REDRESS FOR FEMALE VICTIMS OF SEXUAL VIOLENCE DURING ARMED CONFLICT
SECURITY COUNCIL RESPONSES

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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ABSTRACT

Redress for Female Victims of Sexual Violence During Armed Conflict: Security Council Responses

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The problem of how to assist women affected by armed conflict is one of the most pressing concerns facing the world today. This thesis addresses one part of the problem, namely the recovery of women subjected to sexual violence during armed conflict. My aim is to determine the extent to which the international legal system has responded to this problem through an examination of action taken by the Security Council. In particular, I am concerned with the extent to which the Security Council has recognised the importance of prosecuting perpetrators of sexual violence, and providing compensation to female victims. I look at the international responses to sexual violence committed in the former Yugoslavia and Rwanda. I also examine the provision of compensation to victims of sexual violence by the United Nations Compensation Commission, and the ad-hoc criminal tribunals for the former Yugoslavia and Rwanda.
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INTRODUCTION

THE PROBLEM OF WOMEN AND ARMED CONFLICT

1. The Problem of Women and Armed Conflict

Every year dozens of armed conflicts rage throughout the world during which some of the most egregious violations of human rights imaginable are perpetrated. There is no doubt that armed conflict results in terrible suffering for all of those caught within it and for those who are left to rebuild their lives after it is over. The problem of how to assist these people is one of the most pressing concerns facing the world today and warrants the most serious attention and effort.

(A) Recognising the “Gender Variable”¹

The present work argues that any effective strategy for improving the situation of victims of armed conflict must recognise that gender is one of the factors that determines a person’s experience.² There are many manifestations of men and women’s disparate experience of armed conflict, for example: men are more likely to be combatants whereas women are more likely to be civilians; men may be more often killed during a conflict whereas women are more likely to become refugees or displaced persons; women are more likely to be victims of sexual violence during armed conflict than men; and women are more likely than men to be left without any means of economic survival at the conclusion of hostilities.³ In choosing to focus upon women’s experience, I do not argue that women suffer more as a result of the types of harms inflicted upon them during armed conflict. However, I do argue that greater consideration must be given to incorporating the perspective of women into the legal responses to armed conflict.

¹This is the term used by Adam Jones in his article “Gender and Ethnic Conflict in Ex-Yugoslavia”. (1994) 17:1 Ethnic and Racial Studies 115. Jones argues for an inclusive approach to the gender variable which recognises the unique aspects of men’s and women’s wartime experience.
²This analysis picks up the insights of Gardam who argues that men and women experience warfare in fundamentally different ways, and that this must be acknowledged if improvement in the situation of women is to be achieved. See J. Gardam, “Women and the Law of Armed Conflict: Why the Silence?” (1997) 46 International and Comparative Law Quarterly 55 (hereafter “Why the Silence?”) at pp 58-59.
³Many of these issues are taken up in further detail in Chapter 1.
(B) Concern for Women in Treaty Provisions of the Law of Armed Conflict

The need to consider the situation of women during armed conflict is not a new idea. Existing treaty provisions of the law of armed conflict attempt to do this in various ways. However these treaty provisions have been primarily drafted by men, and inevitably reflect men's own understanding of the way that women experience war. While I accept that these provisions attempt to protect important values, they are often drafted in inappropriate language, or are limited to those aspects of women's lives that men recognise as important. Two examples are considered here to illustrate this point.

(1) Treaty Provisions Regarding Sexual Violence

Since the conclusion of the earliest treaty documents seeking to regulate armed conflict, provisions prohibiting rape and other forms of sexual violence have been included. Many of the earlier provisions are couched in terms of family honour and dignity, and do not reflect the violent nature of the act as experienced by women. Even the more recent provisions protecting women against rape and other forms of sexual violence fail to reflect the reality of women's experience. Article 27 of Geneva Convention IV Relative to the Protection of the Civilian Population stipulates that:

"Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

Footnotes:
4 The law of armed conflict is the collective term for the international legal rules that seek to regulate the conduct of hostilities. The major treaty documents and customary international law principles forming part of the law of armed conflict are described in Section 4(A) infra.
6 For a history of the prohibition of rape in war, see T. Meron, "Rape as a Crime Under International Humanitarian Law" (1993) 87 AJIL 424 at p 425.
Article 76 of Additional Protocol I of 1977 provides that:

"Women shall be the subject of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

Article 4 of Additional Protocol II of 1977 prohibits:

"Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault."

Thus rape and other forms of sexual violence are characterised as an attack against the "honour" of women, or at most as an outrage upon personal dignity. The implication is that "honour" (or dignity) is something lent to women by men, and that a raped woman is somehow dishonourable. It also contributes to the perception that sexual violence is a personal matter and not a human rights problem. It is not simply a matter of semantics. The mischaracterisation of rape as a crime of honour directly reflects and reinforces the trivialisation of the offence. Further, as Gardam points out, Article 27(2) of Geneva Convention IV does not expressly prohibit rape and other forms of sexual violence. It is protective rather than prohibitive. The only requirement is for men to take particular care to protect women against sexual violence. The same applies to Article 76 of Protocol I. These provisions directly reflect the wartime images

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11 For a discussion on the problematic nature of the term "honour" see C. Niarhos, "Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia". (1995) 17-4 Human Rights Quarterly 649, and R. Copelon, "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law" (1994) 5:2 Hastings Women’s Law Journal 243. See also Americas Watch, Untold Terror: Violence Against Women in Peru’s Armed Conflict. at p 3 discussing the characterisation of rape as a crime against honour in Peru’s penal code, and the resulting attitude that a woman had to first prove she was "honourable" before rape allegations were taken seriously. Cf A. Tierney Goldstein, Recognising Forced Impregnation as A War Crime Under International Law. (Centre for Reproductive Law and Policy 1993) who argues that the term "honour" is not problematic when stripped of its historical connection with chastity.
12 Rhonda Copelon argues that the reason for the historical invisibility of rape as war crime is that until recently, it was considered a personal problem, and not a human rights problem. See R. Copelon, “Women and War Crimes”, (1995) 69 St John’s Law Review 61 at p 62.
13 J. Gardam, “Why the Silence?” supra n 2 at p 74.
described by Elshtain of women as the Beautiful Soul and men as the Just Warrior. Sauer explains that during war:

"Women as a group have been assigned the role of society's Beautiful Souls. They represent pure, self-sacrificing, rarefied, pacific beings. They offer compassion and succour and embody everything good in society. Men on the other hand are assigned the role of the Just Warrior. He participates in collective violence, and activity that Beautiful Souls do not engage in."

The provisions appear to be more about the role of the male warrior during armed conflict than about recognising sexual violence as a violation of the rights of women and prohibiting it. Consequently, although the provisions seek to provide "special" protection to women, they reflect a male view of the problem.

(II) Treaty Provisions Protecting Women as Mothers and Carers

Attempts to provide a broader range of "special" protection to women are apparent in the 1949 Geneva Conventions and the Additional Protocols. In addition to prohibiting rape and other forms of sexual violence, many of these provisions relating to women seek to protect them in their capacity as expectant mothers, maternity cases, and nursing mothers. For many of these provisions, the rationale is actually the protection of children and women are only included in so far as they are indispensable to that protection. For example, Article 70(1) of Protocol I dealing with relief actions, includes expectant mothers, maternity cases and nursing mothers as those who should be accorded privileged treatment or special protection. However, when regard is had to the commentary to Protocol I, it becomes apparent that the category of nursing mothers was added at the request of a delegate who argued that:

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16 Additional Protocols supra n 10.
17 See Gardam, "Why the Silence?" supra n 2 at p 57. For provisions providing protection to women in their capacity as mothers and carers see for example, Geneva Convention IV supra n 8. Articles 14, 16, 17, 18, 21, 22, 23, 38, 50, 98, 91 and Protocol I supra n 9. Articles 70(1) and 76.
The proposal was subsequently endorsed as being in accordance with the United Nations Declaration on the Rights of the Child. Similarly with respect to Article 76(2) of Protocol I dealing with inter alia the arrest of pregnant women:

"the underlying purpose...was to protect the unborn child or dependent infant more than the woman herself."

While it is important to recognise the special vulnerability of women due to their role as mothers and carers, it is problematic to limit recognition of the needs of women to these areas.

(C) Women and Armed Conflict Within the United Nations (UN) Framework

Concern for the situation of women affected by armed conflict has also been reflected in the activities of various organs of the UN for several decades. In the early 1970's the UN Economic and Social Council (ECOSOC) considered a series of reports on the protection of women and children in emergency and armed conflict. These reports were prompted by a recognition that women are particularly vulnerable during armed conflict, and considered the need to provide special protection for women and children. In 1974 the UN General Assembly (GA) adopted the Declaration on the Protection of Women and Children in Emergency and Armed Conflict. This document recognised the particular suffering of women and children during armed conflict.

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19 Ibid.
and emphasised the important role that women play "in society, in the family and particularly in the upbringing of children." 23 It emphasised the need for compliance with the laws of armed conflict which offer important guarantees of protection for women and children. 24 Thus as is the case with the treaty provisions of the law of armed conflict described earlier, these developments were primarily concerned with women as mothers and carers. 25

A broader view of the problem of women and armed conflict is apparent in ECOSOC’s consideration of women in particular conflict situations around the world. A series of resolutions have been passed on the situation of Palestinian women and children in the occupied Arab territories. 26 These resolutions inter alia recognise: the poor living conditions of the Palestinian people, particularly the women and children; request the preparation of reports on the situation of these women as well as continued monitoring; and request that Governments, Non-governmental Organisations (NGOs) and Inter-governmental Organisations (IGOs) provide assistance to Palestinian women to facilitate income generating activities and other facilities for women. Resolutions have also been passed in respect of women and children in Namibia, 27 and women and children living under apartheid, 28 requesting inter alia the provision of assistance to improve the living conditions of women living in these situations. ECOSOC has also acknowledged the particular vulnerability of women as refugees. 29

In recent years, the issue of violence against women has attained a prominent place on the UN’s agenda as demonstrated by the GA’s adoption of the Declaration on the Elimination of Violence

23 Ibid, preamble particularly paragraphs 2, 3 and 9.
24 Ibid, particularly paragraph 3.
25 See also S/RES 666, 13 September 1990 paragraph 4, relating to the 1990 Gulf War which requests that particular attention be paid to the situation of those who may be subject to more severe suffering as a result of food shortages in Iraq and Kuwait including expectant mothers and maternity cases.
Against Women in 1994 ("Declaration on Violence"). and the appointment of Radhika Coomaraswamy as the Special Rapporteur on Violence Against Women by the UN Human Rights Commission. Armed conflict has been identified as one of the major sources of violence against women. At its 1993 session, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Linda Chavez as Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices During Periods of Armed Conflict. Thesituation of women during armed conflict was a topic of concern at the World Conference on Human Rights held in Vienna in 1993. Most recently, armed conflict was also a major theme at the Fourth World Conference on Women held in Beijing in November 1995. The two main documents produced at the conference, namely the Beijing Declaration and Platform for Action both emphasise the problem of women and armed conflict.

This review of UN practice on the question of women and armed conflict demonstrates that it is an issue at the forefront of international concern, and provides an important backdrop to the present thesis. While concern was initially restricted to the particularly vulnerable situation of women as mother's and carers, consideration of the issue is becoming broader. In particular, the recognition that armed conflict is one of the critical areas to address in the context of violence against women is important. It is encouraging that so much attention has been paid to the issue, that resolutions have been passed by a range of UN bodies, and that Special Rapporteurs have...
been appointed, and studies carried out. However, of greater importance is the extent to which measures to assist women affected by armed conflict have actually been incorporated into the concrete action taken by the UN in response to armed conflict. By this, I refer to the recent measures taken by the Security Council to enforce the law of armed conflict. Expressions of concern amount to naught if they are not ultimately incorporated into the hard practice of the UN. This is the issue with which the present thesis is concerned.

2. Scope of Topic

(A) Focus on Enforcement

The problem that I have set for myself in this thesis can be stated simply. My aim is to determine the extent to which the needs of women affected by armed conflict have been incorporated into action taken by the Security Council. Hence, I am concerned with measures taken by the Security Council to enforce the law of armed conflict. Clearly improved enforcement is not a panacea. To a large extent by the time the enforcement stage is reached, the system has already failed, and the most desirable approach is to prevent the abuses in the first place. Possible preventative techniques could include greater utilisation of early warning and monitoring techniques by the UN, more effective training of military forces and the strengthening of protective norms applying during conflict. However, I argue that it is legitimate and necessary to focus on enforcement as one of a range of measures to address the problem of women and armed conflict. Given that the international legal system has been spectacularly unsuccessful in preventing conflict and human rights violations during conflict, it is important that real consideration be given to how enforcement measures can assist those who suffer as a result.

Enforcement will only be of assistance to women if the types of harms they suffer during armed conflict are recognised by the international legal system in the first place. That is, women must first have a relevant “cause of action”. However, much of the loss suffered by women as a result of armed conflict is not recognised by the international legal system, which presents a significant initial hurdle to claims for redress by women. Chinkin writes:
"...many of the effects of conflict that are suffered by women as harms or loss are not categorised as such by legal norms. International law does not prohibit, for example, malnutrition caused by United Nations sanctions, the death of a baby through the unavailability of medicines, or the violent injury sustained at the hands of a partner returning from conflict. These situations are simply accepted as unfortunate side effects of conflict and are unrecorded in the catalogues of war crimes."

Thus as pointed out above, it is clear that enforcement is only one part of the problem, and that reform in this area must be carried out in combination with reform in other areas of the law to more accurately reflect the needs of women.

(B) Focus on Sexual Violence

So far I have stated that my focus is upon women and armed conflict in general terms. In fact my focus is much narrower. I am particularly concerned with the situation of women who have been subjected to sexual violence during the course of armed conflict. At the outset I wish to acknowledge that sexual violence is only one part of understanding the way that women experience armed conflict, and conflict-related situations. For example: female soldiers will have a different experience of armed conflict to male soldiers: women's reproductive role and biological systems mean that women suffer specific health implications as a result of the shortage of foods and medical care that frequently accompanies armed conflict: the imposition of economic sanctions will have different impacts for men and women; and a woman's experience as a refugee will differ from that of a man. The problem is that very little information is collected on these aspects of women's experience. Consequently, it is very difficult to use them as the basis for analysis. The one exception is the prevalence of sexual violence during armed conflict, which has been well documented in recent years. Thus, at the risk of obscuring the other

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aspects of women’s experience of armed conflict. I chose sexual violence as the subject-matter of the analysis in this thesis.

Susan Brownmiller was one of the first scholars to present a thorough examination of the historical prevalence of sexual violence against women during armed conflict.\(^{40}\) Since then the issue has received substantial consideration by other authors and this thesis does not seek to traverse that ground.\(^{41}\) Much has also been written about the historical invisibility of sexual violence, and the way this reflects the absence of women’s voices from the international legal system.\(^{42}\) I do not seek to duplicate those efforts. Rather I confine my consideration of the occurrence of sexual violence to the three situations in which the Security Council has taken action to enforce the law of armed conflict, namely Iraq’s 1990 invasion of Kuwait, the conflict resulting from the break-up of the former Yugoslavia, and the 1994 conflict in Rwanda.

It must be acknowledged that men are also subjected to sexual violence during armed conflict. Reports of atrocities committed against men in the former Yugoslavia clearly illustrate this.\(^{41}\) Statistically, however, sexual violence is primarily a crime against women.\(^{44}\) The fact that sexual violence is also perpetrated against some men during armed conflict does not detract from this. Further, men and women occupy different positions in society and within the legal system, and so have different experiences following their trauma. Consequently, I argue that it is legitimate to focus separately on the sexual violence suffered by men and women during armed conflict.

\(^{40}\)S. Brownmiller, Against Our Will: Men, Women and Rape (1975), pp31-113.


\(^{42}\)See generally the sources cited in Chapter 3 note?

\(^{43}\)See for example, L. Wadham, Shame of Bosnia’s Raped POW’s. The Sunday telegraph April 28 1996 p 10, detailing systematic sexual abuse of male captives in Serb and other detention centres, and estimating that at least 4,000 Croatian men were victims of sexual abuse; and International Society for Human Rights, Speaking Out About Sexual Violence Against Men, (Feb 1996) No 1. Duško Tadić, the first defendant tried before the International Criminal Tribunal for the Former Yugoslavia, was charged with inter alia sexual violence of male prisoners. See: In re Duško Tadić and Another (Prosecutor v Duško Tadić and Goran Borovnica), Indictment 1995 I.C.T.Y. No. IT-94-1-T (Feb 13) (amended Sept. 1, 1995, and Dec. 14, 1995). However, in their judgement, the Trial Chamber dismissed these charges for lack of proof. See In re Duško Tadić (Prosecutor v Duško Tadić), Opinion and Judgment 1995 I.C.T.Y. No. IT-94-1-T (7 May 1997). pp 71-89 paragraphs 194-244.

\(^{44}\)See D. Thomas & R. Ralph, Rape in War: Challenging the Tradition of Impunity” (1994) S/A.I.S Rev. 81 at p 83.
(C) Focus on the Security Council

Prior to the 1990's it was not possible to talk of measures taken by the Security Council to enforce the law of armed conflict. Enforcement, to the extent that it did occur, was a matter for domestic legal systems. However, since the end of the Cold War there have been some remarkable developments. Not only has the Security Council shown greater capacity for action in dealing with violations of the *jus ad bellum* (laws regulating the resort to force),\(^{45}\) but it has also demonstrated a willingness to take action in respect of violations of the *jus in bello* (laws regulating the conduct of hostilities) or the law of armed conflict. The Security Council has justified its foray into this area of the law as an application of its mandate under Chapter VII of the UN Charter to maintain and restore international peace and security.\(^{46}\) To date there have been three relevant courses of action by the Security Council. One is the creation of the United Nations Compensation Commission (UNCC) to provide compensation for victims suffering loss as a result of Iraq’s unlawful invasion of Kuwait in 1990.\(^{47}\) The other two are the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) which were established to prosecute violations committed during the conflicts in the former Yugoslavia and Rwanda respectively.

Certainly doubts have been expressed about the capacity of the Security Council to take this sort of action under Chapter VII. This thesis is not concerned with the validity of the Security Council’s action in this area. The fact that this action has occurred is accepted, and the major concern is to determine how this development has impacted upon women.

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\(^{45}\)Refer to the discussion on the *jus ad bellum* in section 4A(VI) infra.

\(^{46}\)The rationale of the Security Council’s action to enforce the law of armed conflict is taken up in Chapter 2.

\(^{47}\)As acknowledged in Chapter 2, the creation of the UNCC was prompted by Iraq’s violations of the *jus ad bellum*, but also encompassed violations of the *jus in bello*. 
3. Framework of Analysis

(A) Part 1: Assisting Women to Recover from Sexual Violence—Measures of Redress

In order to assess the extent to which the needs of women subjected to sexual violence during armed conflict have been incorporated into action taken by the Security Council, it is first necessary to consider what those needs are. Thus the discussion begins in Chapter 1 by considering the appropriate measures of redress for women affected by sexual violence during armed conflict.

In the context of the recovery of trauma survivors, redress can mean many things. It can refer to remedies that address the direct consequences of suffering such as the provision of medical treatment and rehabilitation. It can also refer to remedies that seek to provide justice and to restore the victims, as far as possible, to their position prior to the abuse. These measures include the prosecution of perpetrators, the payment of monetary compensation, and the creation of memorials to acknowledge the wrongs done to victims.

In this thesis consideration is confined to two aspects of redress. One is the prosecution of those who have committed violations, including the initiation of investigative procedures as well as the trial itself. The other is the provision of compensation to victims. Chapter 1 examines how these two measures of redress operate to relieve the suffering of women affected by sexual violence. In focusing upon these two aspects, I do not wish to minimise the importance of other measures of redress for women. However, for present purposes I chose the prosecution of offenders and compensation because these are areas where the Security Council has already taken action, and provide realistic minimum yardsticks for assessing the provision of redress to women. Consequently this thesis seeks to begin the discussion of redress for female survivors of armed conflict, but does not claim to comprehensively address the issue.

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48 Even if a trial does not ultimately occur, the investigation of abuses for the purposes of trial can be a measure of redress for the victim. Refer to the discussion in Chapter 1 section 2A.
In choosing "women" as a category of analysis, and in seeking to identify the common needs that women have regarding redress, I expose myself to the criticisms that have been directed at other authors who have examined the position of women within international law. Most notably, Charlesworth's application of the public/private distinction has been criticised as a western construct that does not reflect the experience of women across cultures. For example, Buss argues that Charlesworth's work assumes a "commonality of oppression based upon gender that fails to recognise other sources of women's oppression such as race, class, culture and religion."  

I acknowledge that the needs of women regarding redress will vary depending upon a range of factors, although as Gardam points out:

"Perhaps the task of finding a shared experience of women is somewhat easier in the area of armed conflict than it has proved to be in the area of human rights and international law generally. So, for example, although rape in warfare will impact differently on women depending on its cultural significance, it must surely be experienced by all women as a terrifying and painful event."

I argue that the difficulty of identifying a single "women's" experience should not send the international legal system into paralysis. It can and should be flexible and responsive to the various trends that are observable in women's experience.

(B) Part 2: Assessing Action Taken By the Security Council

Having examined the needs for redress of women subjected to sexual violence. I then consider the extent to which action taken by the Security Council has delivered this redress.

Chapter 2 is concerned with the extent to which the interests of victims generally have been incorporated into action taken by the Security Council. The first task is to consider the centrality of victims' interests within the provisions comprising the law of armed conflict. The Security Council has sought to apply these provisions in the enforcement action it has taken. This analysis

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51 J. Gardam, "Why the Silence?" supra n 2 at p 67.
demonstrates the rationale behind enforcement of the law of armed conflict generally. The parallel regime of international human rights law provides a useful measure of comparison in this respect. As will be demonstrated, the interests of victims are much more central in international human rights law than they are in the law of armed conflict. The next step is to develop this analysis by considering the specific rationale for the action the Security Council has taken. A range of factors are relevant, including deterrence, retribution and the establishment of a lasting peace. However, I argue that the dominant theme is the desire to take action in response to crimes that shock the conscience of the international community. A hierarchy of values is thus apparent within enforcement of the law of armed conflict by the Security Council. I conclude by asking: what kinds of crimes are considered to "shock" the conscience of the international community and what does this mean for women subjected to sexual violence?

In Chapter 3 I begin my consideration of the extent to which the needs of female victims of sexual violence are incorporated into the Security Council’s hierarchy of values. I analyse the Security Council’s response to sexual violence during the conflicts in the former Yugoslavia and Rwanda, and the steps that have been taken to prosecute offenders. A significant difference is apparent in the response to sexual violence in these two conflicts. The second part of the chapter considers possible explanations for this paradox. There are many relevant factors some of which relate to the practical difficulties of the UN system, and others which raise aspects of feminist theory highlighting the absence of women’s voices from the international legal system.

Chapter 4 examines measures taken by the Security Council to provide victims of armed conflict with compensation. The creation of the UNCC, and the extent to which it recognised the claims of female victims of sexual violence is considered. The chapter concludes that overall, the UNCC was an encouraging development for female victims of sexual violence. However, this progress was not consolidated when the Security Council created the ICTY and ICTR. The Security Council did not grant these tribunals the power to award compensation to victims, nor did it establish an international fund to compensate victims.
4. Definitions and Preliminary Explanations

Before moving to the body of this thesis, it is important to provide some definitions, and explanations of the general principles of the law of armed conflict relied upon.

(A) About the Law of Armed Conflict

(I) A Definition of the Law of Armed Conflict\(^{52}\)

The “law of armed conflict” is the collective term used to describe the international legal principles, whether conventional or customary, that regulate the conduct of hostilities during armed conflict. The term “armed conflict” is now used as the preferred legal term in international law rather than the term “war”. This is because the law applies irrespective of a formal declaration of war.\(^{53}\) Other terms are frequently employed to refer to the law of armed conflict, including “international humanitarian law”, the “laws of war”, “the humanitarian laws of war”, and the “jus in bello”. In this thesis, the “law of armed conflict” is the term generally employed, although the other terms are sometimes used interchangeably, depending upon the context of the discussion.

The law of armed conflict has traditionally been divided into two strands. The Law of the Hague is concerned with the regulation of the means and methods of warfare, and the Law of Geneva refers to the protection of victims of armed conflicts. There are a number of treaty documents setting out these substantive provisions, the most well known being the four Geneva Conventions which aim to alleviate the suffering of war victims.\(^{54}\) In 1977 two Additional Protocols to the Geneva Conventions were adopted to extend and strengthen the protection provided.\(^{55}\) Because

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\(^{53}\) A. Roberts and R. Gueiff. Ibid p1.

\(^{54}\) Geneva Conventions supra n 15.

\(^{55}\) Additional Protocols supra n 10.
this thesis focuses upon sexual violence against women, it is primarily concerned with treaty provisions providing protection to civilians.

