violation amounting to persecution.<sup>264</sup>

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<sup>263</sup> Amnesty International, *Women in the Front Line*, December 1990.

<sup>264</sup> Refugee Law Center, Program on Women Refugees, Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims To Protection in Canada and the United States, based on the submissions by

The right to seek asylum is set out in article 14 of the Universal Declaration of Human Rights, and in other international and regional human rights instruments. Yet there is an increasing tendency to keep displaced people within the borders of their country of origin instead of allowing them to flee to a safer place outside their national borders. While Tanzania has always shown hospitality towards refugees and has allowed thousands who fled earlier conflicts to resettle, it closed its border in March 1995.<sup>265</sup> This was partially in response to renewed fighting in Burundi that led to new movements of people towards refugee camps in Tanzania. The anti-refugee rhetoric has increased tensions between the soldiers guarding the border and the refugees. Tanzanian soldiers have been accused of attacking groups of refugees, and raping women and girls.<sup>266</sup>

Despite the fact that UNHCR's main responsibility is the protection of refugees, since 1991 it has shifted its role from "international protection" of refugees to "humanitarian action." The security of people "living within their own borders" was to be the new guiding principle.<sup>267</sup> Preventive strategies were to be developed to ensure that flight did not take place. The new policies of UNHCR and the international community restricts people's "right to leave," with the excuse that the right to remain" is

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Deborah Anker, Nancy Kelly, John Willshire-Carrera, Mark Hutchins and Laura Stout, 1997.

<sup>265</sup> Women's Commission for Refugee Women and Children, *Refugee Women in Tanzania: Assessing the Implementation of the UNHCR Guidelines on the Protection of Refugee Women*, Delegation Visit to Rwandan and Burundian Refugee Camps, May 27-June 9, 1995.

<sup>266</sup> Women's Commission for Refugee Women and Children, *Refugee Women in Tanzania: Assessing the Implementation of the UNHCR Guidelines on the Protection of Refugee Women*, Delegation Visit to Rwandan and Burundian Refugee Camps, May 27-June 9, 1995.

<sup>267</sup> In the High Commissioner's statement to the 49<sup>th</sup> session (1993) of the Commission on Human Rights the High Commission stated: "In speaking of 'the right to remain,' I mean to underline the need to protect the basic right of the individual not to be forced into exile... The right to remain is implicit in the right to leave one's own country. It is inherent in Article 9 of the Universal Declaration of Human Rights that no one shall be subjected to arbitrary exile"

protected.<sup>268</sup> This has serious consequences for people trying to escape violent conflicts. For example, in Yugoslavia, UNHCR endorsed a policy of "organized flight" and by doing so, seriously undermined the individual right to seek asylum by effectively limiting opportunities for exit.<sup>269</sup> This new policy is not fair as long as there is no UN agency or international instrument that can protect these people within their country of origin. UNHCR's mandate does not include the protection of IDPs and IDPs are not protected under the Refugee Convention. This is not to say that UNHCR should not expand its roles and responsibilities and protect those IDPs that for other reasons are unable to flee their country of origin.<sup>270</sup>

Although IDP women are entitled to the same fundamental rights and freedoms embodied in international and regional human rights instruments, in practice, however, internally displaced women, rarely enjoy such rights and freedoms because displacement, by its very nature, generally entails deprivations of various rights. Governments frequently cause or tolerate internal displacement and can be unwilling or unable to guarantee basic rights and meet the needs of their internally displaced citizens. In armed conflict situations, the fundamental rights and freedoms guaranteed in national and international human rights law may be subject to derogation, except for the core of non-derogable rights. It is significant that the international community has not yet showed any intention to create a treaty which would protect IDPs nor has there been any intention to create an agency that is mandated to protect IDPs (although UNHCR is expanding its mandate). Where intergovernmental organizations, their spe-

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<sup>268</sup> The following international human rights instruments protect women's right to leave: UDHR, art. 13(2); ICCPR, art. 12(2)(3); CERD, art. 5(ii) CEDAW, art. 15(4).

<sup>269</sup> Guy Goodwin Gill, *Refugee Identity and the Fading Prospect of International Protection*, 1996.

<sup>270</sup> The International Committee of the Red Cross has a protection role in some situations involving IDPs, specifically when they occur because of certain armed conflict.

cialized agencies and non-governmental organizations do assist IDPs, it often occurs on an ad hoc basis.<sup>271</sup>

Women who fled their country of origin may want to return to their country when the conflict ends and the situation is safe and stable. UNHCR has as its mandate the repatriation and reintegration of refugees to their home country in safety and with dignity. Over the last few years UNHCR repatriated millions of refugees back to Cambodia, Mozambique, Angola and elsewhere to neighboring countries.<sup>272</sup> The 1991 UNHCR guidelines on the Protection of Refugee Women call upon the UNHCR "to integrate the resources and needs of refugee women into all aspects of programming to ensure equitable protection and assistance activities." The Women's Commission for Refugee Women and Children delegation found that UNHCR neglected women and children in their planning for the return of Angolan refugees, even though women and children constitute the majority of the returnee population.<sup>273</sup> Upon return to Angola refugee women were harassed by police as they crossed border from Congo into Angola. Both women and men reportedly were frequently robbed by police. There were reports of women being strip-searched and being asked to relinquish their belongings at the crossing. There was a clear lack of UNHCR protection officers at these border crossing points. The delegation did not see evidence of UNHCR planning for the specific needs of particular groups of individuals in the repatriation process.<sup>274</sup>

In general, there is very limited knowledge about the UNHCR guidelines among UNHCR staff, NGOs and refugee

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<sup>271</sup> See Report on Internally Displaced Persons, submitted to the Commission on Human Rights by the Representative on Internally Displaced People, E/CN.4/1996/52/Add.2, 5 December 1995.

<sup>272</sup> Women's Commission for Refugee Women and Children, *Refugee Women and Reproductive Health Care: Reassessing Priorities*, June 1994.

<sup>273</sup> Women's Commission for Refugee Women and Children, *Recovering From 30 Years of War: Refugee Women and Children in Angola*, Delegation to Angola, December 1-13, 1996.

<sup>274</sup> Women's Commission for Refugee Women and Children, *Recovering From 30 Years of War: Refugee Women and Children in Angola*, Delegation to Angola, December 1-13, 1996.



women.<sup>275</sup> Despite the fact that women are a significant part of the population targeted for assistance, UNHCR did not use the guidelines nor circulated them during repatriation and reintegration activities in Mozambique.<sup>276</sup> UNHCR staff interviewed by a delegation of the Women's Commission for Refugee Women and Children, did not consider the guidelines applicable during these phases of assistance program planning.