In addition to the laws of the Hague and Geneva, prohibitions against the mass crimes of genocide and crimes against humanity are important sources of law applicable during armed conflict. The prohibition of crimes against humanity is a customary international law development, stemming primarily from the Nuremberg Charter.\textsuperscript{56} It has been codified and developed primarily by the International Law Commission (ILC), through its work in formulating the principles from Nuremberg,\textsuperscript{57} and also in preparing a draft Code of Crimes Against the Peace and Security of Mankind.\textsuperscript{58} The principle as embodied in the Nuremberg Charter required a nexus to armed conflict. However, developments since that time provide support for the proposition that the principle now applies regardless of whether an armed conflict exists or not.\textsuperscript{59} The prohibition against genocide is contained in the 1948 Genocide Convention, and applies in times of war and times of peace alike.\textsuperscript{60}

\textsuperscript{56}Charter of the International Military Tribunal. Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. 1945, in The Law of War: A Documentary History (1972) at 883. Article VII(c) gave the Tribunal jurisdiction in respect of:

"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."


\textsuperscript{59}The Trial Chamber in the Tadić Jurisdiction Case accepted that there is no need for war crimes to be linked with a conflict. See In re Dušan Tadić: Decision on the Defence Motion on Jurisdiction (The Prosecutor v Dušan Tadić), 1995 I.C.T.Y. No. IT-94-1-AR72 (10 Aug); hereafter (Trial Chamber’s Decision on Jurisdiction) at p 30. In its 1996 Report on its work on the Draft Code of Crimes Against the Peace and Security of Mankind, the ILC’s draft article on crimes against humanity does not include the requirement of connection with armed conflict. The ILC states that following Nuremberg:

"The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement."

\textsuperscript{60}Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, states:
(II) The Distinction Between Internal and International Armed Conflicts

A distinction is drawn between international conflicts and internal conflicts. Internal conflicts have historically been considered to fall within the domestic jurisdiction of states. Consequently the system of international law regulating internal conflicts is much less developed than the system regulating international conflict.

Traditionally, international conflicts were defined as those fought between two or more opposing states, and include situations of military occupation. Protocol I extended the definition to:

"include armed conflicts in which peoples are fighting against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

Situations of civil war are referred to as internal conflicts. The Geneva Conventions describe internal conflicts as "armed conflict not of an international character..." Protocol II refers to internal conflicts as those conflicts not covered by 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."

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

61 Common Article 2 to the Geneva Conventions, supra n 15. refers to inter alia all cases of:

"declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if a state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

63 Common Article 3 to the Geneva Conventions, supra n 15.
64 Article 2, Protocol II, supra n 10.
However, situations falling into the category of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" do not meet the threshold required to qualify as internal armed conflict.\(^6\)

The classification of a given conflict is important because the law to be applied varies depending upon the nature of the conflict. For international conflicts, the Hague Convention IV of 1907,\(^6\) the Geneva Conventions and Protocol I apply. For internal conflicts, Common Article 3 of the Geneva Conventions provides minimum standards to be applied. Protocol II operates to expand the basic protections provided in Common Article 3.\(^6\) Some rules apply regardless of whether the conflict is internal or international. As outlined above, the Genocide Convention does not require a nexus to armed conflict at all, and arguably, the same applies to crimes against humanity.

(III) Classifying Conflicts the Persian Gulf, the Former Yugoslavia and Rwanda

The conflict in the Persian Gulf in 1990 was clearly one of an international character. It was a classic illustration of one state (Iraq) using force against another state (Kuwait).

By contrast, the conflict in the former Yugoslavia is difficult to classify. Some elements of it appear to be internal, and yet there are clearly international elements to it also. The approach taken by the Security Council seemed to indicate that it considered the conflict to be international, and this is reflected in the subject-matter jurisdiction granted in the Statute of the ICTY.\(^8\) The ICTY has jurisdiction over grave breaches of the Geneva Conventions;\(^9\) violations

\(^6\) Ibid.
\(^6\) The applicability of the Grave Breaches provisions of the Geneva Conventions to internal conflicts was an issue considered in the Tadić Jurisdiction Case. The Appeals Chamber reversed the prior decision of the Trial Chamber and held that grave breaches apply only in respect of international conflicts, although they did not the emergence of some state practice that could indicate a possible change of position in the future. See In Re Dušan Tadić: Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction, (The Prosecutor v Dušan Tadić), 1995, I.C.T.Y. No: IT-94-1-AR72 (thereafter Appeal Chamber’s Decision on Jurisdiction) p 47.
\(^8\) See Annex to the Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law Committed in the Territory of the Former Yugoslavia (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council
of the laws and customs of war: \(^70\) genocide; \(^71\) and crimes against humanity. \(^72\) In particular, the
inclusion of jurisdiction over grave breaches of the \textit{Geneva Conventions} reflects an understanding
that the conflict in the former Yugoslavia was of an international character. The major omission
from the ICTY's subject-matter jurisdiction is \textit{Protocol I}. This was not included in the ICTY
\textit{Statute} on the basis that its status as customary international law is unclear. \(^73\)

Dušan Tadić, the first defendant to be prosecuted, brought a challenge to the ICTY's jurisdiction.
He argued \textit{inter alia} that the conflict in which he was involved was of an internal nature, and that
charges alleging grave breaches were inapplicable. \(^74\) The Trial Chamber dismissed the challenge,
and the matter was subsequently heard on appeal. The Appeals Chamber held that the conflict
had both internal and international aspects. \(^75\) Consequently the law to be applied to the conflict
in the former Yugoslavia varies depending upon the circumstances surrounding the alleged
charges in a given case.

The conflict in Rwanda in 1994 is primarily one of an internal nature and has been treated as such
by the UN. \(^76\) The internal nature of the conflict is reflected in the \textit{Statute} of the ICTR\(^77\)
which grants subject-matter jurisdiction over: genocide; \(^78\) crimes against humanity; \(^79\) and
violations of Common Article 3 to the \textit{Geneva Conventions} and of \textit{Protocol II}.\(^80\) The omission of
jurisdiction over grave breaches and the inclusion of jurisdiction over Common Article 3 and
\textit{Protocol II} clearly reflects the classification of the conflict as internal.

(1993) (hereafter \textit{ICTY Statute})

\(^69\) ICTY Statute Article 2.
\(^70\) ICTY Statute Article 3.
\(^71\) ICTY Statute Article 4.
\(^72\) ICTY Statute Article 5.

\(^73\) See Secretary General's \textit{Report on Aspects of Establishing an International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the
Former Yugoslavia} \textit{(Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808
General's \textit{Report on ICTY}), at paragraphs 34 and 35.

\(^74\) See \textit{Trial Chamber's Decision on Jurisdiction}, supra n 59.

\(^75\) See Appeal Chamber's \textit{Decision on Jurisdiction}, supra n 67 at p 42.


\(^77\) The \textit{Statute} is contained in S/RES 935 (1994), 8 November 1994 establishing the ICTR (hereafter \textit{ICTR Statute})

\(^78\) ICTR Statute Article 2.

\(^79\) \textit{Ibid.}, Article 3.

\(^80\) \textit{Ibid.}, Article 4.
(IV) The Law of Armed Conflict and Individual Criminal Responsibility

The law of armed conflict is one of the few areas of international law that imposes obligations directly on individuals as well as upon states.81 That individuals are criminally responsible for violations of the law in international conflicts was established beyond any doubt during the Nuremberg War Crimes Trials held after World War II.82 This was subsequently reflected in the enforcement provisions of the Geneva Conventions regarding grave breaches which requires states to ensure the prosecution of persons suspected of having committed grave breaches. The grave breach system embodying individual criminal responsibility was extended in Protocol I.83

Treaties dealing with internal conflicts do not contain any express enforcement provisions providing for individual criminal responsibility. Until recently it was not clear that violations committed in the course of internal conflicts could give rise to individual criminal responsibility. However, since the establishment of the ICTY and the ICTR consensus appears to be building that violations committed during internal conflicts can give rise to criminal responsibility. Both the Trial and Appeals Chambers endorsed this in their judgments in the Tadić Jurisdiction case.84

81 A state is responsible for any conduct attributable to it under international law and constituting a breach of the international obligations of the state. See T. Meron, Human Rights and Humanitarian Norms as Customary International Law (Oxford: Clarendon Press, 1989) p 155, referring to Article 3 of the ILC’s Draft Articles on State Responsibility.
82 Article 6 of the Nuremberg Charter gave the Tribunal power to try and punish individuals. In its judgment the Tribunal affirmed that individuals could be punished because:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

83 Refer to the discussion of grave breaches in Chapter 2, section 2B(i).
(V) The Relationship Between the Law of Armed Conflict and International Human Rights Law

The law of armed conflict and international human rights law have historically developed as separate bodies of law, with the former directed at the alleviation of human suffering during times of armed conflict, and the latter directed at the alleviation of human suffering during times of peace. Since the establishment of the UN, there has been a tendency to regard the law of armed conflict as part of international human rights law. However, as will be demonstrated in Chapter 2, there are some major differences between the two regimes.

(VI) The Relationship Between the Jus ad Bellum and the Jus in Bello

*Jus ad bellum* is the term used to describe the international legal rules regulating the circumstances under which a state may resort to the use of force. For example, the UN Charter prohibits the use of force except in self-defence or in accordance with Chapter VII of the Charter. In contrast, the law of armed conflict, or the *jus in bello* regulates the manner in which hostilities are conducted following the resort to force. The *jus ad bellum* and the *jus in bello* operate as two distinct regimes. The *jus in bello* must be complied with regardless of the circumstances surrounding the resort to force.

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86 Article 2(4) of the UN Charter provides that:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”

This must be read in light of Article 51 which states that:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”

Article 42 further provides scope for the use of force under the auspices of the UN.
(B) Defining Sexual Violence

In this thesis the term "sexual violence" is used as an umbrella term for rape, and other categories of sexual abuse and sexual assault. It is the term presently used by the Office of the Prosecutor (OTP) of the ICTY and ICTR. The ICTR has defined sexual violence as including:

"...forceible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity." 87

The OTP of the ICTY has also defined sexual assault as follows:

"forceible sexual penetration, indecent assault, enforced prostitution, sexual mutilation, forced impregnation, and forced maternity."

The terms sexual violence, sexual abuse and sexual assault are used interchangeably at some points in this thesis in accordance with the terminology adopted by the various bodies commenting upon the issue and forming part of the discussion.

5. What this Work Contributes

In their seminal article published in 1991, Charlesworth et al emphasised:

"the need for further study of traditional areas of international law from a perspective that regards gender as important."

They argued that:

"Research is needed to question the assumption of neutrality and universal applicability of norms of international law and to expose the invisibility of women and their experiences in discussion about the law." 90

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87 In re Jean Paul Akayesu: Indictment (The Prosecutor v Jean Paul Akayesu). ICTR-96-4-I (June 1997) paragraph 10A.
89 H. Charlesworth, C. Chinkin, & S Wright, "Feminist Approaches to International Law" (1991) 85 AJIL 613.
90 Ibid.
Since that time a burgeoning jurisprudence has emerged, particularly in the context of women and international human rights law. Some consideration has also been given to the position of women within the law of armed conflict. Much of the discussion relates to the status of rape as a war crime within the law of armed conflict and was prompted in large part by the events in the former Yugoslavia. Gardam is one of the few authors who takes a broader approach. Gardam’s earlier work exposes the law of armed conflict as a gendered regime. She examines the distinction between combatants and civilians together with the priority accorded to the doctrine of military necessity, and points out the detrimental implications for women. More recently, Gardam has sought to extend the feminist critique from international human rights law into the law of armed conflict, arguing that the law of armed conflict does not reflect the reality of women’s lives, and that infringement of the rules protecting women are not taken seriously. The present work builds upon Gardam’s argument that men and women experience armed conflict differently, and that if improvement in the situation of women is to be achieved, this must be recognised.

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92 Refer generally to the sources cited in chapter 3.


95 J. Gardam, “Why the Silence?” supra n2.

96 Gardam writes that:

“Reform based on the equality model has been convincingly demonstrated to be a singularly blunt instrument to achieve any change for women in a world where they do not live out their lives as the equal of men. If it is accepted that women experience warfare fundamentally differently from men, irrespective of whether the latter are combatants or civilians, then laws that take the experience of men as the norm against which to construct the rules are unjust.”

Ibid. at pp 58-59.
This thesis expands the discussion in this area of international law by focusing upon enforcement action by the Security Council, and the implications of this for women. Orford has considered the implications for women of developments regarding collective security action by the Security Council.  

She argues that:

"There is a need to acknowledge that decisions to impose sanctions or initiate military peacekeeping or peace enforcement operations can have gender-differentiated consequences."  

This thesis extends Orford’s line of analysis by considering the gender-differentiated consequences of Security Council action to enforce the law of armed conflict. I take an approach that is firmly anchored in the practical operation the international legal system. In doing so I seek to avoid the problems associated with feminist analyses that theorise in abstract and focus only upon gender. I identify a problem, the recovery of women subjected to sexual violence during armed conflict, and seek to expose a range of weaknesses within the international legal system that impede progress in relation to this problem. Some are gender related, some are not. I argue that if improvement in the situation of women is to be attained, the totality of their situation must be considered. Although gender is an important factor determining a woman’s experience, it is not the only factor. That aspects of my analysis also have implications for other victims of armed conflict does not call into question the validity of an approach that regards gender as important.

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97 A. Orford, "Collective Security" supra n 37 at p 373.
98 Ibid. p 385.
CHAPTER 1

THE IMPORTANCE OF REDRESS FOR FEMALE VICTIMS OF SEXUAL VIOLENCE

"Other atrocities committed by the Japanese during the Pacific war, such as abuse of prisoners-of-war and massacre of civilian populations, were dealt with by the Tokyo war crime trials, and the perpetrators made to account for their deeds. Significantly, one whole class of victims was totally ignored by everyone then and afterwards, when governments began negotiating wartime compensation with Tokyo. The comfort women were not unknown to the Allies, who had repatriated many...There is the nagging thought that the sufferings of the comfort women did not matter enough for an issue to be made out of them."

1. Introduction

In this chapter I examine the reasons why redress is important to women subjected to sexual violence during armed conflict. Scant attention has been paid to the needs of all victims recovering from violations of the laws of armed conflict, and very few international legal principles have developed regarding redress for men or women. However, the position that women occupy within society, and the types of abuses they typically suffer during armed conflict raise different issues in respect of redress for women and their situation warrants separate consideration. Redress is crucial given that in most cases victims will not only experience their own personal trauma, but also the general break-down in society that inevitably accompanies armed conflict.

The first section of this chapter considers why redress is an integral part of assisting female victims of sexual violence to recover. Both the psychological and practical imperative of redress is discussed. The second part of the chapter presents a case study focusing on the so called "Comfort Women" forced into sexual slavery by the Japanese during World War II. This discussion clearly demonstrates why redress is crucial, as well as the historical failure to provide this redress to women. It also illustrates the influence that other factors, such as the victim's cultural context, will have on redress. The final part of the chapter looks at the extent to which

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2See for example, B. Ferencz. "Compensating Victims of the Crimes of War", (1972) 12:3 Virginia Journal of International Law, 343. See also the discussion in Chapter 2 highlighting the lack of focus on victims within the law of armed conflict generally.
the imperative of redress has been recognised within the international legal system. The discussion begins with a consideration of redress for victims of human rights abuses and victims of crime, and then moves on to consider the specific situation of women subjected to sexual violence during armed conflict. I conclude by examining the reasons why the provision of redress at the international level is important.

2. The Imperative of Redress

(A) The Psychological Imperative of Redress

In light of interviews carried out with survivors of the Holocaust, noted clinical psychologist Yael Danieli describes the way that redress can assist survivors of trauma to re-establish their "equality of value, power, and esteem" and to relieve their "stigmatization and separation from society". Women, just like other victims of trauma during armed conflict, need to have society acknowledge that what has been done to them is wrong. Women often blame themselves for the atrocities committed against them. It is unimaginable that women who have been forcibly detained by opposing forces and assaulted in the most brutal manner could think they are in any way responsible, but there is evidence that they do. Many societies contribute very directly to the view held by women that they are to blame for what has happened to them. Much has been written about the shame associated with having been subjected to sexual violence. In many communities, particularly those in which emphasis is placed upon sexual purity, women are stigmatised and shunned by their families. The 1994 conflict in Rwanda provides a further example. Raped women and women forced to become "wives" of their captors have been subsequently treated with suspicion. They are accused of using the "sex card" to avoid being

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5See for example, Helsinki Watch, War Crimes in Bosnia-Hercegovina (1993) pp 171-172 describing the experience of young Muslim women in the former Yugoslavia.
massacred alongside the defenceless men and children. Thus the provision of redress as acknowledgment of the wrong done to these women is fundamentally important.

Both the prosecution of perpetrators and the provision of compensation have an important role to play in acknowledging the wrongs done to the victim. Prosecutions and preliminary investigations with a view to prosecution are particularly effective venues in which victims can tell their story and feel that their voices are being heard. Dr Judith Lewis Herman, who has carried out an in-depth study of the impact of human rights violations including gender violence concludes that:

"Sharing the traumatic experience with others is a precondition for the restitution of a sense of a meaningful world... The response from the community has a powerful influence on the ultimate resolution of the trauma. Once it is publicly recognized that a person has been harmed, the community must take action to assign responsibility for the harm and to repair the injury. These two responses--recognition and restitution--are necessary to rebuild the survivor's sense of order and justice."

The Commission of Experts appointed to investigate violations of international law committed during the conflict in the former Yugoslavia (hereafter Yugoslav Commission) re-iterate this sentiment. They report that many of the survivors they interviewed told investigative teams that they:

"felt they and their suffering had been acknowledged by having it recorded by the United Nations, regardless of whether they are called to testify."

The Yugoslav Commission describes the healing effect for victims of telling their story to the lawyers, mental health professionals and interpreters sent to interview them, and identify several reasons for this:

"First, as in psychotherapy, the empathy and concern shown by the lawyer, mental health specialist, and translator for the witness was in itself healing. Some descriptions of the suffering endured were so horrible that either the lawyer, mental health worker, or translator, would at times become tearful, a powerful message that the witness was not alone in his or her horror and pain. For those who had not testified previously, telling the whole

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story in detail for the first time was a relief. It allowed the witness to remove the horror of the experience from within and to distance and objectify it, as those bearing witness carefully recorded it. The fact that volunteer lawyers and mental health professionals had come from other countries specifically to take their testimony and provide psychological and medical assistance made it obvious to them that the world cared about the war crimes they had experienced or witnessed. Finally, many witnesses stated that the most positive aspect of testimony was the hope that the perpetrators of these war crimes might be prosecuted and that what they had endured was not acceptable to the world. This helped heal the feeling of helplessness and guilt that some of the witnesses experienced because of their lack of control over their own torture or rape, or the torture, rape, or slaughter of family members, friends, and other prisoners. The hope for justice gave them a sense that something positive might be accomplished."9

The provision of compensation on the basis of legal responsibility also acts symbolically as vindication for the victim.10 In Danieli's words compensation:

"concretizes for the victim the confirmation of responsibility, wrongfulness, she is not guilty, and somebody cares about it."11

(B) The Practical Imperative of Compensation

In addition to assisting survivors to adjust emotionally to their experience of trauma and their subsequent treatment by their community, compensation has a significant practical importance. The financial imperative of monetary compensation for women who have suffered sexual violence during armed conflict should not be overlooked. These women are often left as widows, refugees or displaced persons, requiring significant financial assistance in order to successfully reestablish their lives.

Monetary compensation is particularly important to women because they tend to have fewer economic options than men. This stems from their lack of mobility due to their role as carers, and also from the fact that they generally have lower levels of education and fewer skills than men.12 The "feminisation of poverty" was a dominant theme at the Fourth World Conference on Women, and in the preparations leading up to it.13 Throughout the world, whether in Africa14 or

10 The importance of compensation in acknowledging harms done is clearly borne out in the case study of the Comfort Women in section 3 infra...
11 Y. Danieli, "Preliminary Reflections". Supra n 3 at p 207.
the United States of America, women are more likely to be living in poverty than men. As a result of their generally disadvantaged position within society, women's economic burdens following armed conflict tend to be greater than those of men.

Women also have to cope with financial hardship arising directly from their experience of sexual violence during armed conflict. Sexual violence often results in severe and lasting medical complications. The Centre for Reproductive Law and Policy has carried out a study on the specific health needs of women who have survived the Balkan conflict which, \textit{inter alia}, highlights the problems associated with becoming pregnant as a result of rape. In 1993 it was estimated that in the former Yugoslavia, between 1,000 and 2,000 women became pregnant as a result of rape. Estimates of the number of women impregnated as a result of rape during the 1994 conflict in Rwanda, range from 2,000 and 5,000. These women face the increased financial burdens associated with either raising the children, aborting them, or giving birth to them and arranging for their adoption. Sexual violence also frequently results in serious and lasting medical complications for the victims. There may be permanent damage to the woman's reproductive system, and the contraction of sexually transmitted diseases is a recurrent problem. For example, Human Rights Watch have highlighted the high risk of contracting HIV/AIDS for women subjected to sexual violence during the conflict in Rwanda.

(C) Historical Exclusion of Women's Interests from Measures of Redress

To the extent that redress has been provided in the past to victims of armed conflict, women's needs have been much less frequently recognised than men's. A significant reason for this is the fact that women are generally not part of decision making regarding the initiation and conclusion

\footnotesize{\begin{enumerate}
  \item[20] ibid, pp3 and 76.\end{enumerate}}
of armed conflict nor of domestic political structures. As a result, there is a tendency to disregard women’s interests and to sacrifice them to economic and political interests.  

While the value of placing on the public record the truth about other kinds of atrocities has been recognised, the need to record the truth about sexual violence has not. To illustrate this point, Tierney Goldstein compares the treatment at the Nuremberg Military Tribunal of medical experimentation and rape. She cites the opening address of Telford Taylor at Nuremberg regarding the former:

“For them (the survivors) it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable...”

On the other hand, points out Tierney Goldstein, when it came to the rape of French women in Nice by the Nazis, the French prosecutor said:

“The Tribunal will forgive me if I avoid citing the atrocious details...A medical certificate from Doctor Nicolaides who examined the women who were raped in the region—I will pass on.”

An additional problem is that access to redress in the international legal system is largely dependent upon the willingness of states to make claims on behalf of the victim. Chinkin writes that states are generally not willing “where the victims have no political or economic status...”, which is often the case with women. Further, women are more likely than men to be refugees or displaced persons. It is clear that refugees are one of the groups most in need of redress, yet as stateless persons, they are the least likely to have claims made on their behalf by states.

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23 Ibid.

24 C. Chinkin, “Peace and Force” supra n 21 at p216.

25 80 percent of the world’s refugee population is made up of women and children. See: C. Berthiaum, “Do We Really Care?” (1995) 100 II Refugee Women 11.

26 See C. Chinkin, “Peace and Force” supra n 21 at p 216 who raises the disadvantaged position of stateless persons.
large extent these women are dependent upon NGOs or other international organisations to protect their interests. While international organisations are increasingly playing a role in making claims on behalf of stateless persons affected by armed conflict, but their ability to do so depends upon the flexibility of the historically state-centred international legal system.  

Another problem with compensation measures implemented following armed conflict historically, is that they have often been limited to cases of physical disability. Although, as outlined above, sexual violence may frequently result in severe and often permanent physical consequences, in other cases there may not be any overt physical injury remaining.

(D) Redress for Women as Redress for the Community at Large

The link between redress for individual women and redress for the community at large should not be overlooked and represents a persuasive reason for the international community to give priority to this issue.

First, women often make up the majority of the population at the conclusion of a conflict. For example, in Rwanda it is estimated that 70 percent of the population surviving after the 1994 conflict is female, and that 50 percent of households are now headed by women. It is further estimated that the majority of women who survived the massacre were subjected to sexual violence. Thus in terms of numbers alone, it is crucial to recognise the needs of these women. The reality is that recovery from sexual violence is one of the most pervasive problems presently confronting Rwanda.

Secondly, the establishment of a long term peace can only come through the provision of redress to all victims of armed conflict, including women. As the International Human Rights Law Group explains:

27 Refer to the discussion in Section 3 A. Chapter 4 on claims submitted to the UNCC by organs of the UN.
28Danieli, “Preliminary Reflections”. Supra n at p 205.
29More recently, the UNCC has recognised that sexual assault, and mental anguish arising from sexual assault is compensable. Developments flowing from the UNCC’s work are examined in detail in Chapter 4.
Limitations: The "Essentialist" critique

In the above discussion I attempted to draw out some of the common threads regarding the experience of women suffering sexual violence, their position in the community after hostilities have ended, and their needs regarding redress. Clearly care must be taken when attempting to formulate arguments based upon what is good for women as a category. Western feminists have been criticised for attempting to essentialise the experience of all women on the basis of their gender without regard to other aspects of women’s lives. Angela Harris describes gender essentialism as:

"the notion that a unitary "essential" women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."  

Clearly, the needs of women vary depending upon the individual woman’s particular circumstances and preferences. As Swiss and Giller point out, cultural settings determine the ways in which women express their distress following sexual violence, which in turn influence appropriate responses to trauma. Thomas and Ralph address the issue specifically in the context of war-time rape:

"Efforts to focus on gender alone, while understandable in the context of the historical disregard of gender as a motivating factor in human rights abuses, create a different problem, that of oversimplifying the ways in which different women experience human rights abuse. This not only obscures the diversity of women’s experience.


but also may hide the need to craft remedies that are responsive to gender and the many other factors that intersect with it." 37

However this should not justify the paralysis of the international legal system on this issue. The international legal system can and should be responsive to the various trends that are apparent in women’s experience, and make a serious attempt to offer them viable choices regarding redress. The response to the diversity of women’s lives should not be silence, but rather sensitivity and flexibility. 38

3. Case Study: The "Comfort Women"

(A) Background

Prior to, and during the Second World War, thousands of women and girls in the Asia/Pacific region were conscripted into sexual slavery by the Japanese government. 39 They were used to provide sexual pleasure for Japanese troops, and have become known by the euphemism "comfort women". The story of what had happened to these women remained largely buried until the early 1990’s, when a series of claims were filed in Japan by "comfort women" from Korea and the Philippines demanding redress from the Japanese government. 40 Since that time, a number of investigations into the issue have been carried out by governments and NGOs and the matter has been placed on the agenda of the UN. 41 The struggle by surviving "comfort women" to obtain redress for crimes committed against them over 50 years ago continues today.

38 These ideas are developed further in Chapter 3, Section 6D during the discussion of cultural factors influencing the response to sexual violence in Rwanda.
39 The sexual enslavement of women by the Japanese government is thought to have begun as early as 1932. See D. Boling, “Japan Eschews Responsibility” supra n 21 at p 541. For a useful explanation of the historical context in which the sexual enslavement of these women occurred see U. Dolgopol, “Women’s Voices” supra n 21.
(B) Experiences of the "Comfort Women"

Although the total number of comfort women is unknown, estimates suggest a figure in the vicinity of between 100,000 and 200,000 women and girls. The majority of the women were from Korea and Japan, although there is also evidence that women came from China, Taiwan, the Philippines, Indonesia, Holland, Vietnam, Malay, Thailand, Burma and India.

According to Japanese government research, "comfort" stations were established by the Japanese in Japan, China, the Philippines, Indonesia, Malay, Thailand, Burma, New Guinea, Hong Kong, Macao and French Indochina. There is no doubt that the Japanese military was involved in the establishment and operation of the comfort stations. Military records provide evidence of the establishment of comfort stations as official policy.

There is also clear evidence that "comfort women" were recruited by coercion and force. Many of the women and girls were enticed away from their families upon the promise of profitable employment as nurses, factory workers and so on. They subsequently found out that they were required to work as prostitutes by which time they had no means of escaping their situation. Others were recruited by the blatant use of violence or the threat of violence. In some instances the Japanese Imperial Army wiped out whole families and villages in order to capture "comfort women".

Some of the "comfort women" did receive payment. In theory, some of the women received relatively high payment for the time. However, as Hicks reports, most of the money earned or

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42 George Hicks makes reference to the inability to determine precise numbers of "comfort women" which stemmed from the fact that in government documents women were not viewed as a category. Often they were simply listed amongst the supplies. See G. Hicks, Japan's Brutal Regime supra n 1 at p 17. On the basis of available information, Hicks estimates the number of "comfort women" to be 139,000 Comfort Women at most. Ibid p 19.
43 It is estimated that 80 percent of the women came from Korea. See Japan Federation of Bar Associations, Recommendations supra n 40 at p 8.
44 Ibid, p 3.
46 U. Dolgopol, "Women's Voices" supra n 21 at pp 133-134.
47 Japan Federation of Bar Associations, Recommendations supra n 40 p 3.
49 Ibid.
50 Ibid.
saved by comfort women was lost by the end of the war. Many women received no payment at all.

Many did not survive their experience. The women were subject to repeated rape, often accompanied by severe beatings and mutilation. There are reports of Japanese soldiers killing women out of fear that military secrets would be revealed. Women were left to die in battle field conditions, particularly during the last phases of the war. Some women committed suicide as a result of the shame they knew they would endure upon their return home. Many of those who did survive have suffered long-term medical problems caused by the sexual violence they were subjected to. Often permanent damage to their reproductive systems resulted from the cleansing solutions the women were continuously injected with. As well as the physical manifestations of the abuse, there were severe psychological consequences, which were exacerbated by the terrible burden of feeling unable to confide their experiences to anyone. Many "comfort women" describe the detrimental impact that their experience had upon their ability to form intimate relationships in the years following the war, with many feeling unable to marry or to have children.

(C) Claims of the "Comfort Women"

Some months after the "comfort women" issue was raised in the Japanese Diet for the first time in 1990, South Korean women’s groups formed the Voluntary Service Corps Study Association which drafted a letter to the Tokyo government outlining six claims for redress, namely:

1. That the Japanese government admit the forced draft of Korean women as comfort women;
2. That a public apology be made for this;
3. That all barbarities be fully disclosed;
4. That a memorial be raised for the victims;

51G. Hicks, Japan’s Brutal Regime supra n 1 p 92.
52Ibid.
53Ibid pp 152-158.
54These include "uteritis, uterine membrane inflammation, abnormalities of the oviducts, hematemesis, constant menstrual pain, pain in the uterus, treatments for sterility and venereal disease, removal of the uterus and other damage to the uterus and reproductive functions. See Japan Federation of Bar Associations, Recommendations supra n 40 at p 7.
55G. Hicks, Japan’s Brutal Regime supra n 1 at p 94.
56U. Dolgopol, "Women’s Voices" supra n 21 at p 138. Japan Federation of Bar Associations, Recommendations supra n 40 at p 7 reports that the nervous symptoms of the women’s mental suffering include “constant fear, sleeplessness, headaches, depression, and a deep distrust of others.”
57See for example the story of Ri Po Pu from the Democratic People’s Republic of Korea contained in: U. Dolgopol, “Women’s Voices”, supra n 21at pp 145-147.
5. That the survivors or their bereaved families be compensated;
6. That these facts be continuously related in historical education so that such misdeeds are not repeated.58

In response, Japan denied that there was any evidence of the forced draft of Korean women, and further asserted that all compensation claims between Japan and South Korea had been settled by Treaty following the war.59 Subsequently, damning documentary evidence was uncovered and extensively published in the media in January 1992.60 This forced the government to retract its position. In 1993 the Japanese government admitted for the first time the use of "deception, coercion and official involvement in the recruitment of comfort women".61 Several formal apologies have now been made to the survivors, some in the context of diplomatic relations with relevant countries and others within the forum of the UN.62 However, no compensation has been provided to the individual women by the Japanese government. In July 1995, the Japanese government announced the establishment of an Asian Women’s Fund, to be privately funded and used to provide a one-time payment to surviving “comfort women”. The survivors rejected this offer and demanded that compensation be paid by the government on the basis of legal responsibility.63 Their lawsuits are ongoing, and it is predicted that they could take between 10 and 20 years to resolve.64

(D) Insights into Redress for Women

(I) The Historical Failure to Provide Redress for Sexual Violence

The story of the “Comfort Women” clearly demonstrates the historical failure of the international community to provide redress. The only war crimes trials ever held in relation to this incident of forced prostitution were in Dutch Indonesia regarding interned Dutch women.65 The issue was not addressed during the Tokyo War Crimes Tribunal after World War II, and the international legal system has failed to provide these women with a remedy at any time since. Bolling concludes that:

58 G. Hicks, Japan’s Brutal Regime supra n 1 at pp184-185.
59 Ibid. p186.
60 Ibid p 197.
61 Ibid p264.
63 N. Reilly (ed). Without Reservation supra n 6 at p44.
65 G. Hicks, Japan’s Brutal Regime supra n 1, at p 168.
The fact that the contemporary international legal regime is inadequately equipped to provide such a monetary remedy to these women is surely a great failing of the century. An international legal system that makes piracy a violation erga omnes but fails to provide redress for mass rape—which has been a perennial problem during war or occupations—is a moral outrage.”

The International Commission of Jurists takes a similar position, expressing distress at the failure of the international legal system, and Japan, to address violence perpetrated against women in war." The fact that women did not have an opportunity to tell their stories also meant that prevailing myths about their role were never dismantled, causing further damage. As Dolgopol points out:

"references to the "comfort women" in Allied documents either contorted the women's experiences to make them appear responsible or focused on the Japanese military and the "amenities provided to it, thereby making the women objects." 68

The reaction of the women to the Japanese government proposal to set up a privately sourced compensation fund illustrates the need to officially recognise abuses committed against women during armed conflict. It is not simply the money itself that is important, but also what the payment of the money represents. It represents an acknowledgment of the wrong that was done to them.

11. Explanations for Ending 50 Years of Inaction

Another insight provided by the story of the "Comfort Women" relates to the reasons why this issue has now finally emerged after 50 long years of silence. Dolgopol suggests that the initial failure of the Allies to take any action in respect of the atrocities endured by the "comfort women" was motivated by prevailing attitudes to women of the time. Part of this was the belief that it was better to ignore the issue because of the shame it would inflict upon those women. 69

Howard argues that the inaction can also be explained as an attempt by the Allies to keep war reparations to a minimum and to assist in the construction of a Cold War balance in which Japan would become a major capitalist ally of America and Europe. 70 Howard further identifies a number of factors that contributed to the eventual emergence of the issue in Korea during the

66 D. Boling, "Japan Eschews Responsibility?" supra n 21 at p 587.
68 U. Dolgopol, "Women’s Voices", supra n 21, at p 127.
69 Ibid. at p 149 referring to "...overtones of this attitude in Australian military documents."
70 Howard, True Stories supra n 64 at pvii
1990's. Amongst them are: the development of the women's movement; the conduct of primary research on comfort women; and the outpouring in the 1980's of nationalism directed at perceived foreign cultural imperialism. An additional factor is that the surviving former "comfort women" are now very old. Many have outlived their families and now feel they have nothing to lose by coming forward.

(III) Hearing the Voices of the "Comfort Women": The Importance of Redress

A former "comfort woman" Hwang Kûmju tells of the resentment she has felt over her experience. She describes how she has wanted to tell her story to her government but has been denied the opportunity. The sheer relief of telling their story after so many years of silence comes out strongly in the stories of the individual women. Mun Pilgi explains:

"I ...listened to the testimonies of former comfort women on television. To release my pent-up resentment, I reported to the Council in June 1992. I hesitated a lot, but I feel so relieved to pour out the things that have been piled up in my heart for so many years." 74

Similar sentiments are expressed by Yi Yongsu:

"Now, having reported to the Council and after having poured out my story, I feel so relieved. How many more years can I live? I am grateful that the Council is trying to help us. These days I hum a song, Katsu, putting my own words to the tune: "I am so miserable: return my youth to me; apologize and give me compensation. You dragged us off against our own will. You trod on us. Apologize and give us compensation." This lament, can you hear it, my mother and father? My own people will avenge my sorrows." 75

Reading the stories of the "comfort women" is a heart-wrenching experience. What happened to them is a tragedy. As girls and young women, they had everything to look forward to in their lives. Instead from the time they were enslaved, most of these women have lived their lives in despair and poverty. The words of Yi Sunok captures their disappointment and torment:

"My brother and sisters encouraged me to register as a former comfort woman, but I felt so ashamed. In this society, people still talk behind our backs. I would feel humiliated, even if I was to receive compensation. But then, I would feel mistreated if I didn’t get any compensation. Whenever I think of those years, my heart pounds and my whole body is racked with pain. I live now only with the help of my brother and sisters. My wish is to..."

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71 Ibid at p3-4.
72 Ibid at p 7.
73 Ibid. Statement of Hwang Kûmju: I Want to Live Without Being Treated with Contempt p 70 at pp78-79.
74 Ibid. Statement of Mun Pilgi: I So Much Wanted to Study p 80 at p 87. The reference in the statements presented in this section to the "Council" is a reference to the Korean Council for Women Drafted for Military Sexual slavery by Japan.
75 Ibid. Statement of Yi Yongsu: Return My Youth to Me p 88 at p 94.
Certainly, there were and are prevailing cultural factors inhibiting women from speaking out. However, what is the alternative? Certainly the story of the "comfort women" shows that their suffering is only compounded, not minimised by silence. Dolgopol writes that:

"...what occurred was the forced silencing of these women which led to years of emotional and psychological suffering. Their pain could not be voiced, unlike that of the civilian and military prisoners of war. Although no outward recognition was given to their suffering, people knew that something had happened. Rumours abounded which meant that some women were treated harshly by their own societies."  

4. Recognising the Imperative of Redress: The International Legal System

In the introductory remarks to this thesis I considered the extent to which the problem of women and armed conflict generally has been acknowledged within the international legal system. In this section I build on this analysis by specifically considering acknowledgment within the international legal system of the need to provide redress for female victims of sexual violence. I begin by looking at acknowledgment of the need to provide redress to survivors of trauma and crime generally, and conclude by specifically considering support for the provision of redress to female survivors of sexual violence.

(A) Redress for Victims of Human Rights Violations

The development of international human rights law over the past 50 years has added a new dimension to international law's historical pre-occupation with reparations between states in that:

"...obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches. The principle right these victims are entitled to under international law is the right to effective remedies and just reparation."  

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76 Ibid. Statement of Yi Sunok: It Makes Me Sad that I Can't Have Children p 115 at p123.
77 G. Hicks. Japan's Brutal Regime supra n 1 at p241.
78 U. Dolgopol, "Women’s Voices" supra n 21 at p 149.
In July 1990, the UN Commission on Human Rights appointed Theo van Boven as Special Rapporteur for a *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. One of the aims of this study was to prepare a report which could form the basis for the development of principles and guidelines regarding redress for victims of human rights violations. The final report subsequently submitted by the Special Rapporteur, recognises that redress:

"...has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations."  

Since that time the UN Commission on Human Rights has continued to express the hope that redress for survivors of gross violations of human rights will be given "priority attention". A range of international human rights treaties and other documents make reference to the right of individuals to receive an effective remedy at the domestic level. The *Declaration on the Elimination of Violence Against Women* is illustrative. Article 4(d) requires that states:

"Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence: women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, 'to just and effective remedies for the harm that they have suffered. States should also inform women of their rights in seeking redress through such mechanisms." (emphasis added).

Thus within the context of international human rights law, attention is being paid to the development of principles of individual redress to be implemented at the domestic level.

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81 Report on Reparation supra n 79.

"Each State party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity:
(b) to ensure that any person claiming such a remedy shall have his 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, and to develop the possibilities of judicial remedy
(c) To ensure that the competent authorities shall enforce such remedies when granted.

See also Article 8 of the *Universal Declaration of Human Rights*, U.N. Doc. A/811, 10 December 1948 and Article 14(1) of the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 1984.
Acknowledgment within the international legal community of the importance of redress for survivors of human rights abuses is building.\textsuperscript{85}

\textbf{(B) Redress for Victims of Crime}

There has also been recognition within the UN framework of the importance of redress for victims of crime generally. In 1985, the UNGA adopted the \textit{Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power} (Victim's Declaration).\textsuperscript{86} This was prompted by the recognition that insufficient attention had previously been paid to the rights of victims of crime.\textsuperscript{87} Amongst other concerns, the Victim's Declaration recognises the importance of restitution and compensation for victims. Principle 12 stipulates that:

> "When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; and

(b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization."

\textbf{(C) Redress for Female Victims of Sexual Violence During Armed Conflict}

Despite the fact that few specific legal principles have developed regarding redress for female victims of sexual violence during armed conflict, the issue has materialised on the agenda of the international community. The NGO community has been at the forefront of efforts to raise the issue of redress for women. In 1994, a Country Conditions Communication was submitted to the Inter-American Commission on Human Rights by a group of NGOs.\textsuperscript{88} The Communication


\textsuperscript{86}\textit{Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power}, A/RES/40/34 11 December 1985, (hereafter \textit{Victim's Declaration}).

\textsuperscript{87}Ibid, Preamble paragraph 2.

\textsuperscript{88}The groups involved were: Haitian American Women's Advocacy Network, Asoysyan Fanm Ayisyen Nan Boston (Association of Haitian Women in Boston), Fanm Ayisyen Nan Boston (Haitian Women in Boston), Haiti Communications Project, HAITIwomen, MADRE, the International Women's Human Rights Law Clinic at the City University of New York School of Law, the Human Rights Program and the Immigration and Refugee Program at Harvard Law School, the Women Refugees Project of Harvard Law School and Cambridge and
detailed violations of women's human rights, particularly sexual violence, in Haiti during the political turmoil following the military coup d'état against President Jean Bertrand Aristide in September 1991. Although the political turmoil in Haiti did not qualify as armed conflict as that term is defined in international law, the sexual violence suffered by women in Haiti was very similar to that frequently perpetrated against women during armed conflict. The Communication sought a special report from the Inter-American Commission acknowledging that the abuse suffered by Haitian women was a violation of the American Convention on Human Rights, including a violation of article 5 prohibiting torture. It also requested a declaration that the perpetrators should provide compensation and other support to assist victims to recover.\(^{89}\) The authors of the Communication argued that:

"the failure to recognize these wrongs as the most serious type of violation is discriminatory and enhances the suffering of the survivors by shifting the blame from perpetrator to victim and by depriving the victim of outside vindication and confirmation."\(^{90}\)

NGOs have also been a driving force behind raising the issue of redress for women within UN framework.\(^{91}\) During the Vienna Conference on Human Rights in June 1993, a Tribunal heard testimonies regarding violations of women's human rights around the world, including sexual violence during armed conflict. These testimonies included the experiences of the "comfort women", as well as the experiences of women in Palestine, Somalia, Peru, Russia, and the former Yugoslavia.\(^{92}\) A similar Tribunal was held at the 1995 Fourth World Conference on Women in Beijing in 1995.\(^{93}\) The Beijing Tribunal devoted an entire session to detailing human rights abuses against women in conflict situations. Former "comfort women" told their stories as did women from Algeria, Uganda, and Rwanda. The aim of the Tribunal was to provide a public forum in which women could tell their story, record their experiences and raise awareness about

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Somerville Legal Services, the Center for Human Rights Legal Action, the Center for Constitutional Rights, and the law firm of Morrison and Foerster.

\(^{89}\) Communication on Haitian Women, supra n 2, at p41.

\(^{90}\) Ibid p 24. The Inter-American Commission did subsequently report on the situation in Haiti, and acknowledged that the sexual abuse perpetrated against women in Haiti was a form of torture under Article 5(2) of the American Convention on Human Rights, as well as a crime against humanity. See Inter-American Commission on Human Rights, OEA/Ser.L/VI/II.88, February 9 1995, pp43, and 45. However, no express reference was made to the requests regarding compensation and rehabilitation of the female survivors.

\(^{91}\) One of the earliest initiatives was the International Tribunal on Crimes Against Women in Brussels in 1976. This was an NGO response to the first UN Decade on women. See D. Russell & N. Van de Ven (eds) Crimes Against Women: Proceedings of the International Tribunal (California: Frog in the Well 1984).


\(^{93}\) See N. Reilly (ed), Without Reservation supra n 6.
the need to redress the abuses they had suffered.\textsuperscript{94} The two main documents produced at the Beijing Conference, the \textit{Beijing Declaration} and \textit{Platform for Action}, also emphasise the need for women who have been subjected to violence to be provided with adequate redress.\textsuperscript{95}

The UN Commission on the Status of Women has considered the issue of redress for women subjected to sexual violence during armed conflict. An expert group meeting on measures to eradicate violence against women recommended that:

\begin{quote}
"The United Nations should address all manifestations of violence against women in war and conflict situations and should ensure that, as war crimes and crimes against humanity, they are prosecuted in accordance with international law."\textsuperscript{96}
\end{quote}

Further that:

\begin{quote}
"International mechanisms that monitor human rights violations should give due attention to the question of reparations and compensation for women victims of crimes in war, war crimes and crimes against humanity."\textsuperscript{97}
\end{quote}

Redress for women has also been a topic considered by the ECOSOC. Linda Chavez, the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Periods of Armed Conflict, has emphasised the importance of providing reparations for women subjected to sexual violence.\textsuperscript{98} A final example is the recommendation Mr René Degni-Ségui, Special Rapporteur for Rwanda that:

\begin{quote}
"the United Nations should establish an appropriate legal framework to ensure the protection of widows, women raped during the genocide, orphans and unaccompanied children and to guarantee their fundamental rights. For this purpose it would be appropriate to provide compensation for victims through a special fund set up to that effect."\textsuperscript{99}
\end{quote}

\begin{footnotes}
\item\textsuperscript{94} Ibid, p9.
\item\textsuperscript{95} \textit{Platform for Action} supra n 13 paragraphs Para 124(c) (d) and (h).
\item\textsuperscript{97} Ibid, para 75.
\end{footnotes}
5. Redress at the Domestic or International Level?

As described above, international legal norms have developed regarding redress for victims of crime and human rights violations for implementation at the domestic level. However, in this thesis, I examine the provision of redress at the international level through action by the Security Council. In doing so, I must consider whether redress for war-victims is an inappropriate matter for the international legal system, or whether it can be legitimately left to domestic systems.

I acknowledge that redress at the local level is important, and in some respects preferable to redress at the international level. As Swiss & Giller point out:

"Community-based interventions that are sensitive to the local context and methods of healing may be the best approach to treating the wounds of rape in many situations."\textsuperscript{100}

The domestic level will be a particularly appropriate forum for the provision of certain types of redress such as rehabilitation and commemoration. However, I argue that the measures of redress forming the subject-matter of this thesis, namely the prosecution of offenders and the provision of compensation to victims, are appropriate matters of international concern. Further, redress at the local and international levels need not be mutually exclusive. So for example, the creation of an international compensation fund could make money available for localised rehabilitation projects.

In this section I consider two general reasons why redress at the international level is appropriate.

(A) Violations of the Law of Armed Conflict as a Matter of International Concern

Violations of the law of armed conflict are committed during the use of force by states or other international actors. This is a matter at the forefront of international concern, and affects the interests of the international community as a whole.\textsuperscript{101} In the \textit{Einsatzgruppen} Case conducted under \textit{Control Council Law No. 10} after World War II, the Tribunal commented that:

"Murder, torture, enslavement and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations."\textsuperscript{102}

\textsuperscript{100} S. Swiss and J. Giller, "A Medical Perspective", supra n 36, at p 614.
\textsuperscript{101} These themes are developed further in Chapter 2.
\textsuperscript{102} \textit{US v Ohlendorf et al}, (The \textit{Einsatzgruppen} Case), IV Trials of War Criminals 411 (1950) at p 497.
Consequently, the provision of redress at the international level represents an acknowledgment that the world at large recognises and identifies with the interests of the victims. In these circumstances, action at the international level provides an added element of redress for the victims. This sentiment is reflected in the observations of the Yugoslav Commission described earlier, that many victims interviewed experienced particular comfort knowing that persons had travelled from other countries to hear their story and take action on their behalf.\footnote{Refer to discussion supra n 8 and accompanying text on the Yugoslav Commission.} Given that action is already being taken at the international level, we must be vigilant in ensuring that the interests of men and women are equally represented amongst the community of values. Failure to do so sends a powerful signal to victims that their suffering is not a matter of concern to the world at large.

\section*{(B) The Domestic Forum as an Inadequate Guarantee}

History shows that reliance upon the domestic forum has been a comprehensively failed strategy, especially where crimes against women are concerned. Armed conflict frequently leaves the domestic system paralysed and incapable of responding to the needs of victims. As Brunet and Rousseau point out, in times of conflict:

"The structures of recourse become useless, either destroyed or totally controlled by the repressive regime. It is at this crucial juncture that the importance of an international system of recourse for victims of massive violations becomes apparent."\footnote{A. Brunet and S. Rousseau, \textit{Acknowledging Violations, Struggling Against Impunity: Women’s Rights as Human Rights}, Working paper presented at the consultation and planning meeting for the campaign against impunity in Africa, Ouagadougou, Burkina Faso, (International Centre for Human Rights and Democratic Development, March 22-23 1996).}

Thus, very often, the domestic forum is simply not a realistic option. The International Human Rights Law Group makes this point in the context of sexual violence in the former Yugoslavia.\footnote{International Human Rights Law Group, \textit{No Justice, No Peace} supra n 33 at pp 7-8.} Although there have been some domestic prosecutions of Serbian soldiers:

"Such trials likely will be rare...and in any event would take place under conditions in which the independence of the trial court may be in doubt. It is thus clear that the international community must take primary responsibility for ensuring legal accountability..."\footnote{Ibid p 8.}
6. Conclusions

The arguments presented in this Chapter demonstrate that redress, by way of prosecution of perpetrators and the provision of compensation to individual victims, is a crucial component in the recovery of female victims of sexual violence during armed conflict. At the same time, it is important to acknowledge that the experience of women subjected to sexual violence will vary depending upon a range of factors, including their cultural context. In many cultures, it is difficult for women to speak out about sexual violence and the approach taken historically has been to ignore the problem. However, as the case-study of the "comfort women" shows, this cannot be considered a realistic option. In the long-run, condemning women to silence and taking no measures to compensate them simply compounds their suffering and resentment. There is no doubt that redress for sexual violence is a difficult issue, but one that the international community must tackle with tenacity. A brief survey of activity within the UN framework and the international community in general, reveals that there is no shortage of acknowledgment of the importance of redress for women subjected to sexual violence during armed conflict. What remains to be seen is the extent to which the Security Council has implemented measures to provide that redress during action taken to enforce the law of armed conflict. This issue is taken up in the next three chapters.
CHAPTER 2

THE RATIONALE FOR ENFORCEMENT OF THE LAW OF ARMED CONFLICT BY THE SECURITY COUNCIL

Implications For Female Victims of Sexual Violence During Armed Conflict

1. Introduction

In Chapter 1, the reasons why redress is important for female victims of armed conflict were considered. This chapter and those following, are concerned with the extent to which women's need for redress has been recognised and implemented during action taken to enforce the law of armed conflict by the Security Council. The analysis is begun here by examining the rationale behind that enforcement action. To what extent does action to enforcement of the law of armed conflict recognise the victims' need for redress? What are the implications for female victims of sexual violence during armed conflict?