A recent development that has increased women's chances to fight sexual abuse in times of armed conflict is the recognition by the regional bodies that custodial rape, or rape in circumstances for which a government is liable under the law of state responsibility violates the prohibitions of torture or inhuman treatment in international human rights law. The European Commission has already confirmed that custodial rape constitutes torture under art. 3 of the European Convention.<sup>277</sup> In a recent decision the European Court of Human Rights confirmed that the rape of a woman in detention was indeed a form of torture in breach of article 3 of the European Convention. The Court considered rape of a detainee by a state agent as an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim.<sup>278</sup> The Court has dealt with a few cases under article 3 of the European Convention relevant for the protection of refugees and asylum-seekers. It established that article 3 embraces the situation where a person runs a risk of being tortured as a result of expulsion or refoulement. The Court has not yet found such a violation of article 3 because it has not found a "real and substantial risk" of torture in the cases before it. It should be recalled, however, that many cases are re-

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<sup>275</sup> Women's Commission for Refugee Women and Children, *Refugee Women in Tanzania: Assessing the Implementation of the UNHCR Guidelines on the Protection of Refugee Women*, Delegation Visit to Rwandan and Burundian Refugee Camps, May 27-June 9, 1995.

<sup>276</sup> Women's Commission for Refugee Women and Children, *Refugee Women in Mozambique: Assessing the Implementation of the UNHCR Guidelines on the Protection of Refugee Women*, Delegation Visit to Mozambique, August 1995.

<sup>277</sup> *Cyprus v. Turkey*, Application No. 8007/77, Eur. Comm. Of Hum. Rts., [1978] YB. Eur. Conv. On Hum. Rts. 100..

<sup>278</sup> *Aydin v. Turkey*, decision of 25 September 1997, 57/1996/676/866.

solved through friendly settlement by the European Commission on Human Rights, and never reach the Court.<sup>279</sup> In 1991, in a case that dealt with an asylum-seeker who had been tortured in his country of origin sought to halt his expulsion from a State Party to the European Convention. The Court found that, despite the previous torture, the situation in the country of origin had changed significantly in the sixteen years since the asylum-seeker has fled, and that there was therefore no evident current risk of torture.<sup>280</sup>

The same interpretation has been given to custodial rape by others.<sup>281</sup> Rape in times of war by a state agent with the purpose of intimidating, humiliating or getting information obviously falls within the criteria of torture.

In March 1996, the Inter-American Commission on Human Rights found that a rape of a woman at her home by a state agent amounted to torture under article 5 of the American Convention.<sup>282</sup> The Inter-American Commission noted that rape by a state agent meets each of the three necessary components of torture under contemporary international law. First, rape is an intentional act, which causes physical and mental pain. Second, it is inflicted with the purpose of humiliating and dominating a person in order to extract information. Third, it is committed by a public or private person acting at the official's instigation. In light of this decision, rape by a security official of a woman in detention is always torture. In a report on the Situation of Human Rights in Haiti, the Inter-American Commission stated that when the sexual abuse is committed by representatives of the army, the police or their armed civilian auxiliaries, with the authorization or tolerance of the illegal regime, it constitutes a

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<sup>279</sup> UNHCR, Training Module, Human Rights and Refugee Protection, June 1996.

<sup>280</sup> *Cruz Varas v. Sweden*, Publication of European Court of Human Rights, Series A, Vol 215; Human Rights Law Journal Vol. 12, No. 11-12, 1991.

<sup>281</sup> UN Special Rapporteur on Torture has stated that rape was "an especially traumatic form of torture," UN Doc. E/CN.4/1995/34; UN Special Rapporteur on Violence Against Women stated that rape "is used as an instrument of torture by states against women in detention," UN Doc. E/CN.4/1995/42

<sup>282</sup> *Fernando and Raquel Mejia v. Peru*, Report No 5/96, case 10/970, 1 March 1996.



violation of article 5 of the American Convention, and other international treaties.<sup>283</sup>

Article 54 of Protocol I to the Geneva Conventions prohibits the starvation of civilians as a method of warfare. The delivery of food supplies is protected under the Fourth Geneva Convention and Protocol I although some states have denied international relief organizations access to populations needing emergency assistance. For example, the Karthoum regime in Sudan expelled the International Red Cross on a number of occasions.<sup>284</sup> In the Former Yugoslavia all parties to the conflict have impeded the delivery of humanitarian supplies provided by the UN under a guarantee of humanitarian neutrality. Between October 1992 and mid-January 1993, the UN documented 54 incidents of attack on humanitarian convoys and personnel.<sup>285</sup>

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<sup>283</sup> Inter American Commission on Human Rights, *Report on The Situation of Human Rights in Haiti*, OEA/Ser.L/V/II.88, 9 February 1995.

<sup>284</sup> U.S Committee for Refugees, *Terrorism and Sudan*, Testimony of Roger Winter before the African Affairs Sub-Committee, May 15 1997.

<sup>285</sup> Human Rights Watch, *The Lost Agenda: Human Rights and UN Field Operations*, 1993.



## CHAPTER FOUR

### *Ad Hoc Tribunals and Other International Forums*

#### **Jurisdiction**

Jurisdiction over war crimes, crimes against peace, and crimes against humanity can be vested in an international tribunal, as was done after World War II, when the Nuremberg and Tokyo tribunals were established.<sup>286</sup> After World War II, both the International Military Tribunal in Nuremberg (IMT) and the International Military Tribunal in the Far East (IMTFE) were established to expose, condemn and punish atrocities of war. More recently, the International Criminal Tribunal for the Former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwanda Tribunal) were estab-

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<sup>286</sup> Article 2 of the Statute of the International Tribunal empowers the tribunal to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions.

lished by the Security Council of the United Nations, together with two Commissions of Experts.<sup>287</sup> All four tribunals are ad hoc tribunals, established only to deal with atrocities committed in a specific region, during a set time frame.

Rape and other acts of sexual abuse were widespread during World War II, yet neither the IMT statute nor the IMTFE statute made reference to rape or other sexual abuse. Although rape can be interpreted to be included under article 46 of The Hague Convention, it was not so interpreted during the IMT. Rape was neither mentioned in the Nuremberg Charter nor prosecuted in the IMT as a war crime under humanitarian law, despite the fact that evidence of rape and other forms of sexual assault were presented at Nuremberg. Unlike the Nuremberg Tribunal, rape charges were brought against defendants before the Tokyo Tribunal.<sup>288</sup> However, the IMTFE did not address sexual slavery, despite the testimony of Ester Garcia Moras, a Filipina, and other women who testified in the Tokyo tribunal of their experience as a sex slave.<sup>289</sup>

During the Nuremberg Trials, the concept of crimes against humanity was developed.<sup>290</sup> Based on these trials, several principles were elucidated:<sup>291</sup>

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<sup>287</sup> The Security Council adopted Resolution 780, establishing a Commission of Experts to investigate all allegations. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter the Yugoslavia Tribunal), was established by the Security Council in Resolution 808, adopted on 22 February 1993. In Resolution 935, the Security Council decided to establish a Commission of Experts for Rwanda. The Security Council adopted Resolution 955, on 8 November 1994, in which it decided to establish the International Criminal Tribunal for Rwanda.

<sup>288</sup> The IMFT in Tokyo found Japanese military and civilian officials guilty of war crimes, including rape, because they failed to carry out their duty to ensure that their subordinates complied with international law (Rape of Nanking).

<sup>289</sup> Lourdes Sajor, *Women in Armed Conflict Situations*, Division for the Advancement of Women, DPCSD: Expert Group Meeting on Measures to Eradicate Violence Against Women, MAV/1993/WP.1, 21 September 1993.

<sup>290</sup> Lourdes Sajor, *Women in Armed Conflict Situations*, Division for the Advancement of Women, DPCSD: Expert Group Meeting on Measures to Eradicate Violence Against Women, MAV/1993/WP.1, 21 September 1993.

- the crime is committed against a civilian population;
- proof of government participation is required;
- a systematic pattern of the atrocity is required; and,
- the crimes can be committed by military personnel, local police, and all people occupying key positions (doctors, lawyers, judges, etc.).

The Charters of both IMT and IMTFE defined crimes against humanity as follows:

crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution 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 domestic law of the country where perpetrated.

The definition makes it clear that crimes against humanity can be committed both in times of peace and war. Further, crimes against humanity differ from war crimes, in that it is generally accepted that, as a minimum, a pattern or practice of violations committed in any armed conflict, against persons of any nationality, would constitute a crime against humanity. Thus, a pattern of gross abuses committed in an internal conflict and/or against nationals of the same country as the perpetrators would constitute crimes against humanity.

### **The Yugoslavia Ad Hoc Tribunal**

The Yugoslavia Tribunal was established in 1993 and is the first international tribunal to be held since Nuremberg and Tokyo.<sup>292</sup> Unlike the ones in Tokyo and Nuremberg, the Yugoslavia Tribunal tries all violators on all sides of the conflict. The Yugoslavia Tribunal treats the conflict as an international one, because all sides have agreed to be bound by the broader and more

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<sup>291</sup> In 1968 the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Res. 2391 (XXIII), 26 November 1968.

<sup>292</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (hereinafter the Yugoslavia Tribunal).

detailed norms governing international conflict. The Yugoslavia Tribunal is also the first tribunal established while a conflict was in progress. Most importantly, it is the first tribunal to give particular attention to gender-based crimes.<sup>293</sup>

Given the extraordinary circumstances that wartime imposes on the gathering of evidence, and the particular needs of victims and witnesses, the Tribunal has developed a number of specialized procedures to protect victims of gender-based abuse, without interfering with the rights of the accused. For example, witnesses have the option of speaking to an investigator with whom they feel comfortable, witnesses can use pseudonyms, and can have their voices and images modified when proceedings are recorded to protect their identity.<sup>294</sup> With regard to the admissibility of evidence in cases of sexual assault, Rule 96 states that no corroboration of the victim's testimony is required;

consent shall not be allowed as a defense if the victim (a) has been subjected to or threatened with or has had the reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if she did not submit, another person might be so subjected, threatened or put in fear.

The Rule also requires that before evidence of the victim's consent is admitted in court, the accused must satisfy the Trial Chamber before a camera that the evidence is relevant and credible. In light of the rules, the defense of consent should be denied if a coercive situation is shown, for example, while the victim was in detention, custody, or comparable circumstances of coercion. It is also important that the prior sexual conduct of the victim be prohibited as evidence.

The Yugoslavia Tribunal Rules provide for the creation of a Victims and Witnesses Unit within the Registry, although regrettably it is not required to have female staff.<sup>295</sup> This unit recommends protective measures and provides counseling and support, particularly in cases of rape and sexual assault. The Rules

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<sup>293</sup> The Hague has repeatedly included rape in the charges.

<sup>294</sup> Rules of Procedure and Evidence, (hereinafter the Rules), Rule 34 (protective measures and counseling), 40 (investigation), 69 (non-disclosure of identity), 75 (protection before Trial Chambers).

<sup>295</sup> Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia*, Human Rights Quarterly, Vol. 17, 1995.

also permit evidence by deposition in exceptional circumstances, which will spare some victims and witnesses the burden of traveling to The Hague.<sup>296</sup>

Victims and witnesses are not guaranteed the right to representation. According to the rules, victims of gender-based abuse should be given compensation for injury. However, Rule 106 of the statute delegates the enforcement of judgments and claims for compensation to national tribunals. Victims or persons claiming compensation have to bring their claim before a national court or other competent body, diminishing their chances for actual enforcement. In order to guarantee women the right to compensation, the decision for compensation should also be within the competence of the tribunal.

Even with all the protective measures, witnesses are still afraid to come forward. The first charge brought directly under the rubric of rape against the first defendant tried by the Tribunal, Dusko Tadic, had to be withdrawn on the eve of the trial when the witness became unwilling to testify.<sup>297</sup> Her change of mind is not surprising since witnesses are only protected during criminal proceedings and not afterwards. In order to encourage women to bring their cases to the tribunal in pursuit of justice, the international community should assist in ensuring their post-trial safety by welcoming witnesses to move to their countries and build new lives away from potential retaliators. The appointment of women in important positions can ensure that gender concerns are properly recognized and integrated throughout the Tribunal's work. Especially the appointment of female counselors and female investigators would enhance the proper investigation and prosecution of gender-based crimes.

The statute creating the Yugoslavia Tribunal and defining its jurisdiction names rape as a crime against humanity under article 5. Rape is not, however, explicitly named in the article on grave breaches of humanitarian law based on the Geneva Conventions, or named as a violation of the customs and laws of war or as genocide. Rape as a crime against humanity fails to address the experience of individual women. To constitute a crime

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<sup>296</sup> Rule 71.

<sup>297</sup> De Volkskrant, *Tadic Schuldig aan Misdaden tegen de Menselijkheid*, 9 mei 1997.



against humanity, a systematic pattern of the atrocity is required. However, even the rape of one single woman, which is not part of a systematic policy, is recognized as torture or inhuman treatment in certain circumstances, and therefore, constitutes a war crime or a grave breach of the Geneva Convention.<sup>298</sup> The term sexual assault is not mentioned in the statute at all, but is mentioned in Rule 96 relating to the giving of evidence in sexual assault cases.

Thus, the tribunal has implicit jurisdiction to prosecute rape and other forms of sexual abuse as crimes under Article 2 (Grave Breaches), Article 3 (Violations of the Laws and Customs of War), Article 4 (Genocide), in addition to explicit jurisdiction under Article 5 (Crimes Against Humanity).<sup>299</sup> While international law does not define rape and other gender-specific crimes, the Yugoslavia Tribunal depends on international conventions, customs, national laws and scholarly interpretations for such definitions.