The first step in the analysis is to examine provisions of the law of armed conflict dealing with both prosecution of offenders and the provision of compensation to victims. The nature and content of these provisions provide insight into the rationale of enforcement of the law of armed conflict generally. These provisions also form the basis for the Security Council's action in this area of the law. Throughout the discussion, comparisons are drawn with the enforcement characteristics of international human rights law, in order to assess the extent to which the interests of victims are accorded priority. As will be shown, victim's interests are not a central feature of enforcement provisions of the law of armed conflict, whereas they are in international human rights law.

The second step in the analysis is to look specifically at the rationale behind the action that the Security Council has taken to enforce the law of armed conflict. The Security Council has justified its action as measures necessary to maintain and/or restore international peace and security within its mandate under Article 39 of the UN Charter. I look at the statements made by the Security Council when creating the ICTY and the ICTR in order to identify the basis upon which this action is linked with international peace and security. Several rationales are discernible. However, the dominant theme is that the international community itself was harmed as a result of the commission of acts that shocked the conscience of "mankind".
In the final part of the Chapter I consider the implications of the analysis for female victims of sexual violence. I argue that the extent to which the Security Council takes action to redress sexual violence will depend upon the extent to which the perpetration of these acts is considered to constitute a harm to the international community as a whole. Examination of the grave breach provisions of Geneva Convention IV demonstrates that, at least historically, sexual violence has not been included amongst the most serious crimes committed during armed conflict. The discussion sets the scene for consideration of the Security Council's treatment of sexual violence in the former Yugoslavia and Rwanda in Chapter 3.


A. Compensation for Victims of Armed Conflict

(1) Provisions of the Law of Armed Conflict

There is some recognition within the treaty provisions of the law of armed conflict of a duty to pay compensation for damage arising out of violations of the laws of armed conflict. Article 3 of Hague Convention IV\(^1\) provides that:

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

It is not immediately clear whose losses are to be compensated by virtue of this article, the state's or the individual's? Kalshoven argues that recourse to the records of the Hague Peace Conference show that the delegates intended to lay down a rule relating to a State's liability to compensate losses of individual persons, rather than a rule relating to the international responsibility of one state vis-à-vis another.\(^2\) However, the rule is vague and does not provide individuals with any precise mechanism for presenting their claims. Despite this, Kalshoven maintains that:


the Article is unmistakably designed to enable these people to present their bills directly to the State, i.e. to its competent (military or other) authorities, either during or after the war.\footnote{1}

No provision to the same effect as Article 3 was included in subsequent treaties regulating the law of armed conflict until 1977, when the terms of Article 3 were substantially reproduced in \textit{Protocol I}. Article 91 provides that:

"A party to the conflict which violates the provisions of the \textit{1949 Geneva Conventions} or of this Protocol shall if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

However this time, recourse to the drafting history reveals quite a different purpose behind the adoption of the provision. As Kalshoven explains, Vietnam and other countries sponsoring the Article were primarily concerned to ensure the payment of compensation to states that had been detrimentally affected by violations of the laws of armed conflict. Concern for individual victims was not one of the motivating factors. Indeed it appears that the sponsors may have been unaware of the original significance of Article 3 of \textit{Hague Convention IV}.\footnote{4} Thus it is unclear whether Article 91 gives rise to an individual right to compensation for victims of armed conflict, or confers rights upon states only. Kalshoven takes the approach that in combination, Article 3 of the \textit{Hague Convention} and Article 91 of \textit{Protocol I} provide a right to compensation for both states and individual victims.\footnote{5}

Regardless of the correct theoretical position regarding these articles, compensation claims for individuals have been rarely made in practice. As Fleck comments:

"More often, the victor demands compensatory payment from the defeated without extracting compensation for each individual violation."

Kalshoven also accepts that in practice states conclude lump-sum settlements whereby the vanquished state agrees to:

"...pay a more or less random amount, determined more by its perceived financial capabilities than by any serious attempt to assess the damage caused by the unlawful acts of either party's armed forces; and the victor State may or may not distribute (part of) the money to individual claimants."

\textsuperscript{1} Ibid pp 835-836.  
\textsuperscript{4} Ibid p 846.  
\textsuperscript{5} Ibid pp 846-847.  
\textsuperscript{6} Ibid p 836 (footnote omitted).
There are some examples to the contrary, where compensation has been provided to individuals following armed conflict. In particular, Ferencz describes the program implemented by the Republic of Germany to provide restitution and indemnification for surviving victims of the Holocaust, which provided individual compensation to over three million victims of persecution.

To the extent that these provisions do provide an individual right, the source of compensation is limited. Article 3 of Hague Convention IV imposes obligations on "belligerent parties" which in the context of that Convention means states. Article 91 of Protocol I imposes obligations on a "Party to the conflict" which may include liberation movements as well as states. Clearly, neither of these provisions contemplate the provision of compensation by other relevant actors such as those individuals convicted of war crimes, or the international community at large.

Another limitation is that neither Article 3 of Hague Convention IV nor Article 91 of Protocol I provide victims of violations committed during internal conflicts with a right to compensation. As explained in the introductory remarks to this thesis, the law applying in internal conflicts is primarily derived from Common Article 3 of the Geneva Conventions and Protocol II. Neither contain an equivalent to Article 3 of 1907 Hague Convention IV or Article 91 of Protocol I.

(II) A Comparison with International Human Rights Law

It is clear that existing provisions of the law of armed conflict give very limited recognition to the principle that individuals should be compensated for losses incurred as a result of violations of the law. The interpretation of Article 3 of Hague Convention IV advocated by Kalshoven is the strongest evidence of the existence of a right of individuals to compensation, but the provision has rarely been implemented in practice. The obligation is vague, applies only in respect of international conflicts, and imposes obligations only upon states.

By contrast, as described in Chapter 1, documents forming part of international human rights law frequently contain provisions guaranteeing the victim’s right to an effective remedy. Special Rapportuer van Boven concludes after a survey of the decisions of the Human Rights Committee.

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8 Kalshoven, supra n 2 at p 852.
9 Refer to the discussion in Chapter 1, Section 4A.
that the duties incumbent upon a state that has violated its human rights obligations include *inter alia* the payment of compensation to the victim or to the victim's family.  

B. Prosecution of Perpetrators

(1) The Grave Breach System

The essence of the enforcement mechanism contained in the *Geneva Conventions* and Protocol I is the grave breach system, whereby certain violations of the law are designated as grave breaches.  

Article 147 of *Geneva Convention IV* dealing with the protection of the civilian population lists the following acts as grave breaches:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) unlawful deportation or transfer or unlawful confinement of a protected person;
(e) compelling a protected person to serve in the forces of a hostile Power; or
(f) wilfully depriving a protected person of the rights of fair and regular trial prescribed by the present Convention; or
(g) taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

State Parties have a duty to search for those who are alleged to have committed grave breaches and if found within their territory, to bring them before their courts or alternatively to extradite

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10 T. van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (Final Report Submitted by Mr Theo van Boven, Special Rapporteur to the Commission on Human Rights) U.N. Doc. E/CN.4/Sub.2/1993/8 (hereafter van Boven report) at para 56. The Inter American Court of Human Rights has also commented that:

"The State has a legal duty to take reasonable steps to prevent human rights violations and to use means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation."


"The Court (in Velasquez Rodriguez) stated that the obligation to ensure the free and full exercise of the rights recognized in the (American) Convention to every person subject to its jurisdiction implies the duty of every state to organize the governmental apparatus in such a way that this goal could be juridically ensured. States must therefore prevent, investigate, and punish any violation of such rights, and, if possible, attempt to restore the right violated and provide for compensation."

11 The *Geneva Conventions* supra Introduction n 15. each contain provisions regarding grave breaches. See Articles 50/51/130/147 respectively.
them for prosecution. Consequently grave breaches give rise to compulsory universal jurisdiction. Not only do states have the right to exercise jurisdiction over persons committing grave breaches, but they have a positive obligation to do so. In respect of all other (i.e. non-grave) breaches, State Parties are subject to the less rigorous duty to take measures necessary to suppress those breaches. Meron points out that universal jurisdiction may also arise in respect of non-grave breaches. The difference is that grave breaches entail an *obligation* to prosecute, whereas other violations may simply give rise to a *right* to prosecute. Further, Article 148 stipulates 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 (grave) breaches...”

The grave breach system in the *Geneva Conventions* is incorporated into and supplemented by *Protocol I*. The effect of the grave breach system is to create a hierarchy for enforcement of the law of armed conflict with some violations of the law considered to be more important than others. While all breaches are technically violations of the laws of armed conflict, states are only obliged to take enforcement action in respect of the crimes enumerated as grave breaches.

(II) Individual Criminal Responsibility

The law of armed conflict is an unusual area of international law in that it imposes obligations directly upon individuals, and entails individual criminal responsibility. By contrast, human rights claims at the international level do not involve criminal liability for individual perpetrators. Only states are responsible at the international level for violations of human rights. As the Inter-American Court of Human Rights has stated:

“The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather is to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.”

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15 See Articles 11, 85(3), and 85(4) of *Protocol I*, ibid. Article 85(5) of *Protocol I* characterises these grave breaches as well as those in the *Geneva Conventions* as war crimes.
16 Refer to discussion in section 4(A)(IV) of the Introduction on individual criminal responsibility within the law of armed conflict.
This focus on the victim follows from the general aim of international human rights law. For example, the *International Covenant on Civil and Political Rights* (hereafter *ICCPR*) refers to the aim of ensuring the “inherent dignity” and the “equal and inalienable rights of all members of the human family”.

(III) Treaty Monitoring Bodies and Individual Access to Proceedings

Many international human rights treaties create committees or commissions which are charged with various functions aimed at overseeing the implementation of the treaty. For example, Article 28 of the *ICCPR* establishes the Human Rights Committee to perform this task.\(^\text{18}\)

The Geneva Conventions and Additional Protocols do not create special committees or commissions charged with overseeing the implementation of the Conventions. However, they do provide for a system of “protecting powers”, which theoretically provide some scope to individuals to complain about violations of the provisions of the Conventions.\(^\text{19}\) Article 11 of the *Geneva Convention IV* provides that:

“The High Contracting parties may at any time agree to entrust to an organisation which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention...”

In general terms, it is the duty of the appointed Protecting Powers to scrutinise the application of the *Convention*, and to safeguard the interests of the Parties to the conflict.\(^\text{20}\) Other aspects of their duty include: the right of protected persons to make application to the Protecting Powers;\(^\text{21}\) the right of protected persons detained in occupied territories to be visited by delegates of the Protecting Power;\(^\text{22}\) and the right of internees to be represented before Protecting Powers.\(^\text{23}\)

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\(^{18}\) Pursuant to Article 40 of the *ICCPR*, States are required to report to the Committee regarding the measure they have adopted to give effect to the *Convention*. Articles 41 and 42 regulate the submission of complaints to the Committee by states. Other examples are Article 8 of the *International Convention on the Elimination of All Forms of Racial Discrimination* establishing the Committee on the Elimination of Racial Discrimination; and Article 17 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, establishing the Committee on the Elimination of Discrimination Against Women.


\(^{20}\) *Geneva Convention IV*, supra Introduction n 8, Article 9. See also Article 12 *Geneva Convention IV* regarding the good offices of the protecting power.

\(^{21}\) Ibid Article 30.

\(^{22}\) Ibid. Article 76.
system of Protecting Powers is characterised by "informality" and "confidentiality". There is no public inquiry. The International Committee of the Red Cross (ICRC) also receives special recognition under the *Geneva Conventions*.

In practice this system of protecting powers has not been implemented, and the ICRC has been left as the most important body overseeing enforcement of the law of armed conflict. However, the ICRC's primary concern is to ensure that its humanitarian activities are not prejudiced. Accordingly, it adopts a policy of strict neutrality, which prevents it from publicly denouncing breaches of the law. As Burgos points out, the approach of the ICRC is one of "quiet diplomacy" rather than "public denunciation".

The treaty provisions of the law of armed conflict do not provide any mechanisms for individual victims to initiate proceedings in their own right to seek redress for wrongs committed against them. Under the *Geneva Conventions* there is some scope for individual complaints to be made to the ICRC in the absence of a protecting power. However, there is no scope for individuals to petition for legal redress. It is up to States to take action at the national level, or to cooperate at the international level in the creation of a war crimes tribunal. Consequently, there is no individual access to redress. Again, this contrasts with the position under international human rights law, where there is some scope for individual petition. For example, the Optional Protocol to the *ICCPR* provides a mechanism whereby individuals may bring claims at the international level for breaches of that Convention.

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23 Ibid, Article 102.
24 Wieruszewski, "Individual Complaints" supra n 19 at p 450.
25 For example, Articles 10, 30, 76, 105, and 109 of *Geneva Convention IV* supra Introduction n 8, make reference to the role of the ICRC.
27 Wieruszewski, "Individual Complaints" supra n19 at pp 448-449.
(IV) Limited Recognition of Victim's Needs

In summary, enforcement provisions of the law of armed conflict focus primarily on the punishment of individual perpetrators, rather than the provision of redress to victims. The Geneva Conventions and Protocol I employ the grave breach system to identify those violations that are considered most serious by the international community, and states are obliged to take action to prosecute persons suspected of having committed these violations. By contrast, international human rights law focuses more directly upon the needs of the victim, including the victim's need for compensation. The lack of attention to the needs of victims within the law of armed conflict is underscored by the fact that no permanent monitoring body exists to oversee the implementation of the Geneva Conventions or Additional Protocols, and that individuals have no right to petition for redress of violations.

3. The Security Council and Enforcement of The Law of Armed Conflict

In the 1990's the Security Council has assumed a major role in enforcing the law of armed conflict. Thus for the first time, it becomes possible to talk about enforcement of the law of armed conflict at the international level. Collective enforcement action at the international level is not something that is expressly contemplated in the enforcement provisions of the Geneva Conventions, which as described above, impose obligations upon individual states to take action at the domestic level to prosecute breaches of the law. However, given that this development has now occurred, it is important for the purposes of the present work, to examine the rationale behind the Security Council's enforcement action. I do so with a view to determining the extent to which the interests of victims have been recognised.

29Although the International Military Tribunals at Nuremberg and Tokyo after World War II are often referred to as international war crimes prosecutions, in fact they were not international. The agreement to conduct the prosecutions was established by the four major allied countries, the United States of America, Britain, France and the U.S.S.R. although 19 other states subsequently adhered to this Agreement. See A. Roberts and R. Guelff (eds.), Documents on the Laws of War (2nd ed.), (Oxford: Clarendon Press, 1989), p 153. Thus as Meron has pointed out, the Tokyo and Nuremberg Tribunals were multi-national rather than international. T. Meron, Public Lecture, University of Adelaide Law School, Australia, August 1996.

30Meron comments that:

"Surely, states can do jointly what they may do severally, especially when joint action is undertaken through the Security Council".

See T. Meron, "International Criminalization" supra n 13 at p 564.
4. Rationale for Security Council Action to Enforce the Law of Armed Conflict

Pursuant to Article 24 of the UN Charter (hereafter Charter), the Security Council has primary responsibility for maintaining and restoring international peace and security. Chapter VII of the Charter sets out the power of the Security Council to take action with respect to threats to the peace, breaches of the peace, and acts of aggression. Specifically, Article 39 empowers the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken in accordance with Articles 41 and 42 (of the Charter), to maintain or restore international peace and security." Article 41 relates to the use of non-forceful measures such as economic sanctions, and Article 42 relates to the use of forceful measures.

When the Security Council has taken action to enforce the law of armed conflict it has done so on the basis that the action was a legitimate part of its mandate with respect to international peace and security under Chapter VII of the Charter. To date, action taken by the Security Council to enforce the law of armed conflict consists of the creation of the UNCC and the two ad-hoc war crimes tribunals, namely the ICTY and the ICTR.

(A) The Creation of the UNCC

In resolution 687 (1991), the Security Council decided to create a fund to pay compensation for damages arising out of Iraq's 1990 invasion of Kuwait, and to create a Commission to administer the fund. The Secretary General was requested to report on various aspects of the creation of the fund and Commission.31 In resolution 692 (1991) the Security Council decided to establish the Fund and Commission in accordance with the report submitted by the Secretary General.32 In resolution 705 (1991) the Security Council determined that Iraq would be required to contribute a maximum of 30 percent of its annual oil exports of petroleum and petroleum products to the Fund.33 Additional sources of revenue were to be frozen funds from the export of Iraqi petroleum immediately prior to the embargo, as well as voluntary contributions.34

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In the pre-amble to Resolution 687 creating the UNCC, the Security Council referred to its goal of restoring international peace and security in the region and stated that it was acting under Chapter VII of the Charter.\(^{35}\) In paragraph 16 of the resolution, the Security Council set out its basis for the establishment of the UNCC, namely that Iraq was liable under international law for:

"any direct loss, damage, including environmental damage, and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait."\(^{36}\)

As J. De Preux explains:

"A state which resorts to war in violation of the principle of Article 2, paragraph 4, of the United Nations Charter may be held responsible for all damages caused by such a war, and not only for those resulting from unlawful acts committed in the sense of *jus in bello*..."\(^{37}\)

Consequently, it was primarily the fact of Iraq’s unlawful invasion, or violation of the *jus ad bellum*, that prompted the creation of the UNCC. It is well known that there were also serious violations of the *jus in bello* committed by Iraq during the Gulf War.\(^{38}\) To the extent that these formed part of the over-all illegal conduct condemned by the Security Council, the creation of the UNCC can also be viewed as an application of those provisions of the law of armed conflict requiring the payment of compensation for violations of the law of armed conflict.\(^{39}\) Moreover, what is relevant for present purposes, is that the actual effect of creating the UNCC was to make compensation available to victims of violations of the laws of armed conflict.

**(B) The Creation of the ICTY**

The creation of the ICTY involved a two-step process. In Security Council resolution 808 (1993), the Security Council expressed grave concern over the reports of widespread violations of


\(^{39}\) Refer to above the discussion in section 2A above.
international humanitarian law and determined that the situation in the former Yugoslavia constituted a threat to international peace and security.\textsuperscript{40} It stated that, in the circumstances of the former Yugoslavia, the establishment of an international criminal tribunal would achieve the aim of bringing to justice those persons responsible for violations of international humanitarian law, and would contribute to the restoration and maintenance of peace.\textsuperscript{41} The Council did not expressly state the provisions in the \textit{Charter} upon which the creation of the ICTY was based. However, the reference to the restoration and maintenance of peace suggests that it was based upon Article 39, and that it was a measure taken in accordance with Article 41 (non-forceful measures). This was confirmed in the report prepared by the Secretary General pursuant to Security Council Resolution 808.\textsuperscript{42} The Secretary General stated that:

"the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 39 of the Charter, but one of a judicial nature... As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia."\textsuperscript{43}

In Resolution 827 (1993), the Security Council reiterated that the situation in the former Yugoslavia constituted a threat to international peace and security, and that the establishment of the Tribunal would contribute to the restoration and maintenance of peace.\textsuperscript{44} This time the Security Council expressly stated that it was acting under Chapter VII of the \textit{Charter} in establishing the ICTY and adopting the governing Statute proposed by the Secretary General.

It is clear that the creation of the ICTY is an application, at the international level, of the principle that persons committing violations of the laws of armed conflict are individually criminally responsible for those breaches. The Security Council determined that the prosecution of individuals suspected of violating the law of armed conflict would contribute to the restoration and maintenance of international peace and security. What is the rationale behind the Security Council's decision to take this action? A consideration of the statements made by members of the Security Council at the time enforcement action was decided upon are illustrative.

\textsuperscript{40} S/RES/808 (1993), 22 February 1993 pre-amble paragraphs 1-7.
\textsuperscript{41} Ibid. pre-amble paragraphs 8 and 9.
\textsuperscript{42} Ibid. paragraph 2 requests the Secretary General to prepare a report on the establishment of the Tribunal.
\textsuperscript{44} S/RES/827 (1993), 25 May 1993, pre-amble paragraphs 3, 4 and 6.
(1) Deterrence

When the ICTY was established, the conflict in the former Yugoslavia was ongoing. One reason given for the creation of a tribunal was to try to halt violations in the conflict. The objective of deterrence was reflected in the terms of resolution 827 in which the Security Council stated its belief that:

"...the establishment of an international tribunal and the prosecution of persons responsible...will contribute to ensuring that such violations are halted and effectively redressed." 45

Several countries thought the establishment of the ICTY would also be a deterrent to the commission of war crimes in future conflicts. 46 For example, during the adoption of resolution 808, the representative of Spain referred to the "dual objective of meting out justice and discouraging such grave violations in the future." 47 At the time that resolution 827 was adopted, the representative of the United Kingdom stressed the need to make it clear to individuals committing war crimes that they would be held accountable. 48

(II) The Role of Justice in Establishing Lasting Peace

Another common theme was the crucial role that war crimes prosecutions would play in achieving a lasting peace in the region of the former Yugoslavia. At the time resolution 808 was adopted, the representative for Hungary pointed out that bringing the perpetrators of crimes to justice was an integral part of achieving a lasting settlement of the entire conflict. 49 as did the representative for Spain. 50 In respect of resolution 827, the representative for Hungary again emphasised the fact that in order to achieve lasting peace in the former Yugoslavia, those committing atrocities should be brought to justice. 51

48 Record for Res 827, supra n 46 at p 189.
49 Record for Res 808, supra n 46 at p 170.
50 Ibid, at p 172.
51 Record for Res 827, supra n 46 at p 192.
(III) Crimes that Shock the Conscience of the International Community

The dominant theme however, was the need to take action to protect the interests of the international community and to defend the rule of law. During the adoption of resolution 808 the representative of Venezuela cited the opening address of Judge Robert H Jackson at Nuremberg who referred to crimes:

"so deliberate and so devastating that our civilization cannot allow them to be ignored, for mankind could not survive a repetition of such crimes." 52

The representative of Hungary said that:

"As in 1945, the conscience of Europe and the world cannot allow those who have ordered and committed violations of international humanitarian law-and who cynically and blindly continue to do so- to escape justice." 53

During the adoption of resolution 827 (1993) the representative of Venezuela referred to the need to address "crimes affecting the very essence of the civilized conscience..." 54 The representative of Brazil referred to the deep shock and outrage that Brazil and other countries had felt when hearing of the atrocities committed in the former Yugoslavia, which "could not in any way be tolerated by the international community." 55

(IV) Redress for Victims

There were references to the needs of victims by some member states of the Security Council. During the adoption of resolution 808, the representative for France emphasised the need to ensure that justice was obtained for victims as well as the international community. 56 During the adoption of resolution 827, countries emphasising the need for victims to be compensated included Spain, Venezuela, the United States of America, and Morocco. 57

52 Record for Res 808, supra n 46 at p 169.
53 Ibid p 171.
54 Record for Res 827, supra n 46 at p181.
55 Ibid p 200.
56 Record for Res 808 supra n 46 at pp 163-164.
57 Record for Res 827 supra n 46 at p 205.
58 Ibid p181.
59 Ibid, p188.
60 Ibid, p196.
(C) Creation of the ICTR

The Security Council used a similar, albeit one step, process to establish the ICTR. In resolution 955 grave concern was expressed over the flagrant violations of international humanitarian law committed during the conflict in Rwanda, and a determination was made that this situation continued to constitute a threat to international peace and security. The Security Council further determined that the prosecution of violations of international humanitarian law in Rwanda would contribute to the restoration and maintenance of peace.\(^1\) As with resolution 827, the Security Council expressly stated that it was acting under Chapter VII of the Charter in establishing the ICTR and adopting its Statute.\(^2\) The statements made by representatives in the Security Council in 1994 during the adoption of resolution 955 establishing the ICTR fall into similar categories to those made at the time the ICTY was created.

(I) Retribution and Deterrence

Retribution featured as a rationale for the creation of the ICTR. The Russian representative stated that he believed the main task of the ICTR was to hand out the punishment deserved by those violating the law of armed conflict.\(^3\) Other delegations, such as the United Kingdom referred to the deterrence function of the ICTR.\(^4\)

(II) The role of Justice in Establishing a Lasting Peace

As with the ICTY, the role that war crimes prosecutions play in the establishment of a lasting peace and national reconciliation was highlighted by several representatives. The Russian representative recognised that one purpose of the ICTY was to:

"promote the process of national reconciliation, the return of refugees, and the restoration and maintenance of peace in Rwanda."\(^5\)

The Spanish representative said that:

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\(^2\) Ibid, paragraph 1.


\(^4\) Ibid p 6.

\(^5\) Ibid.
"...in addition to investigating the facts and punishing the guilty, the Tribunal will make its biggest contribution by helping to restore the rule of law in Rwanda and by serving the purposes of justice and reconciliation between all the Rwandese."**

The representative for Rwanda also made reference to the contribution that the ICTR would make to national reconciliation.** Similarly, the representative of Oman pointed to the role of the ICTY in promoting national reconciliation and the eradication of the "tradition of impunity" which he saw as a factor contributing to the events of April 1994 in Rwanda in the first place.

(III) Crimes that Shock the Conscience of the International Community

Again, the dominant theme was the need to take action to protect the interests of the international community, and in particular, the interest that the international community has in the prevention and punishment of the crime of genocide. The French representative referred to the need to punish persons who have engaged in "acts so serious that they are repugnant to the conscience of mankind." He referred to the ICTR's role of serving justice on behalf of all mankind.** The representative of New Zealand also referred to the heinousness of genocide and the fact that the prosecution of perpetrators was of "fundamental importance to the international community as a whole."** The United Kingdom representative referred to the fact that the violations committed in Rwanda concerned the international community as a whole.** The representative of the Czech Republic stated that, even though Rwanda was an internal conflict, its consequences affected the entire international community because "fundamental principles of international humanitarian law were violated."** The representative for Rwanda also believed that the international community should be involved because it, as well as Rwanda, was harmed by the genocide and other massive violations of international humanitarian law. In particular, given that genocide is a crime against humankind the international community as a whole should take action to suppress it.**

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**Ibid p 11.
68Ibid p 17.
69Ibid p 3.
70Ibid p 4.
72Ibid pp 6-7.
73Ibid p 14.
5. Crimes that Shock the Conscience of the International Community

From the preceding discussion, it is clear that a range of factors prompted the creation of the ICTY and the ICTR. However, the need to take action in response to crimes that shock the conscience of “mankind” was a dominant theme. These sorts of crimes inflict injury upon the international community as well as the individuals specifically affected. Justice Louise Arbour, the present Prosecutor for the ICTY and the ICTR, has referred to the notion that victimisation of the individual can constitute victimisation of the world at large, as: “universal victimisation”. What kinds of crimes fall into this category? What factors will determine the extent to which individual victimisation equals “universal victimisation”?

As described in the introduction to this thesis, the ICTY has subject-matter jurisdiction over: grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity. The ICTR has subject-matter jurisdiction over genocide: crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. These areas of subject-matter jurisdiction fall into two general categories. Crimes against humanity and genocide are crimes on a mass scale. To establish the former, evidence must be produced that designated acts were inter alia carried out as part of a widespread or systematic attack against any civilian population. Genocide, as incorporated into the ICTY Statute and ICTR Statute mirrors Article II of the Genocide Convention, and requires proof of certain acts committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Thus the critical element of the crime of genocide is the presence of a specific intent to destroy a group. Robinson points out that:

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74 Refer to discussion on the appointment of Justice Arbour in Chapter 3, Section 6E(II). The comments by Justice Arbour referred to here were made during a public lecture at the University of Toronto Law School on 27 February 1997.

75 Article 3 ICTR Statute. The Report of the Secretary-General Regarding the ICTY states, at para 48, that:

“Crimes against humanity refer to inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”.


77 Article 4 ICTY Statute. (Annexed to Secretary-General’s Report Regarding the ICTY supra n 43) Article 2 ICTR Statute, (contained in S/RES/955 (1994) 8 November 1994) and Article II, Genocide Convention. Ibid.
"Groups consist of individuals, and therefore destructive action must, in the last analyses be taken against individuals. However, these individuals are important not per se but only as members of the group to which they belong." \(^{78}\)

By contrast, the remaining areas over which subject-matter jurisdiction has been granted can generally be established by proof of isolated crimes.\(^{74}\) Causing serious bodily injury to one enemy civilian will qualify as a grave breach of the Geneva Conventions. The murder of one civilian amounts to a violation of the laws or customs of war. The torture of one civilian constitutes a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The only criteria appears to be that the crime reach a certain magnitude of "seriousness". This is reflected in the formal title of the ICTY which is "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991" (emphasis added).

Similarly, the official title of the ICTR is "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994" (emphasis added). In the case of grave breaches of the Geneva Conventions this criteria is prima facie met. Their designation as grave breaches in the Geneva Conventions in the first place reflects an assessment of their seriousness.\(^{80}\) The meaning of "violations of the laws or customs of war" as contained in Article 3 of the ICTY Statute was considered by both the Trial and Appeal Chambers in the Tadić Jurisdiction case.\(^{81}\) In particular, the Appeals Chamber held that Article 3 covers all violations of international humanitarian law other than "grave breaches" of the Geneva Conventions, provided they are "serious". By this the Court meant that there must be "a breach of a rule protecting important values, and the breach must involve grave consequences for the victim."\(^{82}\)


\(^{79}\)The provision relating to appropriation of property may be an exception to this. Pictet states that:

"To constitute a grave breach, such destruction and appropriation must be extensive: an isolated incident would not be enough."


\(^{82}\)Decision of the Appeals Chamber P 52.
This emphasis on “serious” crimes is also present in the ILC’s work regarding the creation of an International Criminal Court. Article 20(c) of the ILC’s 1994 Draft Statute for an International Criminal Court includes “serious violations of the laws and customs applicable in armed conflict” amongst the categories of crimes over which the proposed court would have jurisdiction. The ILC’s commentary to the provision states that:

“not all breaches of the laws of war will be of sufficient gravity to justify their falling within the jurisdiction of the Court, and paragraph (c) is accordingly limited by the use of the phrase “serious violations”. 84

6. Conclusions: Implications for Female Victims of Sexual Violence During Armed Conflict

A. Compensation for Female Victims of Sexual Violence During Armed Conflict

Enforcement provisions of the law of armed conflict give relatively minimal consideration to the issue of compensation for individual victims. This is the case for all victims of armed conflict, including female victims of sexual violence. On the one occasion when the Security Council has acted to provide compensation for victims, there was a clear aggressor, and its action was precipitated by breaches of the jus ad bellum rather than the jus in bello. Obviously from the victim’s point of view, as long as compensation is provided, it makes no difference if their harm is legally attributed to breaches of the jus ad bellum or the jus in bello. During the creation of the ICTY and ICTR there was some recognition by delegates in the Security Council of the need to ensure that victims are compensated, but it was not a dominant consideration. This forms the background for the discussion in Chapter 4 regarding the Security Council’s attempts to provide compensation for victims of armed conflict generally, and for victims of sexual violence in particular.

83 For further discussion of the ILC’s work on an international criminal court, see the concluding remarks of this thesis.
B. Prosecution of Sexual Violence Committed Against Women During Armed Conflict

The Security Council's determination that the prosecution of persons who have violated the laws of armed conflict can contribute to the maintenance and/or restoration of international peace and security is groundbreaking and paves the way for greater enforcement of this body of law at the international level. The Security Council has taken action to prosecute offenders who have violated the laws of armed conflict where those violations are considered to shock the conscience of the international community, and thereby constitute a harm to the international community as a whole. Such "universal victimisation" can arise from the mass nature of the act, or because there has been a breach of a rule protecting values the international community considers to be important, and which involves grave consequences for the victim. Thus in theory, the extent to which action will be taken to prosecute sexual violence against women depends upon the extent to which these acts are considered to reach the required threshold of seriousness.

To what extent is the perspective of women taken into account when this hierarchy of values is determined? This inquiry is similar in nature to Charlesworth and Chinkin's analysis of the concept of *jus cogens* in international law, which exposes the underlying assumptions or rationale upon which the concept of *jus cogens* is based. Charlesworth and Chinkin write that *jus cogens* norms in international law are presented as protecting the most fundamental interests of international society. Importantly:

"*Jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experience of life. Thus the fundamental aspirations attributed to communities are male and the assumptions of the scheme of world order assumed by the notion of *jus cogens* are essentially male. Women are relegated to the periphery of communal values." 

The argument made by Chinkin and Charlesworth is not that women do not receive equal protection regarding those harms that are protected against, but that these are not the harms in respect of which women need protection most. This analysis provides an important starting point for assessing the hierarchy of values evident in Security Council efforts to enforce the law of armed conflict. For example, as pointed out above, the grave breach system of *the Geneva Conventions* is the basis of the enforcement mechanism contained in the *Geneva Conventions*.

85 See discussion on this point by T. Meron, "War Crimes in Yugoslavia and the Development of International Law", (1994) 88 AJIL 78 at p 79.
87 Ibid., at p 66.
88 Ibid., at p 67.
89 Ibid., at p 70.
and forms an integral part of the subject-matter jurisdiction of the ICTY. Sexual violence is not expressly designated as a grave breach, although the view that sexual violence fits within other categories of grave breaches has recently gained acceptance. Nonetheless, the absence of an express reference to sexual violence is a reflection of the historical failure to appreciate the seriousness of sexual violence for women, and of the failure to incorporate the perspective of women into the assessment of the types of harms the international community considers to be most serious. Clearly the issue is complex and requires consideration of a range of relevant factors. The process is begun in the next chapter by considering the Security Council’s response to sexual violence in the former Yugoslavia and Rwanda.

*Ref* Meron points to the view of the ICRC that rape falls within the grave breach of “wilfully causing great suffering or serious injury to body or health” and to the view of the U.S. Department of State that rape constitutes a grave breach under the Geneva Conventions and customary international law. T. Meron, “Rape as a Crime Under International Humanitarian Law”. (1993) 87 AJIL 424 at pp 426-427.
CHAPTER 3
PROSECUTING SEXUAL VIOLENCE AGAINST WOMEN DURING ARMED CONFLICT

Comparing Security Council Responses to Sexual Violence in the Former Yugoslavia and Rwanda

"The fact that the rape of women in the wars in the former Yugoslavia captured world attention provides no guarantee that it will also disappear from history, or survive, at best, as an exceptional case. The apparent uniqueness of the rape directed overwhelmingly against Bosnian-Muslim women as part of a genocidal campaign of "ethnic cleansing" is a product of the invisibility of the rape of women in history as well as in the present. Geopolitical factors—that this rape is being perpetrated by white men against white, albeit largely Muslim women, is occurring in Europe, and contains the seeds of a new world war—cannot be ignored in explaining the attention given to these rapes."\(^1\)

"In February, 1995, nine months after the news of horrific massacres in Rwanda was front-page news, the massive scope of rape in that conflict was first reported in the European press... Women’s shame and unwillingness to speak about rape only partially explains the deafening silence."\(^2\)

1. Introduction

At first glance, the unprecedented reaction to sexual violence against women in the former Yugoslavia appears to signal a decisive change in recognising crimes committed against women during armed conflict. Outrage over the treatment of women during that conflict has prompted a deluge of scholarly consideration highlighting the historical invisibility of sexual violence in armed conflict, and demanding redress for the women who have survived sexual violence in the conflict in the former Yugoslavia.\(^3\) On several occasions, the Security Council expressed grave

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\(^2\) Ibid p 245.

concern over the treatment of women in the former Yugoslavia, and fact-finding teams were sent in with specific instructions to investigate sexual violence. Concern for the situation of women was present during the Security Council’s discussions regarding the establishment of the ICTY and the ICTY itself has made an effort to address sexual violence, and associated issues.

However, an examination of the response to sexual violence during the conflict in Rwanda approximately two years later tells a vastly different story. The Security Council did not refer to sexual violence during its deliberations regarding the conflict. Sexual violence has not been accorded priority by UN fact-finding and investigative missions, nor by the ICTR. The purpose of this chapter is to examine the paradoxical response to sexual violence in these two conflicts. This examination is necessary in order to perform a realistic assessment of the extent to which the perspective of women has been included in Security Council action to enforce the law of armed conflict.

The chapter is divided into several sections. Section two contains an examination of the nature and extent of sexual violence perpetrated during the conflicts in the former Yugoslavia and Rwanda. Fact-finding and investigative missions of the UN and NGOs are considered. This discussion assists the analysis in two ways. First, the extent to which fact-finding missions were established and dispatched to investigate sexual violence in each of the conflicts is of itself, a measure of the international community’s response to sexual violence. Second, the reports of these missions contain the factual information needed to understand the way sexual violence was used in each of the conflicts. This forms an important basis for the discussion in the remainder of the chapter that considers reasons why different responses are apparent.

In section 3, the Security Council's reaction to the sexual violence in the former Yugoslavia is examined. This analysis describes the extent to which sexual violence was considered during the Security Council's discussion of the conflict and the role it played in the Council's decision to ultimately establish the ICTY. This section also contains an analysis of the consideration given to sexual violence within the framework of the ICTY. The governing documents of the ICTY are examined, along with the approach taken by the OTP including the indictments issued, and prosecutions conducted to date. Section 4 follows the same format, but considers the response of the Security Council to sexual violence during the conflict in Rwanda, and the steps taken by the ICTR to address sexual violence. Sections 3 and 4 provide further support for the argument that the Security Council has responded differently to sexual violence in each conflict. Section 5 draws together the observations made in the previous sections and concludes that sexual violence in the former Yugoslavia has received much greater consideration by the international community, than the sexual violence in Rwanda.

In section 6, a number of possible reasons for the different response to sexual violence in the former Yugoslavia and Rwanda are examined. Some of the reasons stem from practical and political realities, and others raise aspects of feminist theory regarding the exclusion of issues of concern to women from international law. This examination assists in determining whether the attention given to sexual violence in the former Yugoslavia demonstrates a real change in attitude regarding the need to provide redress to women, or whether sexual violence in that conflict was somehow considered unique.

2. Sexual Violence and Armed Conflict in the Former Yugoslavia and Rwanda

(A) The Motives for Sexual Violence During Armed Conflict

Writers who have considered the nature of sexual violence during armed conflict identify a number of factors that motivate the crime including the view that it is: a means of troop mollification; part of the spoils of war; a weapon of national humiliation and the destruction of

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male pride\(^a\): a weapon for inflicting national terror;\(^a\) a weapon of retaliation and revenge\(^a\); and a weapon of "ethnic cleansing" and the destruction of a people.\(^a\) Regardless of the reasons behind the infliction of sexual violence, it is always experienced by the individual women as a most violent, terrifying and horrific assault.

(B) Sexual Violence During the Armed Conflict in the Former Yugoslavia

Reports of mass rape in the former Yugoslavia first emerged towards the end of 1992.\(^b\) Since that time, a number of fact-finding investigations have been carried out.

(1) \textit{United Nations' Investigations into Sexual Abuse in the Former Yugoslavia}\(^c\)

Within the UN framework there were two primary efforts to investigate violations of the law of armed conflict in the former Yugoslavia. In August 1992, the Human Rights Commission appointed Mr Tadeusz Mazowiecki as Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia.\(^d\) In January 1993 the Special Rapporteur dispatched an international team of medical experts to investigate rape.\(^e\) In February 1993 the Special Rapporteur reported that rape had been used as an instrument of ethnic cleansing in Bosnia-Herzegovina and Croatia, and that those in positions of power appeared to have made no effort to

\(^a\)Ibid pp 32-34; and J. Kalajdzie "Rape and Representation" supra n 3 at pp 466-467.
\(^d\)Sauer, Ibid pp 38-41; and T. Tompkins supra n 4 pp 866-868 discussing rape as genocide.
\(^b\)In addition to UN efforts to investigate sexual abuse in the former Yugoslavia, the European Community sent a mission headed by Dame Ann Warburton to investigate the treatment of Muslim women in the former Yugoslavia. See Letter dated 2 February 1993 from the Permanent Representative of Denmark to the United Nations Addressed to the Secretary-General U.N. Doc. S/25240, 3 February 1993. The Mission considered the most likely estimate of numbers of victims of sexual abuse to be around 20,000. (see para 14).
prevent the rapes. Further reference to rape was made in subsequent reports filed by the Special Rapporteur.

In 1992 the Security Council requested the establishment of a Commission of Experts (hereafter *Yugoslav Commission*) to investigate the situation in the former Yugoslavia. The mandate given to the Yugoslav Commission was to report to the Secretary-General with conclusions on the evidence of grave breaches of the *Geneva Conventions* and other humanitarian norms in the former Yugoslavia. The ultimate purpose was to enable this evidence to be used as a basis for prosecutions. The Yugoslav Commission worked in close cooperation with Special Rapporteur Mazowiecki. Generally the latter would conduct preliminary investigations of sites, and if sufficient evidence was found to warrant further investigation the matter would be referred to the Yugoslav Commission.

Throughout its fact-finding the Yugoslav Commission gave serious consideration to the issue of sexual violence. The Yugoslav Commission's interim report referred to allegations of "widespread and systematic rape and other forms of sexual assault" which led to "several specific investigations into these allegations." Systematic sexual assault was listed as one of the general areas to be given priority in future investigations.

In accordance with its undertaking, the Yugoslav Commission gave significant attention to sexual assault, and this is reflected in the final report submitted. Approximately 1,100 reported cases of sexual violence were examined. A team of psychologists and psychiatrists were sent along

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15See for example *Fifth Periodic Report* supra n 12, and *Sixth Periodic Report*, supra n 12.
18Ibid.
19Ibid, para 17.
20Ibid, para 58.
21Ibid, para 66(c).
with the lawyers conducting the interviews. This was the first time that lawyers and mental health professionals had worked together in a UN field mission of this type. Most of the cases investigated occurred in Bosnia and Herzegovina between April and November 1992. Several patterns of rape were identified. First, there were sexual assaults by individuals or small groups as part of looting and intimidation before generalised fighting began in an area. Secondly, there were sexual assaults by individuals or groups in conjunction with fighting in a particular area. Thirdly, there were sexual assaults by individuals or groups of detainees. Fourthly, there were sexual assaults by individuals or groups of women held specifically for the purpose of being sexually assaulted and for the purpose of harming the woman. In this situation, perpetrators frequently stated they were trying to impregnate the women, and pregnant women were detained until it was too late for termination. Finally, there were sexual assaults carried out in detention camps for the perpetrator's gratification. The Yugoslav Commission also found evidence that men were subjected to sexual assault. Many victims reported to the Yugoslav Commission that perpetrators made comments about raping pursuant to orders, and stated the objective of ensuring victims and their families would be driven from the area.

The Yugoslav Commission concluded that although all sides to the conflict perpetrated sexual violence, the vast majority of victims were Bosnian Muslims, and the vast majority of perpetrators were Bosnian Serbs, and that Serbs reportedly ran over 60 percent of the detention sites where sexual assault occurred. A number of factors were cited as evidence of an over-all pattern of sexual assault in the former Yugoslavia including:

- similarities among practices in non-contiguous geographic areas;
- simultaneous commission of other humanitarian law violations;
- simultaneous military activity;
- simultaneous activity to displace civilian populations;
- common elements of the commission of rape and sexual assault
- maximizing shame and humiliation to not only the victim, but also the victim’s community; and

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22 Yugoslav Commission Final Report, supra n 24 at para's 494 and 494.
23 ibid. para 485.
24 ibid. para 486.
25 ibid. para 482.
26 ibid. para 488.
27 ibid. para 481.
• the timing of the alleged rapes and sexual assaults." 11

The Yugoslav Commission concluded that:

"These patterns strongly suggest that a systematic rape and sexual assault policy exists, but this remains to be proved. It is clear that some level of organization and group activity is required to carry out many of the alleged rapes and sexual assault. One factor, in particular that leads to this conclusion is the large number of allegations of rape and sexual assault which occur in places of detention... These custodial cases do not appear to be random and indicate a policy of at least tolerating rape and sexual assault or the deliberate failure of camp commanders and local authorities to exercise command and control over the personnel under their authority." 12

(II) NGO Investigations into Sexual Violence in the Former Yugoslavia

A number of NGOs have also completed fact-finding investigations into sexual violence in the former Yugoslavia. 13 These reports generally accord with the conclusions drawn by the Yugoslav Commission. For example Amnesty International agrees that sexual violence was perpetrated:

"in an organized or systematic way, with the deliberate detention of women for the purpose of rape and sexual abuse. Such incidents would seem to fit into the wider pattern of warfare, involving intimidation and abuses against Muslims and Croats which have led thousands to flee or to be compliant when expelled from their home areas out of fear of further violations." 14

However, Amnesty is somewhat cautious about alleging an express military strategy of rape:

"Whether rape has been explicitly singled out by political and military leaders as a weapon against their opponents remains open to question. What is clear is that so far effective measures have rarely, if ever, been taken against such abuses, and that in practice local political and military officers must have had knowledge of, and generally condoned, the rape and sexual abuse of women..."

As outlined above, the Yugoslav Commission was also cautious on this point stating that although there were many indications, a military strategy of rape was yet to be proved. 15

The report completed by Human Rights Watch on sexual violence in the former Yugoslavia focuses upon rape perpetrated in detention camps, particularly the Omarska and Trnopolje

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11 Ibid. para 496.
12 Ibid. para’s 492 and 497.
15 However, some media reports allege incidents of soldiers being ordered to commit rapes. See for example, Roy Gutman, Rape Camps: Evidence in Bosnia Mass Attacks Points to Karadzic’s Pals. N.Y. Newsday, Apr 19 1993 at 7 31. cited in L. Fletcher et al. No Justice, No Peace supra n 10.
detention camps. The report also refers to a strategy of deliberately impregnating women.

(C) Sexual Violence During the Armed Conflict in Rwanda

Whereas sexual violence during the conflict in the former Yugoslavia has been a significant focus of attention, it is less widely known that in Rwanda sexual violence was also perpetrated against women on a massive scale during the conflict in 1994. There have been some efforts at the international level to document sexual violence during the conflict in Rwanda. However these efforts have not been as comprehensive, or accorded as much priority as was the case in the former Yugoslavia. As demonstrated in the subsequent discussion, it has largely been left to the NGO community to draw attention to the issue.

(1) UN Investigations of Sexual Violence in Rwanda

The UN created structures to investigate violations of the law of armed conflict in Rwanda similar to those created to investigate the situation in the former Yugoslavia. The Human Rights Commission appointed Mr René Degni-Ségui as Special Rapporteur for Rwanda. Some of his more recent reports recognise the particular vulnerability of women during the conflict in Rwanda, and make specific reference to sexual violence. In his January 1996 the Special Rapporteur reported that "(r)ape was systematic and was used as a "weapon" by the perpetrators of the massacres..." and that "(a)ccording to consistent and reliable testimony, a great many women were raped: rape was the rule and its absence was the exception." The report estimates the number of rape victims to be between 250,000 and 500,000. However, it appears that the Special Rapporteur did not actually carry out any primary investigations regarding sexual

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16 Human Rights Watch (Helsinki Watch). War Crimes in Bosnia-Herzegovina 1993, pp 18, 163-186.
17 Ibid, p 21
19 Jan 96 Report Ibid, para 16.
20 Ibid.
violence. Instead, he relies upon information provided from other sources. The Special Rapporteur's January 1997 report also addresses sexual abuse. Again, the report primarily relies upon investigations of sexual abuse carried out by NGOs such as Human Rights Watch.\footnote{Jan 97 Report supra n 38, para 29.}


The Rwanda Commission's Final Report does make reference to sexual violence, although it is given limited consideration.\footnote{Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. Doc. S/1994/1405 of 9 December 1994, (hereafter Rwanda Commission Final Report).} Reference is made to allegations regarding the rape and abduction of women and girls compiled by NGOs particularly African Rights. The Rwanda Commission states that it considers rape an egregious breach of international humanitarian law and a crime against humanity. There is some discussion of the legal norms prohibiting rape. Finally, the Report recommends that the prosecutor:

"explore fully the relation between the policy of systematic rape under a responsible command as a crime against humanity on the one hand, and such a policy as a crime of genocide, on the other."

It is apparent that, although both the Special Rapporteur and the Rwanda Commission recognised that sexual violence had occurred during the conflict in Rwanda, there was virtually no effort made to conduct primary investigations into it. A more informal report on gender-specific violations of human rights during the conflict in Rwanda was compiled by Maricela Daniel of the United Nations High Commission for Refugees (UNHCR) in 1995 (hereafter Daniel Report).\footnote{Maricela Daniel, Community Services Coordinator UNHCR, Report on Assignment to Rwanda 12 June to 24 July 1995, (hereafter Daniel Report), copy on file with author.}
The report is based upon information collected by the Human Rights Field Officers (HRFOs) in Rwanda. This information suggests that most of acts of sexual violence were committed during the course of the genocide by the militia and the general population.\textsuperscript{26}

In discussing possible motives for the rapes, Daniel refers to the commonly held Hutu perception that Tutsi women were more beautiful than Hutu women, and to the dissemination of Hutu propaganda that Tutsi women were unreliable.\textsuperscript{27} The report expresses the view that Tutsi women were considered part of the spoils of war, and that "aggressors derived satisfaction and a sense of superiority from the humiliation, terror and helplessness of the victim."\textsuperscript{28} The report refers to allegations received by staff assisting the Special Rapporteur that Rwandese Patriotic Front (RPF) soldiers also perpetrated gender-specific human rights violations, but concludes that they appear to be relatively isolated cases.\textsuperscript{29}

\textit{(II) NGO Investigations of Sexual Violence in Rwanda}\textsuperscript{30}

One of the first NGOs to raise the issue of sexual violence perpetrated against women in Rwanda was African Rights, a London based human rights NGO, which published a report on the Genocide in Rwanda in 1994 and then a revised report in 1995.\textsuperscript{31} The 1995 report estimates that thousands of Tutsi women were raped,\textsuperscript{32} and identifies two rationales behind the rape. First, there was a clear perception that women were property. Much of the sexual violence was perpetrated by militias who considered women to be the spoils of war. African Rights cite Emmanuel Sagahutu, a Hutu in Kigali who said:

"These uneducated thugs had moved into villas surrounded by televisions, videos and nice furniture. Now, they wanted a beautiful woman to complete their victory."\textsuperscript{33}

\textsuperscript{26}Ibid. p 8.
\textsuperscript{27}Ibid p 8.
\textsuperscript{28}\textit{Daniel Report}, supra n 45 p 8.
\textsuperscript{29}Ibid. p 10.
\textsuperscript{31}African Rights, \textit{Rwanda: Death, Despair and Defiance,} (Revised 1995 Edition), thereafter \textit{African Rights Report.} The report is in excess of 1,000 pages, of which about 50 pages are specifically concerned with the rape and abduction of women and girls.
\textsuperscript{32}Ibid. p 748. "Interahamwe" is the collective term for militia groups in Rwanda.
\textsuperscript{33}Ibid. p 750.
Many women were forced into sexual slavery during the conflict in Rwanda. Often, women were rescued from death, only to become the sexual slaves of their rescuers. There is evidence that abducted women were taken as ‘wives’ by their captors. There is also reference to women being bought and sold among the interahamwe.