Almost half of all persons indicted by the Tribunal are accused of sexual assault or rapes as either perpetrators or superiors. In June, 1996, in its first indictment specifically pertaining to sexual offenses, the prosecutor charged several Bosnian Serb soldiers with crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war. The indictment is of major legal importance as it is the first time that sexual assaults have been investigated for the purpose of prosecution under the rubric of torture and enslavement as a crime against humanity. The sexual abuses were committed in the rape camps in Foca, Bosnia. The indictment defines acts of forcible sexual penetration as "penetration, however slight, of the vagina, anus or oral cavity, by the penis. However, sexual penetration of the vulva or anus is not limited to the penis." The indictment states that such acts constitute an element of a crime against humanity, (enslavement under article 5(c), torture under article 5(f), rape under article 5(g), violations of the laws and

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<sup>298</sup> Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 American Journal of International Law, July 1993; Beth Stephens, *Women and the Atrocities of War*, ABA's Human Rights, Vol. 20 (no. 3), Summer 1993.

<sup>299</sup> See chapter 2 and 3.

customs of war, (torture under article 3 and 3(1)(1) of the Geneva Conventions) and a grave breach of the Geneva Conventions, (torture under article 2(b)). The first case before the Yugoslavia Tribunal in which rape and sexual assault were prosecuted is the Celebici case.<sup>300</sup>

The statute rejects trials *in absentia*. The Tribunal does not have its own police force. Thus, prosecution depends on the international community's willingness to arrest and detain those accused, either with or without the cooperation by the governments of the accused. Article 29 of the statute sets out the responsibilities of states in locating and identifying suspects and witnesses, in the detention of suspects, their transfer to the seat of the tribunal, as well as the provision of the relevant documents and evidence to the tribunal. Under article 146 of the Fourth Geneva Convention each HCP<sup>301</sup> is under the obligation to search for persons alleged to have committed, or to have ordered to be committed, grave breaches, and to bring such persons before its own court, or to hand such person over for trial to another HCP.<sup>302</sup> Because article 2 of the statute gives the Yugoslavia Tribunal jurisdiction to prosecute grave breaches of the Geneva Conventions, all HCP may be asked to arrest and to hand over the indicted criminals to the tribunal.<sup>303</sup> Few governments have yet obliged the requirement to arrest indicted war criminals, thereby permitting the tribunal to start prosecution. In the meantime, the US-led NATO force is authorized to arrest indicted war criminals, but declined to do so until July, 1997, when they finally arrested one war criminal in Serbia and

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<sup>300</sup> Although, Tadic was initially charged with rape, the charges were dropped.

<sup>301</sup> States who signed and ratified the Geneva Conventions.

<sup>302</sup> Most European countries have no legal obstacles to trying war criminals in national courts, but most of those who hold suspects have not yet initiated court action as yet. Some European countries, such as Denmark, Switzerland, Finland, France, Germany, Italy, The Netherlands, Norway, Spain and Sweden now have legislation enabling extradition. However, most have failed to extradite criminals to the Yugoslavia Tribunal.

<sup>303</sup> On November 8, 1994, Tribunal judges asked the German government to defer its case against Dusan Tadic, a Bosnian Serb who had been arrested by German authorities in February 1994.

handed him over to the tribunal in The Hague. In an attempt to arrest another war criminal they killed the person in crossfire.<sup>304</sup>

Despite the obstacles faced by the international tribunal for the former Yugoslavia, its outcomes are critical to the global community. The international judgment will deprive the perpetrators of impunity. Even in cases where governments refuse to extradite the accused, they will still be deprived of full freedom of movement.

### **The Rwanda Ad Hoc Tribunal**

The Security Council established an Ad Hoc International Criminal Court for Rwanda, for the dual purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda, and for prosecuting Rwandan citizens responsible for genocide and other such violations committed in neighboring states, between January and December 1994. The Rwanda Tribunal is empowered with jurisdiction over violations committed during an internal conflict, unlike the Yugoslavia Tribunal which has jurisdiction over crimes committed in an international conflict. The precedent established by the Rwanda Tribunal will hopefully increase legal protection for the IDPs under Protocol II.

The Rwanda Tribunal has Rules of Procedure and Evidence similar to the Rules of Procedure and Evidence of the Yugoslavia Tribunal. The rules provide comparable protection to victims and witnesses of gender-based abuses in Rwanda, such as the use of pseudonyms to protect a witness's identity; use of in-camera proceedings; and the scrambling of voices and images.<sup>305</sup> The Rwandan Tribunal also applies the same rules regarding the admissibility of evidence in cases of sexual assault.<sup>306</sup>

So far, the Rwanda Tribunal has indicted 22 Rwandans, four of whom are in custody in Arusha. Another six, awaiting

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<sup>304</sup> The Washington Post, *10 Croats Surrender to War Crimes Tribunal: Suspects Charged by Hague Panel With Leading Bloody Campaign Against Bosnian Muslims*, October 7, 1997.

<sup>305</sup> Rules of Procedure and Evidence, (hereinafter the Rules), Rule 34 (protective measures and counseling), 40 (investigation), 69 (non-disclosure of identity), 75 (protection before Trial Chambers).

<sup>306</sup> Rules of Procedure and Evidence, Rule 96.

extradition, are being held in Cameroon, Belgium and Switzerland. In the statute of the Rwanda Tribunal, rape is explicitly mentioned as a crime against humanity and a serious violation of article 3 of the Geneva Conventions.<sup>307</sup> The tribunal also has jurisdiction over rape and other forms of sexual violence when they constitute torture. Since rape and sexual violence were an integral part of the genocidal campaign of the Hutus to destroy the Tutsis, the tribunal can prosecute the perpetrators under article 2 of the statute. Although the Rwanda Tribunal has been specifically empowered to address issues of sexual violence, no indictment of the Tribunal confirmed by the Trial Chamber to date, has charged anyone with responsibility for rape or sexual violence.

The effectiveness of the Rwanda Tribunal has been affected by uncertainties concerning the timely provision of budgetary resources hindering effective administrative support, serious operational deficiencies in the management of the Tribunal, geographical separation of the Prosecutor's office from the other organs of the Tribunal and the lack of adequate infrastructure at both Arusha and Kigali.<sup>308</sup> In addition, the methodology and investigative procedures used by the Rwanda Tribunal have not been conducive to collecting rape testimonies in the Rwandan context. The Tribunal should step up its efforts to integrate a gender perspective into its investigations. Meanwhile, the international donors should ensure sufficient financial support for the Rwanda Tribunal.

In light of the precedent set by the prosecutor of the Yugoslavia Tribunal, it is remarkable that the prosecutor of the Rwandan Tribunal has not charged anyone with rape and sexual violence, despite testimonies, documentation and reliable reports indicating the availability of other probative evidence, that sexual violence was part of a campaign of genocide, crimes against humanity, and war crimes under articles 2, 3, and 4 of

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<sup>307</sup> Statute of the International Tribunal in Rwanda, arts. 3 and 4.

<sup>308</sup> United Nations General Assembly, *Report of the Office of Internal Oversight Services on the Audit and Investigation of the International Criminal Tribunal for Rwanda*, A/51/789, 6 February 1997.

the Statute of the Rwanda Tribunal.<sup>309</sup> For example, Jean Paul Akayesu, a former mayor in Rwanda, who had exclusive control over the communal police and gendarmes during the conflict in Rwanda, was the first to be charged in connection with the state-sponsored massacres of at least 500,000 people, mostly minority Tutsis. Despite specific testimony at his trial by at least two witnesses, no charges of rape or any other acts of sexual violence have been brought against Akayesu.

Pursuant to Tribunal Rule 74 a group of women's human rights legal scholars and non-governmental organizations submitted a brief *amicus curiae*, urging the prosecutor to conduct the necessary investigations and amend the indictment to charge rape and other sexual violence within the framework of genocide, crimes against humanity and war crimes.<sup>310</sup> According to the Statute, it is the Prosecutor's responsibility to investigate and prosecute persons responsible for serious violations of international humanitarian law.<sup>311</sup> Her failure to do so, despite the available evidence that thousands of Rwandan women were subjected to gender-based abuses during the armed conflict, leaves the impression that the Tribunal does not consider rape and sexual violence to be as important as other offenses. Her practice merely continues and condones the discrimination toward women during armed conflicts that has persisted for centuries. This attitude within the Tribunal will discourage victims and witnesses of gender-based abuses from further participating in investigations and trials. The Tribunal's refusal to include charges of sexual violence in the indictment effectively deprives

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<sup>309</sup> See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. SCOR, 49<sup>th</sup> Sess., UN Doc. S/1994/1405, 1994; Human Rights Watch/ Africa Human Rights Watch / Women's Rights Project/ federation International des Ligues des Droits de l'Homme, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, 1995; African Rights, *Rwanda: Death, Despair and Defiance*, September 1994.

<sup>310</sup> Amicus Brief: Respecting Amendment of the Indictment and supplement of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal, 27 May 1997.

<sup>311</sup> Mrs. Lousie Arbour appointed by the Security Council in 1996 to replace resigning Chief Prosecutor Justice Richard Goldstone.

victims of any form of legal redress, since Rwanda's national court is unable to try all the war criminals currently in custody.

Both ad hoc criminal tribunals are mandated to investigate, prosecute and punish persons responsible for genocide and other serious violations of international humanitarian law. Both Ad Hoc tribunals are able to provide legal remedies to victims.<sup>312</sup> However, as Sewall states, the major function of the tribunals is to try specific individuals for specific crimes. It is not to provide a legal response to the variety of violations from which victims suffer. She also argues that the tribunals, by virtue of being international and because of their precedent setting nature, are perhaps the least inclined to respond to the individual needs of the victim when it comes to restitution.<sup>313</sup> While the right to compensation for victims is recognized by the tribunals, the tribunals cannot award compensation. They can only transmit to the competent authorities of the states concerned their judgment finding the accused guilty of a crime which caused injury to a victim. Consequently, the victim must file her claim for compensation before a relevant national court or other competent body. The Rules of Procedure and Evidence expressly provide that judgments of the tribunal are deemed final and binding as to the criminal responsibility of the convicted person for such injury.

### **A Future Permanent International Criminal Court**

While civil and political rights can be enforced through international mechanisms, there has never been a permanent criminal court of international jurisdiction which could try individuals accused of crimes under the 1949 Geneva Conventions, or the Genocide Convention. Both conventions require states to prosecute offenders in their national courts. However, article 6 of the Genocide Convention also refers to acts of genocide tried by an international penal tribunal. The Yugoslavia Tribunal and

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<sup>312</sup> Rule 105 and 106 of both Rules of Procedure and Evidence established for the Rwanda and Yugoslavia Tribunals contain the right to restitution and compensation.

<sup>313</sup> Rebecca Sewall, Women, Law and Development International, *Retribution, Restitution, and Resolution: Responding to Gender-based War Crimes*, Unpublished manuscript, 1997.



the Rwanda Tribunal are the first tribunals established by UN Security Council.

The desire to establish a permanent criminal court started as early as 1948, but proposals did not advance very far. Finally, on December 17, 1996, the UN General Assembly adopted Resolution 51/207, which calls for a diplomatic conference in Italy in June 1998 to review and open for signature a convention to establish a permanent international criminal court (ICC). In preparation for that meeting the General Assembly charged the Preparatory Committee (Prepcom) with examining drafts of a statute for a permanent ICC.

The proposed ICC is expected to complement national justice systems by taking action when national courts are ineffective or incapable of prosecuting crimes of international concern.<sup>314</sup> National states remain responsible for the investigation, prosecution and punishment of perpetrators of gender-based crimes. Prosecution in national courts is preferable as this minimizes language problems, allows the prosecution to take place within the context of established legal and cultural norms and be based on familiar precedents and rules. However, prosecution in national courts may be subjected to political bias resulting in unfair or non-existent prosecution. This has proven to be true in the case of the former Yugoslavia. When perpetrators are not prosecuted in national courts for crimes, including gender-based crimes committed during internal or international conflicts, the victims may receive a message that these crimes are not considered important. Unquestionably, the failure to prosecute perpetrators allows them to act with impunity.

In Rwanda, the situation is different. The government wants to prosecute war crimes and crimes against humanity committed during the internal civil war, but is unable to do so because there is no functioning judicial system. Many judges and prosecutors were killed in the civil war or fled the country. In these situations the permanent criminal court will take over the role of the na-

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<sup>314</sup> In this respect the ICC statute differs from the statute for the Yugoslavia Tribunal, which in article 9(2) proclaims the tribunal's "primacy over national courts."



tional court system to prove that criminal acts were committed, and punish the perpetrators in order to deter future atrocities.