The second rationale identified is the use of sexual violence as a method to terrorise the Tutsi community. African Rights expressed the view that the use of rape is genocidal, in that:

"It destroys the fundamental fabric of interpersonal relations that constitutes a community. It shatters the sense of security and identity of the victim, and isolates her from her family and community."

However, the report acknowledges that there was no evidence of specific instructions to the interahamwe to rape women.

In 1996, Human Rights Watch released a fact-finding report documenting sexual violence during the genocide in Rwanda. On the basis of existing evidence, Human Rights Watch conclude that virtually every female in Rwanda who had reached adolescence and who survived an attack by the militia was subsequently raped. Estimates range from between 250,000 to 500,000 raped women. Human Rights Watch also report that women were collectively and individually forced into sexual slavery.

Human Rights Watch suggest a number of reasons for the perpetration of sexual violence in Rwanda. As in the Daniel Report, reference is made to the fact that Hutus considered Tutsi women to be more beautiful than Hutu women. Consequently they were:

"targeted because of the gender stereotype which portrayed them as beautiful and desirable, but inaccessible to
Hutu men whom they allegedly looked down upon and were “too good” for.”

Reference is made to Hutu propaganda portraying Tutsi women as “calculated seductress-spies” who were deliberately used by the Tutsi’s to infiltrate the Hutu ranks.” The purpose of rape was “to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi woman.”

Like African Rights, Human Rights Watch argues that a genocidal pattern to sexual violence in Rwanda is perceptible. Specifically:

“The genocidal intent behind sexual violence in the Rwandan genocide emerges from both the overall pattern of sexual violence and the individual cases of abuse, documented in different parts of the country during different phases of the genocide. The pattern of sexual violence in Rwanda shows that acts of rape and sexual mutilation were not accessory to the killings, nor, for the most part, opportunistic assaults. Rather, according to the actions and statements of the perpetrators, as recalled by survivors, these acts were carried out with the aim of eradicating the Tutsi. Taken as a whole, the evidence indicates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people.”

3. The Security Council and the ICTY: Responses to Sexual Violence in the Former Yugoslavia

(A) The Security Council and Sexual Violence in the Former Yugoslavia

The Security Council made reference to sexual violence in former Yugoslavia on a number of occasions during its consideration of the conflict.” There is little doubt that the reports of systematic sexual violence perpetrated against women were one of the considerations prompting the Security Council’s decision to create the ICTY. In resolution 808 in which the creation of a tribunal was proposed, the Security Council expressed (again), its grave concern over the treatment of Muslim women in the former Yugoslavia.” In resolution 827 in which the Statute

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"Ibid.
"Ibid. pp 16-18.
"Ibid. p 18.
"Ibid. p 35.
"See for example: S/RES 798 (1992) 18 December 1993 condemning the systematic detention and rape of women and demanding that all detention camps, particularly those for women be immediately closed; S/RES 820 (1993) 17 April 1993, condemning the massive, organized and systematic detention and rape of women, and reaffirming the individual responsibility of the perpetrators; S/RES 827 (1993) 25 May 1993 expressing alarm at the systematic detention and rape of women; and S/RES 1019 (1995) 9 November 1995 expressing concern over reports of rape and deportation of civilians.
of the Tribunal was adopted, the Security Council made a further express reference to the "massive organized and systematic detention and rape of women." Statements made by members of the Security Council when resolution 808 and 827 were adopted also lend support to the proposition that the sexual violence against women was one of the foremost concerns in establishing the ICTY. For example, United States representative Madeline Albright stated that:

"The International Tribunal will prosecute the rapists and murderers and their superiors."''

(B) The ICTY and Sexual Violence

(1) Scope for Addressing Sexual Violence in the Former Yugoslavia: The Statute and Rules of Procedure and Evidence

The two main sources of rules regulating the proceedings before the ICTY are its Statute (hereafter ICTY Statute) and its Rules of Procedure and Evidence, (hereafter ICTY Rules). These documents facilitate the prosecution of sexual violence in several ways.

First, express reference to rape is found in Article 5 of the ICTY Statute which lists rape as a crime against humanity whenever it is "committed in armed conflict, whether international or internal in character and directed against any civilian population..." The Report of the Secretary General regarding the ICTY contains the further requirements that the act be part of a "widespread or systematic attack committed on national, political, ethnic racial or religious..."
grounds."4

Secondly, both the ICTY Statute and ICTY Rules make provision for the protection of victims and witnesses. It was largely the anticipated prosecutions for sexual violence that prompted these provisions.5 Experience of sexual assault prosecutions at the domestic level has demonstrated the need for an approach that minimises the trauma suffered by victims when testifying. This was considered particularly important in the case of the former Yugoslavia where sexual violence was used as a means of terrorising and repressing the civilian population. Any re-enforcement of that effect through unnecessary confrontation in Court would undermine the integrity of the proceedings. Further the ICTY commenced operation while the conflict in the former Yugoslavia was ongoing. Consequently, victims and witnesses were likely to have very real concerns for their safety. Many still live within the territory of the former Yugoslavia. Finally, the ICTY is not able to provide a witness protection program akin to those used at the domestic level in criminal cases. The ICTY Statute reflects the need to protect witnesses and victims, but at the same time requires that this objective be balanced against the rights of the accused.6 As contemplated by the ICTY Statute, the ICTY Rules give further consideration to the issue of victim and witness protection.7 They stipulate inter alia that a Victims and Witnesses Unit be

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4 Secretary-General’s Report Regarding ICTY supra n 71, para 48. These requirements were subsequently incorporated into the corresponding provision of the ICTR Statute (Article 31). See the discussion on the ICTR Statute and crimes against humanity infra section 4B.

5 See Secretary-General’s Report Regarding ICTY, ibid, para 108, which states:

"In light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault." (emphasis added).

6 Article 20(1) of the ICTY Statute supra n 71 stipulates:

"The Trial Chamber shall ensure that a trial is fair and expeditious and the proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

Article 21 specifying the accused’s right to a fair and public hearing is expressly made subject to Article 22 which states:

"The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."

7 The relevant provisions are found in Rules 34 (establishment of a victims and witnesses unit). 39 (Prosecutor's power to take special measures to provide for the safety of potential witnesses and informants). 40 (Prosecutor's
established.\textsuperscript{78} The purpose of this Unit is to "recommend protective measures for victims and witnesses"\textsuperscript{79}, and to "provide counselling and support for them, in particular in cases of rape and sexual assault."\textsuperscript{80}

Thirdly Rule 96 of the ICTY Rules regulates evidence in cases of sexual assault. The rule states that no corroboration of the victim's testimony is required;\textsuperscript{81} that no defence of consent can be raised where violence, duress, detention or psychological oppression, or the threat of fear thereof, has occurred, and that, in order to put forward evidence of consent, "the accused must satisfy the Trial chamber in camera that the evidence is relevant and credible..."\textsuperscript{82}; and that no evidence shall be admitted regarding the prior sexual conduct of the victim.\textsuperscript{83} Rule 96 is an effort to avoid the unfairness inherent in many rules regulating prosecutions for sexual violence at the domestic level. It reflects an appreciation of the particular difficulties confronting victims of sexual violence during armed conflict.\textsuperscript{84}

\textbf{(II) The OTP: Responses to Sexual Violence in the Former Yugoslavia}

The Prosecutor makes all decisions regarding the investigation and prosecution of crimes.\textsuperscript{85} Consequently the Prosecutor's attitude to addressing sexual violence is critically important. In the case of the ICTY, the OTP has stated that it:

\begin{quote}
"...is currently undertaking investigations into serious violations of humanitarian law committed in the former Yugoslavia, specifically sexual assaults. These investigations cover sexual assaults perpetrated against women, men or minors during military take-overs in detention centres and camps."\textsuperscript{86}
\end{quote}

\textsuperscript{78}power to request States to take all necessary measures to prevent the injury to (or intimidation of a victim or witness).
\textsuperscript{79}Rule 34, ICTY Rules, supra n 72.
\textsuperscript{80}Rule 34 (A) (I), ibid.
\textsuperscript{81}Rule 34 (A) (ii), ibid.
\textsuperscript{82}Rule 96(I), ibid.
\textsuperscript{83}Rule 96(ii) and (iii), ibid. For a discussion of the amendment history of this provision see P. Viseur-Sellers and K. Okuizumi, "Intentional Prosecution" supra n 3 at pp 52-53.
\textsuperscript{84}Rule 96(iv), ICTY Rules, supra n 72.
\textsuperscript{85}For further discussion of this rule see P. Viseur-Sellers & K. Okuizumi, "Intentional Prosecution" supra n3 at p 52.
\textsuperscript{86}ICTY Statute supra n 71, Article 16.
Although the ICTY Statute itself only expressly lists rape as a crime against humanity, indictments have been issued by the OTP charging rape as a grave breach of the Geneva Conventions, a violation of the laws and customs of war, and as a crime against humanity. In the indictment issued against Radovan Karadžić and Ratko Mladić on July 25 1995, both men were charged with command responsibility for sexual violence committed by their subordinates. These acts were charged as genocide on the basis that they caused serious bodily or mental harm to members of the group and deliberately inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part. They were also charged as a crime against humanity. In the Čelebići indictment issued in March 1996, sexual violence against women was charged as both a grave breach and as a violation of the laws and customs of war by means of torture. The Foča indictment of June 26 1996, charged sexual violence against women as torture and also as a crime against humanity by enslavement. Thus the approach taken by the OTP is to recognise that sexual violence can be charged implicitly under all categories of the ICTY’s subject-matter jurisdiction.

In October 1996 the Secretary-General reported that sexual assaults accounted for 22 per cent of all counts charged in indictments issued by the OTP. The indictments deal with sexual violence against both men and women. In June 1996 the first ever indictment was issued dealing exclusively with sexual violence. Two months into the Tadić case, the first prosecution brought before the ICTY, a further milestone was reached when the Trial Chamber heard the first

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1. See for example, in re Meačić & Others: Indictment (The Prosecutor V Meačić & Others), 1994 ICTY No 95-4-1 (Nov 4), (hereafter Meačić) charging sexual violence against women as a grave breach by willfully causing great suffering. See also in re Dušan Tadić and Goran Borovnica: Indictment, (The Prosecutor V Tadić and Goran Borovnica), 1995 ICTY No IT-94-1-I (Feb 13) Amended Dec 1 1995, and Dec 14 1995, charging sexual violence against women as a grave breach by willfully causing great suffering. However, this charge was subsequently withdrawn prior to trial.
2. Meačić. Ibid. charging sexual violence against women as a violation of the laws or customs of war by subjecting the victim to cruel treatment.
3. Meačić. Ibid. For further discussion of the ICTY indictments charging sexual violence see P. Viseur-Sellers and K. Okuizumi, “Intentional Prosecution” supra n 3 at pp 54-56.
8. Report of the Secretary General on the Rape and Abuse of Women, supra n 86, para 22.
testimony in history from women at the international level regarding wartime rape. The testimony was used as general evidence against Tadić. The Čelebici prosecution, which is presently proceeding before the ICTY, involves several charges of sexual violence.

The OTP has also taken seriously the need to provide protection to witnesses and victims, particularly those in sexual abuse proceedings. In accordance with the ICTY Rules, the Prosecutor has requested and been granted a range of protective measures for victims and witnesses. These include the use of pseudonyms; the redaction of court transcripts to delete reference to the victim's identity; the giving of testimony in camera; testimony by one way closed circuit television; scrambling of victims' and witnesses' voices and images; and the banning of photographs, sketches or videotapes of victims and witnesses. The most controversial aspect of the protective measures granted by the ICTY has been the decision to allow the identity of some victims and witnesses to be kept from the accused even at the trial stage. The ICTY decisions on witness protection demonstrate an appreciation of the way that women are affected by sexual violence and their subsequent experience in the legal system.

Another important development is the establishment of the Victims and Witnesses Unit (hereafter Unit) which became operational in April 1995. It aims to provide counselling on the legal rights of victims and witnesses and also to provide psychological help and support. It is envisaged that the Unit will deal mainly with female victims of sexual violence, and a
commitment has been made to hiring qualified women wherever possible.\textsuperscript{102} The Unit has a support officer who is experienced in dealing with cases of sexual assault.\textsuperscript{103} and guidelines have been established for the provision of child-care and other support services for victims and witnesses.\textsuperscript{104}

4. The Security Council and the ICTR: Responses to Sexual Violence in Rwanda

(A) The Security Council and Sexual Violence in Rwanda

In contrast to the former Yugoslavia, the Security Council did not make reference to the sexual violence perpetrated against women during its discussion of the conflict in Rwanda.\textsuperscript{105} Whereas in resolutions 808 and 827 establishing the ICTY, sexual violence against Muslim women was specifically referred to, sexual violence against women in Rwanda was not discussed at all in resolution 955 creating the ICTR. Nor was sexual violence mentioned even once during the discussion in the Security Council prior to and following the adoption of resolution 955, which again, contrasts with the situation with respect to the former Yugoslavia.

(B) The ICTR and Sexual Violence

(i) Scope for Addressing Sexual Violence in Rwanda: The Statute and Rules of Procedure and Evidence

As with the ICTY, the two main sources of rules regulating the proceedings before the ICTR are its Statute (hereafter ICTR Statute)\textsuperscript{106} and its Rules of Procedure and Evidence, (hereafter ICTR Rules).\textsuperscript{107} The ICTR Statute is substantially the same as the ICTY Statute.\textsuperscript{108} Similarly the ICTR

\textsuperscript{104}Ibid, p 31 para 120.
\textsuperscript{105}The Security Council did make specific reference to the deaths of innocent civilians including women on several occasions. See for example, S/RES/912 (1994) and S/RES/918 (1994). However, no reference was made to acts of sexual violence against women.
\textsuperscript{106}The ICTR Statute was adopted by the Security Council pursuant to resolution 955 (1994), 8 November.
Both Tribunals have jurisdiction over genocide and crimes against humanity. The main difference is that whereas the ICTY has jurisdiction over grave breaches of the Geneva Conventions and violations of the laws or customs of war, the ICTR has jurisdiction over violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.¹⁰⁹ This is a reflection of the fact that Rwanda is primarily classified as an internal conflict, whereas the former Yugoslavia has elements of both an internal and international conflict.¹¹⁰ Reference is made to rape in two articles of the ICTR Statute. Article 3 dealing with crimes against humanity is in similar terms to Article 5 of the ICTY Statute, and expressly refers to rape.¹¹¹ Article 4(e) regarding violations of Article 3 common to the Geneva Conventions and of Additional Protocol II also expressly refers to rape as well as “enforced prostitution and any form of indecent assault.”

The ICTR Statute reflects the same effort to balance the protection of witnesses and victims against the rights of the accused as the ICTY Statute.¹¹² The ICTR Rules regarding witness protection are in the same terms as the ICTY Rules regarding witness protection.¹¹³ Although the

¹¹⁰ ICTR Statute supra n 106, Article 4.
¹¹¹ Refer to discussion on the classification of these conflicts contained in the Introduction to this thesis.
¹¹² The main difference between Article 3 of the ICTR Statute and Article 5 of the ICTY Statute is that the former expressly includes the requirement that the crimes be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds...” This was absent from the latter, but clearly an essential element of the crime when regard is had to the Secretary General’s Report on the ICTY supra n 71, para 48.
¹¹³ Article 19(1) of the ICTR Statute is in the same terms as article 20(1) of the ICTY Statute. Article 20 (2) specifying the accused’s right to a fair and public hearing is expressly made subject to Article 21 which states:

“The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.”

¹¹⁴ Rules 34 (establishment of a victims and witnesses unit), 39 (Prosecutor’s power to take special measures to provide for the safety of potential witnesses and informants), 40 (Prosecutor’s power to request States to take all necessary measures to prevent the injury to or intimidation of a victim or witness), 65 (Trial Chamber can only order release of a detained accused if satisfied it will not pose a danger to any victim or witness), 69 (Prosecutor’s power to apply for non-disclosure of identity of a victim or witness), 71 (providing for testimony by way of depositions) 75 (power of Judge or Chamber to order protective measures for victim’s and witnesses at the trial stage), 79 (Power of Trial Chamber to order closed sessions), 89 (rules of evidence to ensure a fair trial) 96 (Evidence in cases of sexual assault), are in the same terms as the corresponding rules for the ICTY.
**ICTR Rules**. like the **ICTY Rules**, stipulate that a Victims and Witnesses Unit shall be established. Slow progress has been made in this respect, and this has significantly hampered the preparation of cases for trial.\(^{114}\)

The **ICTR Rules** contain provisions to the same effect as the **ICTY Rules** regarding corroboration: the circumstances under which a defence of consent can be raised; and the prohibition on prior sexual conduct of the accused in sexual assault cases.

(II) **The OTP: Responses to Sexual Violence in Rwanda**

The available evidence suggests that the **ICTR** has made very few moves to investigate sexual violence. According to Human Rights Watch:

> "the manner in which the International Criminal Tribunal for Rwanda has been conducting its investigations strongly suggests that unless it takes active steps, it may fail to mount even one rape prosecution. The Tribunal has been using methodology and investigative procedures that preclude it from effectively obtaining rape testimonies in Rwanda."\(^{115}\)

The first prosecution proceeding before the ICTR is against Jean Paul Akayesu, who was the bourgmestre (mayor) of the Taba commune during the 1994 conflict. The indictment originally issued contained no charges of sexual violence.\(^{116}\) However, during the course of testimony, evidence of sexual violence within the Taba commune became apparent. In June 1997, an amended indictment was issued charging sexual violence as genocide and as a crime against humanity.\(^{117}\) No other indictments charging sexual violence have been issued to date.

5. **Comparing the Response to Sexual Violence in the Former Yugoslavia with the Response to Sexual Violence in Rwanda**

UN fact-finding missions for the former Yugoslavia gave extensive consideration to the issue of


\(^{115}\)Human Rights Watch, *Shattered Lives*, supra n 59, p 94.

\(^{116}\)In re Jean Paul Akayesu: Indictment (The Prosecutor V Jean Paul Akayesu), 1996 ICTR No 96-4-I (12 Feb 1996).

\(^{117}\)Ibid (amended June 1997).
sexual violence, and carried out primary investigations relating to it.\textsuperscript{118} By contrast, missions for Rwanda referred to sexual violence in an incidental manner, and relied primarily upon reports compiled by NGOs.

The Yugoslav Commission was preoccupied with the connection between ethnic cleansing and sexual violence. The Yugoslav Commission’s final report shows that the existence of detention camps in which sexual violence was perpetrated and the relationship between these camps was a major focus of attention.\textsuperscript{119} Although no definitive proof was uncovered of a systematic rape and sexual violence policy, there was clearly a widely held perception that such a policy existed.

On the other hand, sexual violence in Rwanda appears to have more closely reflected the traditional pattern of sexual violence during armed conflict. It was motivated by the view that women were property and was used to terrorise. Although African Rights and Human Rights Watch have both argued that there were genocidal aspects, there does not appear to be the same widespread perception that a systematic policy of sexual violence was employed. Certainly there was no evidence of detention camps created specifically for the perpetration of sexual violence, nor of sexual violence committed pursuant to orders.

Sexual violence perpetrated against Muslim women in the former Yugoslavia was one factor prompting the Security Council’s determination that violations of the laws of armed conflict in the former Yugoslavia constituted a threat to international peace and security, and its subsequent decision to establish the ICTY. By contrast, sexual violence in Rwanda was not part of the Security Council’s determination that violations of the law of armed conflict in Rwanda constituted a threat to international peace and security. The Security Council’s decision to establish the ICTR was primarily based upon the Rwanda Commission’s \textit{Preliminary Report}, which made no reference to sexual violence.\textsuperscript{120}

\textsuperscript{118} It should be noted that the conduct of the Yugoslav Commission’s “rape inquiry” has been subject to criticism. In particular two members of the Commission (Grever and Cleiren) withdrew from the inquiry over disagreement as to how it would be conducted. See \textit{Yugoslav Commission Critiques} supra n 23 at pp 91-95. However, the fact that it was initiated and carried out at all is of significance for present purposes.


There is no doubt that the response of the ICTY to sexual violence represents substantial progress in terms of recognising the wrongs done to women during armed conflict. Even so, some concerns remain. The first indictment issued by the ICTY was against Dragan Nikolić in relation to acts alleged to have taken place at the Sušica detention camp in eastern Bosnia and Herzegovina. The indictment contained no charges of sexual violence. A hearing was held in the matter pursuant to Rule 61 of the ICTY Rules from 9-13 October 1995. In cases where an arrest warrant has been issued but not executed, Rule 61 allows the Prosecutor to submit the indictment to a Trial Chamber, together with supporting evidence for the indictment. This procedure is done in the absence of the accused. The trial chamber then determines whether there are reasonable grounds for believing the accused has committed the acts alleged.

During the course of the Nikolić Rule 61 hearing, several witnesses gave testimony regarding sexual violence at Sušica camp. In its judgment, the Trial Chamber invited the Prosecutor to amend the indictment to include charges of sexual violence. The Chamber, comprised of Judge Jorda, Judge Odio Benito and Judge Riad pointed out that:

"From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women and girls were subjected to rape and other forms of sexual assault during their detention at Sušica camp. Dragan Nikolić and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances."

"The Trial Chamber feels that the prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches of war crimes."

The question arises as to why these cases of sexual violence were not investigated and charged earlier?

Another problem with the prosecution of sexual violence before the ICTY is that little has actually been tested because of the inability to take defendants into custody. The arrest of suspects by NATO and their subsequent transfer to The Hague in June and July of 1997 may,

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122 If so, an international arrest warrant is issue, and the Security Council can be informed. See Rule 61(D) and (E) ICTY Rules supra n 72, and ICTR Rules supra n 107.
perhaps signal greater hope in this respect in the future.124

Despite these criticisms and difficulties, it is clear that the prosecution of sexual violence has received serious consideration and very real efforts have been made to facilitate the prosecution of sexual violence before the ICTY.

There is as much scope for addressing sexual violence before the ICTR as there is before the ICTY. Indeed the express reference to rape in two provisions of the ICTR Statute as compared to one provision in the ICTY Statute may actually strengthen the scope for prosecuting these types of offences. This is particularly the case given that Article 4 of the ICTR Statute expressly lists rape, enforced prostitution and indecent assault as violations of Common Article 3 and Additional Protocol II. Violations of this article are easier to prove than crimes against humanity (the only offence in which express reference is made to rape in the ICTY), because it is not necessary to show the violations took place "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". The ICTR also has as much scope as the ICTY for giving priority to witness protection and minimising the trauma of victims of sexual violence testifying before it.

While a very positive development, the existence of such provisions in the documents governing the ICTR do not necessarily demonstrate a commitment to providing redress for these crimes. Clearly, the ICTR Statute and ICTR Rules are, to a large extent, simply a reproduction of the ICTY Statute and ICTY Rules. One wonders what the situation would have been had the ICTR been created first. On the other hand, obviously the reference to sexual violence in Article 4 of the ICTR Statute cannot be explained as a mere reproduction since there is no equivalent article in the ICTY Statute. However Article 4 is, for the most part, a verbatim reproduction of Article 4 of Protocol II which makes express reference to "rape, enforced prostitution and any form of indecent assault" amongst a range of other acts. Consequently, it does not appear that the inclusion of this provision was a reflection of particular concern over the perpetration of sexual violence in Rwanda.125 This argument is reinforced by the silence on the issue leading up to the

125 No reference is made to sexual abuse in the Secretary-General's Report on ICTY, supra n 101.
creation of the ICTR, and the failure to take steps to address sexual violence since. Overall, it appears that sexual violence perpetrated against women in the conflict in Rwanda has not been a matter of serious concern to the Security Council or to the international community generally. A significant difference in approach to redressing the wrongs committed against women in each of the conflicts is apparent.