A permanent international criminal court will reduce the likelihood of international crimes going unpunished while promoting the consistent application of norms regarding international crimes. The recently established *ad hoc* international criminal courts have jurisdiction only over those crimes committed in a certain territory and within a certain time frame. Permanency is required primarily because a permanent court is likely to be more effective than *ad hoc* tribunals, which are inadequate in several respects. First, to acquire the political will and resources to establish an *ad hoc* tribunal is extremely difficult. Second, the establishment of *ad hoc* tribunals appears to be selective. What justifies an *ad hoc* tribunal in the cases of Yugoslavia and Rwanda, while the atrocities committed in Cambodia, Liberia, and other countries go unpunished? A permanent criminal court would promote stability and achieve a greater degree of international peace and justice.<sup>315</sup>

It remains to be seen whether the proposed ICC will, indeed, provide justice to victims of gender-based violence where national systems fail. The effectiveness of the proposed ICC for victims of gender-based violence will depend on the number of states that ratify the treaty and accept the Court's jurisdiction.<sup>316</sup> The draft statute's consent requirements, which determine whether the ICC's jurisdiction may be exercised, unnecessarily inhibit the exercise of the court's jurisdiction and should be modified. The statute should provide that state parties to the ICC statute automatically accept the court's inherent jurisdiction. In addition, the draft statute only allows state parties and the Security Council to initiate investigations.<sup>317</sup> To make the ICC more effective, the prosecutor and individuals should also be permitted to initiate proceedings. Moreover, the effectiveness

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<sup>315</sup> For more information on the proposed international criminal court see the report prepared by the Committee on International Law and the Committee on International Human Rights of the Association of the Bar of the City of New York, 20 December 1996.

<sup>316</sup> The ICC will be established through a convention.

<sup>317</sup> Draft Statute, arts. 23(1) and 25.

of the ICC depends on its jurisdiction. Under article 20 of the revised Draft Statute, the ICC would have jurisdiction with respect to several serious crimes:

- the crime of genocide;
- the crime of aggression;
- serious violations of the laws and customs applicable in armed conflicts;
- crimes against humanity;
- crimes, established under or pursuant to the treaty provisions listed in the Annex of the Statute, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

A large number of delegations called for more specific definitions of the crimes within the Court's jurisdiction, on the ground that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullem crimen sine lege and nulla poena sine lege*). Instead it was argued that the proscribed conduct or the constituent elements of each crime ought to be specified in the Statute to avoid any ambiguity and to ensure full respect for the rights of the accused.<sup>318</sup> The International Commission of Jurist (ICJ) believes that it is of the utmost importance for the crimes under the Court's jurisdiction to be clearly defined.

The ICJ would like to point out that the Statutes creating the International Criminal Tribunals for the Former Yugoslavia and Rwanda do also define the crimes under their jurisdiction. Definitions similar to those contained in the Statutes for the two International Criminal Tribunals would adequately meet the needs of the principle of *nullem crimen sine lege*.<sup>319</sup>

The ICJ believes that it is necessary to clarify the scope of crimes against humanity. The Charters for the Nuremberg and Tokyo Tribunals and the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda offer such clarification. With regard to gender-based crimes, the ICJ argues

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<sup>318</sup> A/AC.244/CRP.1/Add.1, 11 April 1995.

<sup>319</sup> International Commissions of Jurists, *The International Criminal Court*, Third ICJ Position Paper, August 1995.

that crimes against humanity under the jurisdiction of the ICC should include:<sup>320</sup>

- torture or other cruel or inhuman treatment, as defined in the Torture Convention;
- slavery and slavery trade as defined in the Slavery Convention;
- outrageous assaults on personal dignity, such as sexual assault and enforced prostitution, (in both cases when used as a political weapon).

Many women's human rights groups around the world have initiated a lobbying effort aimed at incorporating a gender perspective into the future permanent ICC. The current focus of the ICC draft statute focuses on crimes which constitute gross violations of human rights and which often arise in armed conflict situations. The drafters have generally agreed on the inclusion of genocide, crimes against humanity and war crimes.<sup>321</sup> The two ad hoc tribunals for Rwanda and Yugoslavia are seen as a model for the future ICC. The attitude of both tribunals towards gender-based violence, therefore, are important precedents for the future ICC. The Prosecutor of the Yugoslavia Tribunal did prosecute rape and other forms of sexual abuse as crimes against humanity, (enslavement under article 5( c), torture under article 5(f), rape under article 5(g), violations of the laws and customs of war, (torture under article 3 and 3(1)(a) of the Geneva Conventions) and a grave breach of the Geneva Conventions, (torture under article 2(b)). A positive development is that almost half of all persons indicted by the Yugoslavia Tribunal are accused of sexual assault or rapes, as either perpetrators or superiors.

In the meantime, it is critical that rape and other forms of sexual abuse be explicitly mentioned in the statute of the ICC. Unlike the statute of both ad hoc tribunals, the ICC should explicitly name gender-based abuses as grave breaches of humanitarian law based on the Geneva Conventions, as violations of the customs and laws of war, or as genocide. Rape should be named

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<sup>320</sup> International Commissions of Jurists, *The International Criminal Court*, Third ICJ Position Paper, August 1995.

<sup>321</sup> See draft prepared by a working group of the international Law Commission and a report of the August 1996 Prepcom meeting.

as a crime against humanity. In addition, the ICC statute should provide that the rules of procedure and evidence are to be drawn up simultaneously when the ICC is established and not only within six months of judicial elections. The rules should include special protective measures to protect victims and witnesses of gender-based crimes, while protecting the rights of the defendant.

It is of utmost importance that the proposed ICC include more legal remedies for victims of rape and other forms of sexual violence. Such remedies should include an individual right to compensation, rehabilitation and the right to social services, including abortion, health services and counseling. Currently, the draft Statute of the ICC fails to provide for restitution or a means for victims and their families to obtain compensation and rehabilitation. As a result of this lack of effective remedies, a group of international women's right organization is working to ensure that the Statute of the ICC or some other mechanism include the right to remedies. Amnesty International argues that if the draft Statute is not amended to permit it to award restitution, compensation and rehabilitation, an international civil court or claims commission should be established to do so. This independent civil court or claims commission should be able to process claims against individuals as well as states. The advantage of such a body is that the standard of proof would be less than that required in a criminal case.

## CHAPTER FIVE

### *Conclusions and Recommendations*

#### **Conclusions**

This report analyzes how women are protected by international, regional and national mechanisms, against state violence in times of armed conflicts. Although international human rights law and humanitarian law include sufficient provisions to protect women against rape and other forms of sexual violence, international, regional and national systems often fail effectively to protect women against state violence committed in conflict situations. The international mechanisms prohibit state violence against women, but lack the proper enforcement tools to ensure the protection of women against gender-based crimes committed by state agents in times of armed conflict. The same is true for the regional mechanisms.

It is every country's own legal and moral responsibility to prevent, investigate and punish gender-based abuses committed by state agents during armed conflicts. At the same time, most perpetrators enjoy impunity due to the international commu-

nity's lack of political will to investigate, prosecute and punish perpetrators of gender-based abuses. Countries continue to deny any legal responsibility for gender-based abuse committed by state agents. In addition, the issue of redress and reparation to the victim is given very little attention. Consequently, most countries fail to enact national laws which comply with international human right law and humanitarian law, and guarantee victims and their families an individual right to effective and enforceable remedies. Even when national laws provide sufficient provisions to provide victims legal redress, the system may still fail. Victims of state violence are often reluctant to report the violence due to social stigmas and out of fear of reprisals. Most systems lack special procedures to which women can file a confidential complaint about sexual abuse without fearing reprisal. Many countries still consider gender-abuse in conflict situations as inevitable and accept it as such. In addition, states fail to enact national laws to protect the rights of refugee women conform the requirements in international human rights law. For example, states fail to equally protect refugee women due to discriminatory refugee status determination procedures and lack of gender sensitive measures to protect refugee women.

Although rape and other sexual abuses are recognized as serious crimes in early humanitarian laws, it is only recently that the international community addresses these forms of violence as serious infringements of fundamental women's rights. Both ad hoc international criminal tribunals for Yugoslavia and Rwanda have jurisdiction over rape and other forms of sexual abuses. The tribunals may provide redress to victims subjected to gender-based violence in the two countries but are useless mechanisms for all those other victims in other countries around the globe. However, the prosecution of rape and other sexual abuses will set important precedents for the proposed permanent international criminal court. The proposed ICC will be an important tool to enforce established criminal law. But in order to provide victims effective protection and an enforceable right to remedy, the draft statute of the ICC still requires some important amendments.



## Recommendations

### Governments

- Every State should ratify, without reservation, and ensure full implementation of international human rights and humanitarian instruments such as the 1951 Refugee Convention and its Protocol, CEDAW, the Torture Convention, the Genocide Convention and the Geneva Conventions.
- Every State should review and, where necessary, amend its Penal Code (as well as its Military Code and any other specialized criminal code applicable to State agents, such as a Code of Conduct for Law Enforcement Agents)<sup>322</sup> to ensure that penal provisions regarding sexual assault are in full compliance with international human rights and humanitarian law.<sup>323</sup> In particular:
  - Every State should ensure that rape, forced prostitution and forced pregnancy are criminal offenses, whether committed during war or peace, and whether the perpetrator is a private person or a state agent.
  - Every State should ensure that sexual assault laws are nondiscriminatory; *i.e.*, they do not contain special evidentiary or substantive requirements not applied in other criminal contexts, such as rules requiring corroboration of the victim's testimony, or

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<sup>322</sup> For simplicity, these recommendations use the phrase "Penal Code" to encompass not only criminal codes applicable to civilians, but also any separate Military or Law Enforcement Code.

<sup>323</sup> While this report focuses on violence against women during armed conflict, the recommendation that States review and amend their Penal Codes, evidentiary rules and other applicable laws cannot be so limited. The manner in which a country's legal system conceptualizes sexual assault crimes in times of peace both reflects and shapes community values (especially values concerning honor and its link with female chastity) that have a direct, concrete impact on violence against women in time of war.



rules requiring overt physical resistance to the crime.<sup>324</sup>

- Every State should break the legal link between sexual assault and *the victim's* morality. The crime of rape dishonors the perpetrator, not the victim. Laws that treat crimes of sexual assault as dishonoring the victim will inevitably discourage victims from coming forward. As the Special Rapporteur on violence against women has previously noted, laws in many countries currently are being changed to define rape as a crime against the person or a crime against physical integrity, rather than as a crime against morality, chastity or honour.<sup>325</sup> These changes are entirely to be applauded and encouraged.
- Every State should ensure that consent is not a defense to any form of sexual assault when at the time of the offense the victim is in the custody or control of the State. In this respect, Rule 96 ("Evidence in Cases of Sexual Assault") of the International Tribunal for War Crimes in the Former Yugoslavia's Rules of Evidence and Procedure is a model worthy of emulation.
- Every State should ensure that neither its Penal Code, its prosecutorial practices nor its evidentiary rules classify some women as "unrapable."<sup>326</sup> Laws or practices that require a victim to be a virgin, a "maid, married woman or widow," or a "chaste" or "honest" woman have the effect of denying whole categories of women (in fact, any woman who has ever engaged in sex outside of marriage, including, arguably, a victim of childhood incest) the denial of their rights under international law.

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<sup>324</sup> See generally Report of the Special Rapporteur on violence against women, its cause and consequences, 12 February 1997, E/CN.4/1997/47 at para. 34 ("Report on Violence in the Community")

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

- Every State should ensure that neither its Penal Code, its prosecutorial practices nor its evidentiary rules extend permission to certain categories of men to commit sexual assault. The Special Rapporteur previously has recommended that States introduce legislation which recognizes marital rape as a crime.<sup>327</sup> In this context she would note that by decriminalizing marital rape, a State is not merely failing to exercise due diligence to prevent violence, it is in effect issuing a license to commit such violence. Similar reasoning applies to laws such as those that exist in some parts of South America which provide that a man cannot be prosecuted for rape if prior to trial he marries the victim. In this respect, the recent action of the Peruvian Parliament in repealing such legislation is to be applauded.<sup>328</sup>
- Every State should break the legal link between female chastity and male property interests. Laws that sentence rapists of married women more harshly than rapists of single women serve to codify a husband's property interest in his wife's chastity and should be repealed.
- Every State should ensure that all military and law enforcement personnel, as well as any State personnel who work at prisons, detention centers, refugee camps or similar institutions, receive training on violence against women and international human rights and humanitarian law. In particular, such training should:
  - Identify sexual assault as a serious crime under international human rights and humanitarian law;
  - Address the underlying attitudes (discussed in this report) that have led to the widespread use and tolerance of gender-based violence in time of war; and

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<sup>327</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, 5 February 1996, E/CN.4/1996/53 at para. 142 ("Report on Violence in the Family")

<sup>328</sup> See "Peru Strikes Law that Allowed Marriage After Rape," Reuters World Service, April 4, 1997.

- Help trainees to develop the skills necessary to resist peer pressure or orders from higher-ranking personnel to commit sexual assault or any other violation of humanitarian law.

It cannot be over-emphasized that knowledge-based training (*i.e.*, training which merely recites that sexual violence against women is a violation of humanitarian law) in this area will have minimal or no impact. To be effective, training must focus on skills and attitudes. Soldiers and officers alike must perceive those who perpetrate sexual atrocities not as men strong enough to dominate their enemies in every way, but as unprofessional hacks. The sad stories emerging from investigations of war crimes in Rwanda, Bosnia, and elsewhere make clear that this is not universally the case.

- Every State should provide gender-sensitive training to prosecutors to increase their awareness of gender-based crimes and the importance of investigating, prosecuting and judging them without discrimination or bias.
- Every State should implement the UNHCR guidelines on the protection of refugee women and the guidelines on the prevention of and response to sexual violence into their national policies with regard to refugee women.
- Every State should apply the United Nations Code of Conduct for Law Enforcement Officials and should establish a national code of conduct for the military. Every country should ensure that victims of sexual abuse, or in the event of their deaths, their legal representatives have access to national and international recourse procedures. States should not renounce or settle compensation issues without the consent of the sexual abuse victims.
- Every State should protect the victims of sexual abuse, their relatives and friends, and witnesses from intimidation and reprisals.
- Every State should include women in the decision making processes before, during and after the conflict.
- The constitution of every State should define the procedure for declaring a state of emergency and the dura-

tion of such an emergency. Non-derogable rights shall be protected throughout the time of a state emergency.