6. Explaining Differences in International Responses to Sexual Violence in the Former Yugoslavia and Rwanda: Practicalities and Theories

(A) Other Priorities: Sexual Violence Overshadowed by the Magnitude of the Genocide

One factor explaining the failure of the international community to respond to sexual violence in Rwanda may be that the magnitude of the genocide in that conflict has over-shadowed all other abuses. Investigative teams have clearly given priority to establishing responsibility for the genocide. The Daniel report explains that in the context of investigations by HFOs:

"all efforts had concentrated on identifying who had been the killers and the number of persons who had been killed. Whether rape had occurred systematically or was an element of genocide was, according to them, not considered by the SIU (Special Investigations Unit)."

The world should be horrified at the slaughter that took place in Rwanda, and be making every effort to ensure that justice is done. However, this does not justify the failure to address other atrocities. Some sexual violence victims may have survived their experience, but this does not make the act any less horrifying. Indeed the need to address crimes perpetrated against women takes on particular importance when regard is had to the fact that approximately 70 percent of the population in Rwanda is now female, and that approximately 50 percent of house-holds are now headed by women. Thus addressing crimes of sexual violence committed against women is a crucial aspect of restoring and rehabilitating the community that remains.

126Human Rights Watch comment that "The main focus has been on the killings and not as many women were killed." Shattered Lives, supra n 59 at p 89.
127Daniel Report, supra n 45 at p 3.
(B) Mis-Management of the ICTR

It is possible that the ICTR’s failure to address sexual violence is a manifestation of the well-publicised administrative difficulties it faced, particularly during the initial phases of its operation. In February 1997, a UN Report prepared by Karl Paschke (hereafter *Paschke Report*) was released detailing mismanagement within the ICTR. It was reported that “not a single administrative area of the Registry (Finance, Procurement, Personnel, Security, General Services) functioned effectively.” Similarly, the OTP of the ICTR suffered severe “administrative, operational and leadership problems.”

These difficulties appear to result at least in part from a lack of commitment by the international community to ensuring the effective operation of the ICTR. Although problems primarily resulted from mismanagement by ICTR personnel, the *Paschke Report* also notes that the UN itself failed to provide the necessary support. Difficulties were aggravated as a result of funding delays. Karl Paschke, has reportedly stated that he did not recommend the dismissal of the ICTR Registrar because of the extraordinarily difficult task he had in setting up a new institution with little support or backup from the UN.

However, these administrative inefficiencies do not fully explain the lack of attention given to sexual violence by the ICTR. As described above, no attempt has been made to even put procedures in place, regardless of whether they are carried out effectively in practice. Further, there still remains the question of the inadequate response of Security Council in its consideration of the conflict, and the comparative lack of focus on sexual violence by UN fact-finding and investigative missions.

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134 Reuters 13 February 1997, on file with author.
(C) African v European Conflict

It has been suggested that "the plight of African victims (does) not generate the same outcry as the suffering of Europeans."115 Certainly the failure of the international community to prevent the conflict in Rwanda in the first place has been explained along these lines. There is no doubt a great deal of force in these criticisms. However, this argument does not take us very far in trying to understand the specific situation of women in Rwanda. The response of the international community to the conflict in Rwanda may have been inadequate for reasons relating to race, but within the framework of even that inadequate response, why is it that the experience of African women has been particularly invisible? It cannot simply be a question of race. The intersection of race and gender must be acknowledged.

This raises the question of how the international legal system responds to acts of sexual violence against black African women by black African men. Copelon suggests the fact that rape in the former Yugoslavia was perpetrated by white men against white European women cannot be ignored in understanding the response of the international community.136 Certainly the failure of western domestic legal systems to adequately address the rape of black women has been criticised. In the African-American context Crenshaw writes:

"Rape statutes generally do not reflect male control over female sexuality, but white male regulation of white female sexuality. Historically there has been absolutely no institutional effort to regulate black female chastity. Courts in some states had gone so far as to instruct juries that, unlike white women, black women were not presumed to be chaste."157

Angela Harris also refers to the historical failure of legal systems in the United States to recognise the rape of black women as a crime, and points out that where provisions existed they were seldom used to protect black women, who were considered promiscuous by nature. She writes:

"(t)rape’ ... was something that only happened to white women: what happened to black women was simply

116 R. Copelon, "Surfacing Gender", supra n 1 at pp 244-24.
Given that international law is primarily a Western construct, and that the response of the international community is determined to a very large extent by perceptions of countries like the United States of America, these insights may assist in explaining the reaction of the international community to the sexual violence perpetrated against black women in Rwanda.¹³⁹

(D) Cultural Differences

(I) The Claims: Reactions of Rwandese Women to Sexual Violence

One argument used to explain inaction with respect to sexual violence in Rwanda is that Rwandese women will not talk about sexual violence, and that this reluctance is a cultural matter. The Daniel report states that:

“Clearly, strong cultural obstacles in Rwanda to address taboo subjects such as rape have been, and will continue to be, among the main difficulties in receiving and documenting reports of violence against women. Rape in the African context is a particularly great humiliation to the victims. The identification by the society of these victims brings stigmatisation and further humiliation to them. The recounting of such experiences is regarded as equally humiliating and embarrassing.”¹⁴⁰

(II) The “Essentialist” Critique

The “essentialist” critique was described in Chapter 1. It is acknowledged that arguments that the international legal system must be more responsive to the experience and needs of women affected by armed conflict are vulnerable to the criticism that those needs and experiences will vary depending upon the woman’s cultural and social context. Thus it is important to examine the substance of the claim that Rwandese women choose not to talk about their experience or to testify in legal proceedings as a result of their particular cultural context. It is obvious that any consideration of international responses to the sexual abuse of women in Rwanda must be sensitive to the views and wishes of the women themselves.


¹³⁹ The position of African women within the international legal system is a topic requiring much greater consideration than it has received for the purposes of the present work. See the further comments on this point in the concluding remarks.

¹⁴⁰ Daniel Report, supra n 45, at pp 2-3.
Difficulty investigating sexual violence is not unique to Rwanda or to Africa. The Yugoslav Commission articulated a number of the difficulties they had investigating rape in the context of the former Yugoslavia. First, sexual violence is a notoriously under-reported crime in all countries because victims are understandably reluctant to go through the 're-victimisation' process that testifying in court often entails. In most societies there is also a great deal of shame associated with having been raped. and this was particularly the case with Muslim women in the former Yugoslavia where great importance is placed upon virginity and chastity, and victims of sexual violence are ostracised from the community. In the context of an on-going conflict situation there is the added difficulty of fear of reprisals given that many victims and perpetrators are living among one-another. The passage of time since the crimes were committed, coupled with migration further complicates the collection of evidence. Finally, victims often express a fear that reporting would be useless, together with general scepticism about the international community’s ability or commitment to improving their situation. These difficulties are very similar to those identified by Human Rights Watch with respect to investigating sexual violence in Rwanda.

Despite these difficulties, addressing sexual violence is certainly not impossible, provided that serious attention is paid to minimising the problems that women face. The Yugoslav Commission concluded that despite the associated difficulties:

"The great majority of victims and witnesses interviewed were willing to be contacted in the future by the Prosecutor and would consider testifying before the Tribunal."  

Similarly, in the context of Rwanda, Human Rights Watch reject claims that it is impossible to investigate sexual violence because Rwandese women will not talk about their ordeals as "patently false". Human Rights Watch concludes that:

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142 See for example Helsinki Watch, War Crimes in Bosnia pp 171-172 describing the experience of young Muslim women in the former Yugoslavia.  
Thus it seems that the cultural difference argued for is not a valid reason for failing to address sexual violence in the conflict in Rwanda. Rather it is a lack of commitment on the part of the international community to deal sensitively with the issue. Ultimately it is for each individual woman to decide whether she wishes to talk about her experience, or to testify in legal proceedings. However, she must be given a viable choice. After noting the reluctance of Rwandese women to talk about their experience, the Daniel Report states:

"Therefore, no Rwandese woman would be willing to be identified as a rape victim or to talk of her experiences to anyone, particularly foreigners, unless the victim has developed confidence and trust in her interlocutor and such an interlocutor clearly expresses the objective of collecting their testimonies." 147

Further:

"Developing this confidence requires interest, training, sensibility, familiarity with the culture, total discretion and confidentiality. Unfortunately, very few HRFO's have had either the interest, time or skills to develop such confidence from the victims or appreciate of the importance of gathering information on this subject." 148

Similarly, it is up to the international community to demonstrate to survivors of sexual violence that their situation can be improved by coming forward with their experience. The treatment of witnesses and victims during legal proceedings, is thus crucially important.

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146 Ibid at pp 25-26. See also K. Pratt et al. No Justice, No Peace supra n 10 at p 30 emphasising the critical importance of the gender of the interviewer.
147 Chinkin writes:

"It cannot be assumed that all women will share the same needs. For example, some who feel that crimes committed against them have been disregarded may feel a sense of empowerment in the establishment of the Tribunal (for the former Yugoslavia) while others may consider this a further intrusion into their lives, or fear the consequences of proceedings. Responses must take into account both individual preferences and the needs of the harmed society." (footnotes omitted). See C. Chinkin, "Rape and Sexual Abuse of Women in International Law", (1994) 5 EJIL 326 at p 337.
148 Daniel Report, supra n 45 at pp 2-3.
149 ibid. at p 3.
(E) The Role of Women and Other Lobbying Forces

(1) Pressure Exerted by Individuals and Lobby Groups

One reason that has been put forward to explain the attention to sexual violence in the former Yugoslavia is the demands for redress made by committed women and women's groups in Bosnia, and within the international community generally.\(^{151}\) A range of new and existing groups have exerted significant pressure upon the international community.\(^{151}\) Although women's groups in Rwanda exist and are attempting to deal with the issue of sexual violence, they do not appear to have the same resources or audience as those in the former Yugoslavia.\(^{152}\)

The influence of key individuals within the institutions created by the Security Council to respond to armed conflict must also be considered. For example, it appears that the attention devoted to the issue of sexual violence by the Yugoslav Commission was due in large part to the position adopted by Cherif Bassiouni.\(^{153}\) A report prepared on the work of the Yugoslav Commission describes how Bassiouni had been moved by the plight of young rape victims and challenged by the prospect of clarifying some of the legal questions surrounding sexual violence in armed conflict. The government of the Netherlands had offered a grant of money to the Yugoslav Commission which was originally earmarked for an exhumation at Ovcara. Bassiouni was particularly hopeful that the money could be used for an investigation into sexual violence instead. Kalshoven, who was Chairman at the time, subsequently put forward this suggestion.

\(^{160}\) I Kalajdzic, "Rape, Representation, and Rights: Permeating International Law with the Voices of Women", 21 Queen's Law Journal 457 at 484 footnote 90, pointing out that "the symbolic placement of rape first on the list of indictments was due in large part, if not wholly, to the efforts of feminist human rights activists during and after the hearing for the deferral of Tadic's prosecution from Germany to the Tribunal."

\(^{151}\) Groups assisting women in the former Yugoslavia include: Center for Women Victims of War (Zagreb); Karet (Zagreb); The Organization of Women of Bosnia-Herzegovina (Zagreb); Trešnjevka (Zagreb); SOS (Belgrade); Center for Anti-War Action (Belgrade); and Humanitarian Law Fund (Belgrade). The activities of other NGOs who have exerted pressure on the issue of sexual violence in the former Yugoslavia were described in section 2(B)(II) concerning NGO investigations into Sexual Abuse in the Former Yugoslavia.

\(^{152}\) Groups offering assistance to Women in Rwanda include: Association for Widows of the April genocide (AVEGA); Pro-femmes Twese Hamwe; Association Hagaruka; Association rwandaize des femmes des médias; and Asoterwa.

\(^{153}\) Following the resignation of Fritz Kalshoven, Cherif Bassiouni served as Chairman of the Yugoslav Commission from 19 October 1993 until the Commission concluded its work in April 1994. See Yugoslav Commission Final Report supra n 22 at pp 7-8.
After a great deal of bureaucratic wrangling within the UN, the mission ultimately went ahead under Bassiouni's leadership.\textsuperscript{154}

(II) Gender Composition of the ICTY and ICTR

The presence of women within the structures created to enforce international law also makes a critical difference in the extent to which issues of concern to women are addressed.\textsuperscript{155} At the time of the ICTY's creation, Madeleine Albright, the United States representative in the Security Council emphasised the need for women to be represented within the ICTY.\textsuperscript{156}

The governing documents of the ICTY and the ICTR give very limited consideration to the question of gender composition. Both Tribunals are composed of three organs, namely the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor and the Registry (which services the Chambers and the Prosecutor.)\textsuperscript{157} The Chambers are composed of eleven independent judges.\textsuperscript{158} The only criteria regarding the election of judges is that they should be:

"persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices".\textsuperscript{159}

Further:

"due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."\textsuperscript{160}

\textsuperscript{154} Guest, \textit{Yugoslav Commission Critique} supra n 23 at p 93.


\textsuperscript{156} Verbatim Record. U.N. Doc. S/PV.3453, 8 November 1994, at p 186. Ms Albright stated:

"My Government is also determined to see that women jurists sit on the Tribunal and that women prosecutors bring war criminals to justice." She further refers to the "recommendation of the Organization of the Islamic Conference that gender be duly represented on the Tribunal."

\textsuperscript{157} ICTY Statute supra n 71, Article 11; ICTR Statute supra n 106, Article 10.

\textsuperscript{158} ICTY Statute. Ibid. Article 12; ICTR Statute, Ibid. Article 11.

\textsuperscript{159} ICTY Statute. Ibid. Article 13(1); ICTR Statute. Ibid. Article 12(1).

\textsuperscript{160} ICTY Statute. Ibid. Article 13(1); ICTR Statute. Ibid. Article 12(1).
Accordingly there is no requirement of gender balance in the composition of the judges. The judges are elected by the GA from a list submitted by the Security Council. Of the 11 judges originally elected to the ICTY, 2 were women. Of the six judges recently elected, one is a woman. Of the 11 judges appointed to the ICTR, there is only 1 woman.

The Prosecutor, who is appointed by the Security Council from nominations made by the Secretary-General, is responsible for the conduct of all investigations and prosecutions. The Prosecutor of the ICTY also serves as Prosecutor for the ICTR. Given that all decisions regarding crimes to be investigated and prosecuted are made by the Prosecutor, gender sensitivity within the OTP is particularly important. The criteria specified for the appointment of the Prosecutor is that:

"He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases."

No criteria is specified in respect of the Prosecutor’s staff.

The only area where express reference is made to the need for the presence of female staff is with respect to the Victims and Witnesses Unit. Rule 34(B) provides that:

"Due consideration shall be given, in the appointment of staff, to the employment of qualified women."

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1ICTY Statute, Ibid. Article 13(2); ICTR Statute, Ibid. Article 12(2).
2They are Judge Gabrielle Kirk McDonald (United States of America), and Judge Elizabeth Odio Benito (Costa Rica). The first 11 judges elected were Cassesse (Italy) (President); Odio-Benito (Costa Rica) Vice-President; Kanbi-Whyte (Nigeria); Kirk McDonald (USA); Li (China); Deschenes (Canada); Stephen (Australia); Sidhwa (Pakistan); Abi-Saab (Egypt); Vohrah (Malaysia); Jorda (France). See ICTY First Annual Report supra n 102, at pp 52-54. On 2 October 1995 Riad (Egypt) replaced Abi-Saab, and on 15 July 1996 Sidhwa resigned for health reasons. ICTY Third Annual Report supra n 103 at p 10, para 6.
3Florence Mumba (Zimbabwe) was elected by the United Nations General Assembly on 20 May 1997.
4Judge Navanethem Pillay of South Africa.
5ICTY Statute, supra n 71, Article 16(4).
6ICTY Statute, supra n 71, Article 16; ICTR Statute, supra n 106, Article 15. The Prosecutor has the power to question victims and witnesses, and to collect evidence, see ICTY Statute, Ibid. Article 18(2); ICTR Statute, Ibid. Article 17(2).
7ICTR Statute, Ibid. Article 15(3).
8The Prosecutor’s staff are appointed by the Secretary-General upon the recommendation of the Prosecutor. See ICTY Statute, supra n 71, Article 16(5); ICTR Statute, supra n 106 Article 15(5).
9ICTY Statute, Ibid. Article 16(4); ICTR Statute, Ibid. Article 15(4).
In practice, gender sensitivity within the ICTY has been better than one might expect having regard to the governing documents. The first chief prosecutor was Richard Goldstone of South Africa, who was appointed on 8 July 1994 and took office on 15 August 1994. The comments he made about the need to prosecute sexual violence were encouraging. He recognised that international law had previously paid insufficient attention to sexual violence, primarily because "the laws were conceived of and drafted by men." The present Chief Prosecutor is Canadian Judge, Louise Arbour who was appointed by Security Council resolution 1047 (1996) on 29 February 1996, and took up her position on 1 October 1996.

Some consideration has been given to the need for women to be present in key areas of the ICTY's operation. In particular:

"In order conscientiously to address the prevalence of sexual assault allegations committed in the former Yugoslavia and Rwanda, a legal adviser for gender-related crimes has been appointed. The adviser, as a member of the Prosecutor's secretariat, reports directly to the Prosecutor and the two Deputy Prosecutors and has three major areas of responsibility: to provide advice on gender-related crimes and women's policy issues, including internal gender issues such as hiring and promotion; to work with the Prosecution Section to formulate the legal strategy and the development of international criminal law jurisprudence for sexual assaults; and to assist the Investigations Unit in developing an investigative strategy to pursue evidence of sexual assaults."  

An ICTY investigation team has been established to look specifically into sexual violence. There are nine investigative teams comprised of both males and females. This is critically important because, as Patricia Viseur-Sellers, the legal advisor for gender issues points out:

"teams that are gender-integrated tend to look at the sexual assault component of investigations earlier and with more profundity."  

In the case of the ICTR there were, as at 31 December 1996, a total of 311 staff members, 99 of whom are women. However the ratio of women within the key investigative areas is less

170 ICTY Second Annual Report supra n 101 at para 36.  
172 ICTY Third Annual Report supra n 103 p 27 para 87.  
173 ICTY Second Annual Report supra n 170 pp 15-16 para 44.  
176 Ibid.  
encouraging. Available information suggests that there are presently no female investigators within the OTP of the ICTR.\textsuperscript{178} Not surprisingly, there has been a lack of attention to investigating sexual violence. One positive development is the cross-appointment of Patricia Viseur-Sellers as the legal officer for gender issues for the ICTR, as well as the ICTY.

There is no doubt that the inclusion of women in key areas of the ICTY's operation has had a major impact on the consideration given to sexual violence. The ICTR has had a much slower start. The existence of a legal adviser for gender issues is a positive development, but clearly greater attention to gender composition across the board and particularly in the investigative teams is required.

\textbf{(F) Differences Perceptions as to the Way Sexual Violence was Used in the Two Conflicts}

Reference was made in Section 5 above to the different motives behind the perpetration of sexual violence in Rwanda and the former Yugoslavia. To what extent is the divergence in response caused by different perceptions as to the way that sexual violence was used in the two conflicts? Some writers have argued that sexual violence during armed conflict has traditionally been considered a private matter, and that international law has ignored it for this reason.\textsuperscript{179} It has been further argued that the reason why sexual violence in the former Yugoslavia has been given so much attention is because of its political nature. It is said that this political aspect takes sexual violence during armed conflict outside the private realm where it is usually located, and places it in the public realm.\textsuperscript{180} These arguments rely upon the public/private distinction which has been frequently utilised by feminist international lawyers to assist in exposing the absence of women's voices and concerns from international law, particularly international human rights law.\textsuperscript{181}

\textsuperscript{178} Conversation with Investigation staff of ICTY, September 1997.

\textsuperscript{179} See for example, A.B. Levy, "International Prosecution" supra n 3 at pp 261-262 who writes: "Rape traditionally fell within the context of a private, and not public matter. International law has traditionally ignored or undermined the private sphere, and thus issues of concern to women." at p 262 and at footnote 38 "The under reporting of rape is largely due to victim humiliation and shame at coming forward with such a "private" problem."; and Bassioumi and Manakus who write "...rape and sexual assault are often viewed as private aberrational acts, not proper subjects for an international public forum." Bassioumi & Manakus, The Law of the International Criminal Tribunal for the Former Yugoslavia (New York: Transnational Publishers, 1996), pp 557-558 footnote 154.

\textsuperscript{180} Anne La Forest, Paper Presentation, Canadian Council on International Law Conference, Ottawa October 18 1996.

However, the public/private distinction has been subject to various criticisms. As pointed out in the introduction to this thesis, it has principally been attacked as a western construct that does not reflect the experience of all women across cultures. In this thesis, I do not seek to rely on the public/private distinction to explain the different response to sexual violence in the former Yugoslavia and Rwanda. However, I do argue that different perceptions as to the way that sexual violence was used in the two conflicts is a significant factor.

It seems that what is meant when the political nature of the sexual violence in the former Yugoslavia is identified as an exceptional feature, is that sexual violence was perceived to be intimately connected with the war effort. The statements of UN bodies involved in investigating sexual violence in the former Yugoslavia demonstrate a pre-occupation with systematic sexual violence carried out in conjunction with a policy of ethnic cleansing, and a comparative lack of concern about sexual violence carried out under other conditions. The existence of detention camps in which sexual violence was perpetrated and the relationship between these camps are continuously emphasised in the reports.

Sexual violence in the former Yugoslavia was considered to be more than a crime against the honour of the individual woman. It became a crime against the entire Muslim community. Thus

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2For a useful summary of some of the criticisms, see K. Engle, “After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights”, in Dallmayer, Reconceiving Reality, supra n 139, 143 at pp 143-144.

3For a useful summary of some of the criticisms, see K. Engle, Ibid pp 148-151. Engle discusses inter alia the danger that the critique fosters the impression that the private is necessarily a bad place for women and bad in general; the failure to recognise that some women do not want to be regulated by international law; the emergence of conspiracy theories against women; and failure to assess what women want from international law as a result of obsession with women’s marginality.

4For example in the Human Rights Commission it was reported that “During 1996, the Special Rapporteur received some allegations of rape incidents, although it would appear prima facie that those cases do not fall within the context of systematic and concerted practices.” Report of the Secretary General on Rape and Abuse of Women in the Areas of Armed Conflict in the former Yugoslavia, U.N. Doc. A/51/557 25 October 1996, para 8.
it appears that it was taken seriously not because of its impact upon the individual women involved, but rather because of the impact it had upon the community at large. In these circumstances, sexual violence was recognised as an appropriate matter for the international community to act upon.

In Rwanda, sexual violence is perceived to more closely resemble the traditional use of sexual violence in armed conflict. As mentioned above, there was no widespread perception that a deliberate policy of systematic sexual violence had been employed, and there were no reports of detention camps set up specifically to inflict sexual violence. In these circumstances sexual violence was perceived to be incidental to the fighting. Consequently, it appears that the abuse of women motivated by the view that they are property and the spoils of war, has not been a matter of serious concern to the international community.

This discussion raises the issue of "genocidal" sexual violence, which has come into focus as a result of events in the former Yugoslavia. At the outset it should be noted that the issue of whether the perpetration of sexual violence in armed conflict can, as a matter of law, amount to genocide is an unsettled one.184 Nonetheless, it is widely claimed that acts of sexual violence against women in the former Yugoslavia, and in particular in Bosnia and Herzegovina, reflect a genocidal intent.185

Some writers take an intersectional position, arguing that the violence women suffer because they

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184 Louise Arbour, Chief Prosecutor of the ICTY and ICTR expressed doubt as to whether sexual abuse could fit within the meaning of article 2 of the Genocide Convention, during a meeting with the International Women’s Rights Class, University of Toronto Law School (27 February 1997). Article 2 defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

See also P. Viseur Sellers, “The Gender Limitation of Legal Genocide”, Institute for Genocide Studies Newsletter, 1.

are women cannot be viewed in isolation from violence that they suffer because they are members of a particular ethnic or religious group. Other writers, while recognising the importance of acknowledging the intersectionality of the women’s experience, express concern that the current emphasis on genocidal sexual violence may be obscuring the gender element of the offence. Copelon argues that regardless of the rationale for inflicting sexual violence, the impact upon the individual women is the same. Accordingly, the person’s particular reason for inflicting the abuse should be immaterial. Of course the motive behind the acts will be of relevance when it comes to deciding how to prosecute the crime: as a grave breach, as torture, as genocide, as a crime against humanity etc. However, it should not be a factor in deciding whether to prosecute the crime or not. Thomas and Ralph’s comments are apposite:

“The attention to rape’s strategic function, however, has attached much significance to “mass rape” and “rape as genocide”. This emphasis on rape’s scale as what makes it an abuse demanding redress distorts the nature of rape in war by failing to reflect both the experience of individual women and the various functions of wartime rape...Individual rapes that function as torture or cruel and inhuman treatment themselves constitute grave breaches of the Geneva Conventions. Thus, even if rape occurs in an apparently indiscriminate fashion and not in the service of an overarching strategic policy and not on a massive scale, it constitutes a violation of international law. When rape does occur on a mass scale or as a matter of orchestrated policy, this added dimension of the crime is recognized by designating and prosecuting rape as a crime against humanity (or of genocide)”

In this Chapter I have described the perceptions of the international community as to how sexual violence was used in the former Yugoslavia and Rwanda. I do not claim to be establishing the reality of the experience of the women. The basis of my critique is the sentiment expressed above by Copelon, Thomas, and Ralph. The strategic function of sexual violence should be irrelevant in determining the international community’s response. From the victim’s perspective, the use of sexual violence in each conflict is equally devastating. It should be regarded as equally serious by the international community.