- Governments acting alone or in concert should urge countries who violated women's rights in times of armed conflict to fully redress all violations.
- Governments whose nationals are claimants should assist the victims of gender-based crimes, their associations and representatives in the process.
- Governments should consider sanctions such as freezing assets and trade embargoes against the erring state. However, the sanctions should not impede humanitarian aid.
- Host countries should allow access for UNHCR and other relevant agencies to asylum-seekers and refugees from the first moment of their arrival in the country of refuge.
- Host countries should in the context of refugee status determination, recognize as refugees those women or girls seeking asylum who have suffered, or have a well-founded fear of suffering, sexual violence because of their race, religion, nationality, political opinion or membership in a particular social group, when the government of their country of origin is unwilling or unable to protect them from such abuse.
- Host countries should immediately stop the practice of arbitrary detention of female asylum-seekers and refugee women.
- Host countries should guarantee victims of gender-based abuse free and equal access to the courts of law for non-nationals.
- Host countries should protect women's refugees' right to non-refoulement.

### **The United Nations**

- International treaty bodies that monitor the observance and realization of human rights should pay due attention to the question of gender-abuse by state agents in times of armed conflict and should include the right to effec-

tive remedies for victims in their judgments and recommendations.

- UN agencies such as, UNHCR UNICEF, WHO, UNDP and others should increase the co-operation and communication between each other to provide women better protection against gender-based violence. For example, UNHCR can provide specific information about camp populations which will enable WHO to provide tailored medical care.
- All Special Rapporteurs should address the plight of women in times of armed conflict when making recommendations to governments.
- The UN should create a new UN agency that has the explicit mandate to protect internally displaced people.
- The question of reparation for victims of gender-based abuses should receive more attention and the UN should adopt a set of principles and guidelines that give content to the right to reparation for these victims. The proposed basic principles submitted by Theo van Boven, Special Rapporteur should serve as a basis for such undertaking.<sup>329</sup>
- The UN should include provisions on reparations in new instruments and should amend existing instruments in this regard.
- The UNHCR guidelines on the protection of refugee women and the UNHCR guidelines on Preventing and Responding to Sexual Violence Against Refugee Women should be implemented by UNHCR.
- UNHCR should ensure that staff members have full knowledge of UNHCR's policy and guidelines on refugee women to ensure that female refugees derive equal, adequate and appropriate benefits from the organiza-

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<sup>329</sup> See Proposes Basic Principle and Guidelines in Report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, E/CN.4/Sub.2/1993/8, Theo van Boven, Special Rapporteur, 2 July 1993.

tion's protection, assistance and durable solutions activities.

- The UNHCR guidelines on the protection of refugee women and the UNHCR guidelines on Preventing and Responding to Sexual Violence Against Refugee Women should be disseminated to UNHCR staff, NGOs and refugee women. To this end UNHCR should translate the guidelines into the needed language. UNHCR should educate illiterate refugees about the guidelines.
- The UNHCR guidelines on the protection of refugee women and the UNHCR guidelines on Preventing and Responding to Sexual Violence Against Refugee Women should be expanded beyond the camp settings since most of the uprooted women are no longer in the traditional camp settings.
- UNHCR should immediately address protection issues faced by refugee women and girls who travel great distances for fuel wood. Trucks used to deliver wood should deliver it closer to the camps.
- In the camps refugee women should have access to safe latrines and the camps should be lit at night to increase the safety of refugee women.
- The camps should be protected against intruders from outside by barbed wires or other devices.
- UNHCR should implement programs that take into account the specific needs of widows, elderly and single women and girls.
- UNHCR should provide information to refugee women as well as men to help them make informed choices about repatriation options. UNHCR should assess the legal standing of refugee women in their host countries and in their country of origin, with particular attention to legal provisions that limit the rights of women in considering whether resettlement in a third country or repatriation to countries of origin is appropriate.<sup>330</sup>

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<sup>330</sup> Rwandan female widows returned to Rwanda to find out that they could not claim their own land and property because the laws in Rwanda do not al-



- UNHCR should make sure that female protection officers and gynecologists are available to refugee women in the camps.
- UNHCR should train refugee women as community protection officers, who can serve under the UNHCR protection officer.
- UNHCR should ensure that both male and female staff receive gender-sensitive training to increase gender-awareness and is deployed in situations where refugee women are at risk.
- UNHCR should establish formal monitor and reporting procedures to improve the protection of refugee women against gender-based violence.
- UNHCR and other relevant organizations should ensure that women have equal access to procedures for voluntary repatriation and enough information to make sensible choices.
- UNHCR should assign protection officers to border areas where refugees are returning.
- UNHCR should assume a proactive role in helping refugees reintegrate into their former communities or existing communities, or in establishing returnees in new settlements. Plans for active monitoring of the physical safety, social and economic status of refugee women must be formulated before the process starts.
- UNHCR should ensure that refugee women have access to gender-specific services such as counseling and medical care.
- UN agencies should make education, vocational training, income generating and public health priorities in the refugee camps and in the country of origin (after the war or after repatriation).
- The United Nations should be legally responsible for violations of human rights and humanitarian law by UN peacekeeping forces.

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low women to inherit, *see* Human Rights Watch report (Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath).



## Other Actors

- Non-governmental organizations should promote and disseminate the principles of international human rights, humanitarian and refugee law relevant to the protection of women in times of armed conflict.
- Non-governmental organizations should continue to lobby for ratification of instruments and withdrawal of any reservations.
- Non-governmental organizations should increase awareness with regard to violence against women in conflict situations through education and training programs.
- The international community should encourage the participation of refugee women in the planning and implementation of programs.
- Non-governmental organizations should establish concrete strategies to assist and protect internally displaced people (IDP) in all situations resulting in IDPs and not just on an ad hoc basis.
- Non-governmental organizations should continue to report on violations by a state of its international obligations relating to women.
- Non-governmental organization should continue the assistance of female victims in civil actions for compensation.
- Non-governmental organizations should support the repatriation and re-integration of the population into their countries of origin.
- Non-governmental organizations should make education, vocational training, income generating and public health priorities in the refugee camps and in the country of origin (after the war or after repatriation).

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- Non-governmental organizations should continue to report on violations by a state of its international obligations relating to women.
- Non-governmental organizations should continue the assistance of human rights in their actions for compensation.
- Non-governmental organizations should support the reparation and re-integration of the population into their countries of origin.
- Non-governmental organizations should make education, vocational training, income generating and health projects in the refugee camps and in the country of origin (after the war or after repatriation).

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