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186 J. Kalajdzic, “Rape, Representation, and Rights” supra n 3.
187 See for example, R. Copelon, “Surfacing Gender”, supra n 1 at p 246. See also R. Copelon, “Women and War Crimes”, supra n 1 at p 66-67.
189 Suzanne Gibson also expresses concern about distinguishing between genocidal rape and other forms of rape because it tends to diminish the seriousness accorded to other types of rapes in armed conflict. S. Gibson, “The Discourse of Sex/War: Thoughts on Catherine MacKinnon’s 1993 Oxford Amnesty Lecture” (1993) 2 Fem. Legal St. 179, discussed in J. Kalajdzic, “Rape, Representation and Rights”, supra n 3 at p 481.
190 D. Thomas & R. Ralph, “Challenging the Tradition of Impunity”, supra n 3, at p 86.
7. Conclusions

It is clear that the need to redress acts of sexual violence against women in the former Yugoslavia has been accorded greater priority than the need to redress acts of sexual violence against women in Rwanda. A range of factors have been presented to explain this discrepancy. The answer is no doubt a combination of many of these factors, and possibly others. Of particular concern is the likelihood that the Security Council’s response to sexual violence of women in the former Yugoslavia was very much bound up in the particular circumstances in which it was inflicted, as opposed to a more general recognition of the seriousness of all forms of sexual violence in armed conflict.

Not only does this present bleak prospects for providing redress to the women of Rwanda, but it raises serious concerns about the way sexual violence in other conflict situations will be dealt with. For the women of Rwanda it may not yet be too late for their situation to be addressed. However the longer it is left, the more difficult it is to collect accurate information regarding the commission of offences. A real commitment on the part of the international community now is essential if we are to ensure that the response to sexual violence in the former Yugoslavia does not go down in history as a mere anomaly.
CHAPTER 4

COMPENSATION FOR FEMALE VICTIMS OF SEXUAL VIOLENCE

Assessing Security Council Action

1. Introduction

The creation of the UNCC by the Security Council is a remarkable development. It is the first, and so far the only attempt, by the international community to provide compensation for victims of armed conflict. With this initiative, the Security Council has gone a long way towards injecting the perspective of victims into enforcement of the law of armed conflict, and overcoming some of the difficulties outlined in Chapter 2. Consequently, the UNCC provides valuable insight into the types of injuries the international community considers compensable. Most importantly for present purposes, the UNCC is a clear statement that sexual violence is a compensable war-related harm.

As is the case in most other conflicts throughout history, women were subjected to sexual violence during the Gulf War. In the first part of this chapter, documentation of this sexual violence is briefly examined in order to provide a background to considering the compensation needs of women. I then review the operation of the UNCC with a view to determining the extent to which the UNCC has responded to the needs of women. I conclude that, overall, the UNCC represents significant progress in this area.

The second part of the Chapter considers the approach to victim compensation taken by the Security Council within the framework of the ICTY and the ICTR. Unfortunately, the Security Council has not consolidated the progressive development represented by the UNCC. Instead it has deferred responsibility for compensation to the domestic level, and has effectively failed to

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guarantee victims, including victims of sexual violence, a realistic chance of receiving compensation. In the final part of the Chapter I argue that the international community should take responsibility at the international level to ensure that victims receive compensation. The reasons why domestic forums are inadequate guarantees of compensation to victims, and possible sources of funding at the international level are addressed.

2. Sexual Violence Perpetrated Against Women During the Gulf War

There is evidence that wide-spread sexual violence was among the violations of the law of armed conflict committed during the Gulf War. Chinkin points out that at least 5,000 Kuwaiti women were raped by Iraqi soldiers during the 1990 invasion, and that after Iraq was ousted from Kuwait, many foreign domestic working women in Kuwait were subjected to sexual violence from returning Kuwaitis. The occurrence of sexual violence was confirmed by a UN report on the Gulf War which states:

"...women particularly were victims of rape. According to the information received and interviews conducted...in... Kuwait, the following categories of cases of rape can be distinguished:

a) Rape of foreign women by Iraqi soldiers during the first two weeks of the occupation. Most, but not all, of the victims were young women of Asian origin....

b) Rape of women during house searches by Iraqi army personnel, sometimes in front of close relatives...

c) Other women were reportedly raped when abducted for that purpose from check-points or from the street.

d) Finally rape was used as a method of torture...."

Thus sexual violence was characteristic of the Gulf War, just as it has been characteristic of most other armed conflicts throughout history. Its occurrence is documented, although it did not receive the level of attention that sexual violence in the former Yugoslavia subsequently received in the media and in the Security Council. The abuse was inflicted for a variety of reasons. However regardless of the particular circumstance surrounding the crime it was a terrifying

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2 On the question of general violations of the law of armed conflict committed during the Gulf War see Chapter 2 section 4A.
5 Refer to discussion in Chapter 3 on the attention given to the issue of sexual violence in the former Yugoslavia.
experience causing immense suffering for the woman concerned. Like all other victims of trauma these women require redress to assist their recovery, and facilitate their reintegration into society.

3. An Overview of the UNCC

(A) Creation

As outlined in Chapter 2, the Security Council created the UNCC to provide compensation for loss or damage arising from Iraq's invasion and occupation of Kuwait in August 1990. It is primarily funded by a 30 percent levy on Iraq's annual oil exports. The UNCC functions as a subsidiary organ of the Security Council. It is predominately an administrative rather than a judicial body, and focuses on processing claims for compensation. It is not intended to act as an arbiter in disputes between claimants and Iraq. Although the UNCC was created to provide compensation to individuals (as well as companies, international organisations and governments), they do not have direct access to the UNCC. Rather governments are required to file consolidated claims on behalf of individuals. The UNCC was not intended to be an exhaustive compensation mechanism, and parallel actions in national courts were always envisaged.

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6 Refer to discussion in Chapter 2 section 4A.
8 See generally J.P Carver, "Dispute Resolution or Administrative Tribunal: A Question of Due Process", in Lillich, UNCC supra n 1 p 69. See also paragraph 25 of the Report of the Secretary General Regarding UNCC which states:

"The processing of claims will entail the verification of claims and evaluation of losses and the resolution of disputed claims. The major part of this task is not of a judicial nature: the resolution of disputed claims could, however, be quasi-judicial."

9 UNCC Decision No 1 reprinted in R. Lillich. UNCC p399. Para 19 provides that: "Claims will be submitted by Governments. Each Government will normally submit claims on behalf of its nationals." However as described below UN bodies have been allowed to file claims on behalf of some stateless individuals.
10 See Report of the Secretary General Regarding UNCC. supra n 7, paragraph 22 which states inter alia:

"Resolution 687 (1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq's unlawful invasion and occupation of Kuwait. In other words, it is entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems. The likelihood of parallel actions taking place on the international level in the Commission and on the domestic level in national courts cannot be ignored. It is, therefore, recommended that the Governing Council establish guidelines regarding the non-exclusivity of claims and the appropriate
The UNCC is composed of three organs namely, a 15 member Governing Council, 11 Panels of Commissioners and the Secretariat. The Governing Council is the policy organ of the UNCC and is responsible for formulating guidelines. The Commissioners implement the guidelines, make appropriate recommendations regarding the payment of claims submitted to them by the Secretariat, and the Governing Council makes the final determination.

Initially, Iraq refused to resume oil exports under the conditions imposed by the UN, thereby crippling the capacity of the Fund to operate as intended. Limited amounts from Iraqi frozen funds and national contributions were made available in the initial phases of the UNCC’s operation in order to cover administrative costs and to pay some individual claims. However, in resolution 986 (1995) the Security Council permitted Iraq to sell oil pursuant to what is commonly known as the “oil-for-food” arrangement. It was anticipated that implementation of this resolution would provide the UNCC with approximately SUS 100 million per month. The provisions of resolution 986 were subsequently extended to allow further oil exports by Iraq resulting in the payment of additional sums to the UNCC. Part of the money received has been used to cover the UNCC’s operating costs, some has been used to reimburse countries that made recoverable contributions during the UNCC’s financial crisis, and the remainder is available for the payment of claims.

As of 30 April 1997 over 2.6 million claims had been submitted by over 100 governments from

mechanisms for coordination of actions at the international and domestic levels in order to ensure that the aggregate of compensation awarded by the Commission and a national court or commission does not exceed the amount of the loss.”

See also for example UNCC Decision 13 regarding further Measures to Avoid Multiple Recovery of Compensation by Claimants, reprinted in R. Lillich. UNCC supra n 1, at p 445.

The composition of the Governing Council is the same as that of the Security Council at a given point in time.

Report of the Secretary General Regarding UNCC supra n 7 at para’s 5 and 6.

Ibid para 10.

Ibid para 20.


See also for example S. RES/1111 (1997), 4 June 1997.

UN Press Release IK/209, 2 December 1996.
around the world on behalf of themselves, their nationals and companies. In addition, more than 3,000 claims had been filed by various UN organisations on behalf of persons not in a position to have claims submitted by a government. These organisations include the UN High Commissioner for Refugees and the UN Relief and Works Agency for Palestine Refugees in the Near East.19

(B) Focus on Individuals

In its first decision, the Governing Council established six categories of claims, four of which relate to individuals. They are:20

Category A: Departures from Iraq or Kuwait during the period of 2 August 1990 to 2 March 1991;
Category B: Serious personal injury or loss of spouse, child or parent;
Category C: Individuals claiming up to US$100,000 in personal damages;
Category D: Individuals claiming personal damages in excess of US$100,000;
Category E: Claims from corporations and other entities; and
Category F: Claims from governments and international organisations.

To be eligible for compensation, a claimant must show that their injury falls within one of the above-mentioned categories, and that it was a direct result of Iraq's unlawful invasion of Kuwait.21

As Brower points out, the UNCC is structured in such a way as to facilitate claims by individuals, who are in a better position than corporate claimants and governments.22 In its first decision the

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20 UNCC Decision No 1, reprinted in R. Lillich. UNCC supra n 1 (hereafter Decision No 1) at p 399. See also C. Alzamore, “The UN Compensation Commission: An Overview”, in R. Lillich. UNCC supra n 1 p 3 at p 6ff

"...whereas...the Tribunal was a positively horrible place for individuals, but was a rather satisfying one for business claimants and the two governments, just the reverse is the case at the UNCC where the individual claimant is king and corporate claimants and governments suffer from a number of disadvantages." at p 19.
UNCC established expedited procedures for the processing of claims in Categories A, B and C, which relate to individuals.\textsuperscript{23} These categories receive priority at both the processing and the payment stage.\textsuperscript{24} The Governing Council has also determined that successful claimants in categories A and C will receive up to $2,500 each before any payments are made to corporations, governments or individuals with claims exceeding $100,000.\textsuperscript{25} Thus clearly, individuals, particularly those claiming smaller sums, have been accorded considerable priority by the UNCC. In addition, the UNCC has given preference to damage suffered by civilians. In Decision No 11,\textsuperscript{26} the Council stated that loss or injury sustained by members of the Allied Coalition Armed Forces would not be compensable, except if those individuals were detained by Iraq as prisoners of war, and their loss or injury arose from Iraqi violations of international humanitarian law. In Decision No 19\textsuperscript{27}, the Governing Council determined that costs incurred by the Allied Coalition Forces in responding to Iraq's invasion of Kuwait were non-compensable.

The deadline for filing claims in categories "A", "B", "C", and "D" was 1 January 1995 although some provision was made for the filing of late claims. The 6,000 claims that were filed under Category "B" were dealt with first.\textsuperscript{28} Claims under this category were assessed and paid in full by 17 December 1996 with SUS 13.45 million paid to approximately 4,000 persons.\textsuperscript{29} As at 31 December 1996 the Panels of Commissioners had decided in excess of 1 million claims in categories "A", "B", "C", and "D" combined, and awarded in excess of SUS 4.6 billion.\textsuperscript{30} As Crook concludes:

"The UNCC process is...a major forward step in applying international law to establish responsibility for war damages to (injured) persons and to assess those damages. For the first time, a multilateral UN mechanism has been created to provide redress for the individual consequences of illegal state action...The UNCC thus helps to

\textsuperscript{23} UNCC Decision No 1, supra n 20. See also, M.F. Raboin, "The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing" in R. Lillich, supra n 1 at p 119.
\textsuperscript{25} UN Press Release IK 216, 14 March 1997.
\textsuperscript{26} UNCC Decision No 11, Eligibility for Compensation of Members of the Allied Coalition Armed Forces, reprinted in R. Lillich, supra n 1 at p 443.
\textsuperscript{27} UNCC Decision No 19, Military Costs, reprinted in R. Lillich, Ibid p 454.
\textsuperscript{28} UN Press Release IK 198, 31 May 1996.
\textsuperscript{30} United Nations Compensation Commission http://www.unog.ch/uncc-claims.htm
4. The UNCC's Approach to Sexual Violence

(A) Compensation for Sexual Violence

As outlined earlier, Category "B" recognises claims for inter alia, "serious personal injury". In Decision No 3, the Governing Council defined this term as follows:

1. "Serious personal injury" means:
   (a) Dismemberment;
   (b) Permanent or temporary significant disfigurement, such as substantial change in one's outward appearance;
   (c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;
   (d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.

2. For purposes of recovery before the Compensation Commission, "serious personal injury" also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained. (emphasis added)

3. "Serious personal injury" does not include the following: bruises, simple strains and sprains, minor burns, cuts and wounds; or other irritations not requiring a course of medical treatment."

The Governing Council made a determination that compensation would be provided for pecuniary losses resulting from mental pain and anguish associated with "serious personal injury". It also determined that compensation would be provided for non-pecuniary losses resulting from mental pain and anguish associated with certain injuries including sexual assault. Ceilings were established on the amount recoverable for mental pain and anguish. For sexual assault, aggravated assault or torture the limit is US $5,000 per incident. Claimants suffering losses falling under more than one category are entitled to cumulative payments for mental pain and anguish. However, there is an overall ceiling of US $30,000 per claimant, and US $60,000 per family unit.

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31 J.R. Crook, "The UNCC and its Critics: Is Iraq Entitled to Judicial Due Process?" in R. Lillich. UNCC supra n 1, p 77 at p 87.
33 Ibid.
34 UNCC Decision No 8, Determination of Ceilings for Compensation for Mental Pain and Anguish, reprinted in Lillich. UNCC supra n 1 at p 421.
Thus physical or mental injury arising from sexual assault is expressly included in the UNCC's definition of "serious personal injury", and non-pecuniary losses caused by mental pain and anguish resulting from sexual assault are expressly made recoverable. The classification of sexual abuse as a violent crime is reflected by the fact that it is contained in the same category as aggravated assault or torture. A ceiling of US $5,000 per incident applies to recovery for mental pain and anguish associated with all of these injuries.

(B) Proving Sexual Assault Claims Before the UNCC

The UNCC Panel of Commissioners issued recommendations in 1994 regarding Category "B" Claims, in which particular attention is paid to standards of proof regarding compensation for victims of sexual assault.\(^{35}\) The Panel accepted the existence of documentary evidence that many women were raped by Iraqi forces and said: \(^{36}\)

"The Panel had before it some claims where rape by members of the Iraqi military forces was asserted as the cause of the injury. These claimants did not provide any medical documentation. The Commission's medical expert was of the view that many rape victims often do not wish to seek the help of a physician, as they may wish to suppress the memory of the rape, or they are embarrassed to admit that they have been sexually assaulted. Furthermore, a physician would not have been able to offer a written assessment of the physical injuries suffered by the claimant, unless the claimant presented herself for treatment immediately after the attack, which would have been difficult during the invasion and occupation of Kuwait. Taking the above-noted factors into account, the Panel recommends compensation for claims for rape where circumstantial evidence is available."

This is further evidence of a progressive approach to the provision of compensation to female victims of sexual violence by the UNCC. It recognises the difficulties associated with reporting sexual violence, particularly those arising during times of armed conflict.

(C) Evaluating the UNCC's Approach to Compensation for Sexual Violence

The particular nature of the UNCC as an administrative body that is required to process large

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\(^{36}\) Ibid. Part B para 2(b), (footnote omitted).
volumes of claims for compensation, has both advantages and disadvantages for female victims of sexual violence. It is clearly an advantage that the Commission has recognised the evidentiary difficulties faced by rape victims, and has adopted a procedure designed to maximise access to compensation. The fact that the proceedings are not contentious, and there is no accused whose rights could be prejudiced, means there can be little objection to such an approach. It is also significant that the UNCC considers all forms of sexual assault to be compensable, regardless of the factors motivating it. The most important consideration is the harm suffered by the individual woman, rather than the context in which it occurs. As such it is a procedure that focuses very clearly on the individual’s right to redress.

On the other hand, the UNCC has taken a pragmatic approach to compensation, making difficult decisions about how best to allocate limited resources amongst many seriously affected individuals. As a result, the guidelines and ceilings set on recovery do not necessarily reflect the many consequences for women arising from sexual violence apart from the injury of suffering through the perpetration of the abuse itself. As described in Chapter 1, sexual violence may leave the woman physically unable to have children in the future, or unable to form relationships. A child may be conceived as a result of rape. There is also the danger of contracting sexually transmitted disease including HIV/AIDS. From the information made available by the UNCC, the extent to which these factors have been recognised in the awards made by the UNCC is unclear. Another difficulty is that individuals do not have access to the claims procedure in their own right. They must rely upon governments to claim on their behalf. However, the UNCC has allowed various UN bodies to file claims on behalf of stateless individuals which is a welcome development. Overall, the UNCC clearly represents a significant advance and an important precedent for the provision of compensation to victims of sexual violence at the international level.

17 During discussions with the UNCC in Geneva in July 1997 I was unable to obtain further information on this point.
5. Compensation, the ICTY and the ICTR

(A) Proposals for Compensation

Prior to the adoption of the *ICTY Statute*, a number of proposals were put forward by various international bodies arguing that the ICTY should be given power to order compensation for victims. For example, the Organization of the Islamic Conference proposed that:

"The statute should provide a victim compensation scheme. The tribunal should be authorized to order damages to compensate for injuries or losses resulting from criminal conduct. Governments should be required to pay victim compensation for crimes committed by individuals in their service, or acting for or on their behalf, under the principles of state responsibility."  

Likewise, Amnesty International proposed that:

"The Tribunal should have the power to order a convicted person to provide compensation and restitution to a victim or dependants for injury caused by the criminal act. The Security Council should establish a separate international commission to process compensation claims against individuals as well as against States."

Statements made by some delegations at the time the *ICTY Statute* was adopted emphasised the need to address the issue of compensation for victims and their families. The representative of Morocco stated that the ICTY should not ignore the appropriate compensation for victims and their families. Similarly, the representative of Djibouti said that:

"... bringing the guilty to justice, whatever their ethnic origin, and compensating the victims must be considered as two factors that are indissolubly linked and are the ultimate goal of the resolution..." (emphasis added).

As described in the sections below, the ICTY and ICTR do not have power to award compensation, nor has a parallel claims commission been established. The primary reason for the failure to include compensation appears to be the anticipated financial constraints under which the Tribunals would operate.  

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(B) Recovery of Property

The ICTY Statute and ICTR Statute both grant power to order restitution of property acquired by criminal conduct. Article 24(3) of the ICTY Statute and its equivalent in the ICTR Statute state that:

"In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." \(^{42}\)

Rule 105 of the ICTY Rules and the ICTR Rules provide further guidance in respect of restitution of property. \(^{44}\) Following a conviction, the Trial Chamber has the power to hold a special hearing to determine restitution of property or the proceeds of property, including property in the hands of third parties otherwise unconnected with the commission of the crime. \(^{45}\) The standard to be applied regarding determination of ownership is the balance of probabilities. \(^{46}\) If the Chamber is unable to determine ownership, it shall request national authorities to do so and upon the basis of that determination order restitution as appropriate. \(^{47}\)

It is important that the Tribunal's be empowered to order the recovery of property. The misappropriation of dwellings, livestock and other valuables is a frequent and devastating component of conflict. For the victims of these acts, recovery is a crucial aspect in resuming their lives. However, it is problematic that orders of restitution are linked to the commission of a crime and conviction by the ICTY or ICTR. In those cases where no prosecutions are instigated, or where the indictee is never taken into custody, persons who have lost property will be left without a remedy at the international level. Further, the focus on property loss to the exclusion of

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\(^{42}\) Article 24(3) ICTR Statute.

\(^{44}\) The ICTY Rules and the ICTR Rules set out in greater detail the rules regarding restitution of property. Pursuant to Rule 88(B), if the Trial Chamber finds the accused guilty of unlawful taking of property, it must make a specific finding to that effect in its judgment. Having done that, pursuant to Rule 105 the Chamber then has power to hold a special hearing to determine restitution, and this power extends to property in the hands of third persons.


\(^{47}\) Ibid Rule 105 (D).

\(^{47}\) Ibid Rule 105 (E) and (F).
other types of loss including personal injury and mental anguish represents a significant backwards step by the international community from the advances made by the UNCC. Men lose more property because they own more, and they are the most likely beneficiaries of this provision.\textsuperscript{48}

(C) Compensation

Neither the \textit{ICTY Statute} nor the \textit{ICTR Statute} include the power to order compensation as part of the penalties imposed on convicted persons.\textsuperscript{49} However, both the \textit{ICTY Rules} and the \textit{ICTR Rules} do consider the issue of compensation. Rule 106 common to both provides:

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under Sub-rule (B) the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Consequently, the approach taken is to transfer responsibility for compensation from the international to the domestic level. The only role of the ICTY and ICTR is to provide States with judgments finding the accused guilty of a crime causing injury to a victim. Domestic jurisdictions are required to accept these judgments as conclusive proof of criminal responsibility for the injury.

\textsuperscript{48} See the discussion of property loss in the context of the conflict between Turkey and Cyprus, R. Ridd & H. Callaway, \textit{Caught up in Conflict: Women's Responses to Political Strife} (MacMillan Euduction, 1986) p36.

\textsuperscript{49} Although at the time the ICTY Statute was adopted, the United States representative, in clarifying her country's position regarding Article 24 (relating to penalties), stated that:

"...with respect to Article 24, it is our understanding that compensation to victims by a convicted person may be an appropriate part of decisions on sentencing, reduction of sentence, parole or commutation."

(D) Criticisms of Approach to Compensation

The Security Council clearly recognises the importance of compensation for victims. For example, Security Council Resolution 827 pursuant to which the Statute of the ICTY Statute was adopted stipulates that:

"...the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law..."

However, the Security Council has not been willing to take responsibility for ensuring the provision of compensation at the international level. In Chapter 1 I raised some general reasons why redress at the domestic level for war-victims is problematic. In this section, I consider some of the specific difficulties associated with deferring responsibility for compensation to the domestic level.

(1) The Domestic Forum as an Inadequate Guarantee

The approach to compensation adopted for the ICTY and ICTR assumes that domestic systems have in place the structure and legislation needed to provide victims of armed conflict with compensation. This is not necessarily the case. Further, as Carver points out, most governments have no experience in the provision of compensation to victims of armed conflict. Carver also sees a danger that compensation at the domestic level could result in different assessments for similar injuries with vastly different outcomes for the individuals involved. It will generally be the case that only large and sophisticated claimants can pursue recovery through domestic channels. Many victims will be without the resources required to pursue recovery. There is the further difficulty of stateless persons, which is a significant problem given the number of refugees

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52 J.P Carver, "Dispute Resolution or Administrative Tribunal: A Question of Due Process" in Lillich p 69 at p 72.
created by the armed conflicts in Rwanda and the former Yugoslavia. How are they to make claims for compensation? Finally, like Articles 24 regarding the recovery of property, Rule 106 is only operative where there is a conviction before the ICTY or ICTR. Those victims who cannot point to a judgment from the ICTY and ICTR are left even more vulnerable in the domestic legal system.

(II) An Illogical Approach?

Victims of the Gulf War are entitled to compensation at the international level if they can show their loss was a direct result of Iraq's invasion of Kuwait. Victims of the conflicts in the former Yugoslavia and Rwanda are required to pursue recovery at the domestic level. Why is compensation in the first case a matter of international concern but in the latter case it is not? As a matter of principle the difference in approach is irreconcilable. It can only be explained by reference to the political realities of the UN system. In the case of the Gulf War there was one clear aggressor which had been ostracised from the community of nations. In addition to providing compensation for victims, the creation of the UNCC served the function of sanctioning Iraq. Most importantly, Iraq's oil provided an easily identifiable and significant source of funding for the UNCC, relieving the international community from committing its own resources.

Deferral of compensation to the national level by the ICTR and the ICTY is also an illogical approach given that responsibility has been assumed for the restitution of property rights. There is no reason in principle why recovery of property is an appropriate objective for the international community, and compensation is not. Again, political realities dominate. The international community is prepared to reallocate existing resources, but is not prepared to commit new resources in order to assist the recovery of victims.

6. Conclusions

The international community must urgently re-assess the priority given to compensation for

53It is estimated that 80 percent of the world's refugee population is made up of women and children. See: C. Berthiaum, "Do We Really Care?" (1995) 100 II Refugee Women 11.
victims of armed conflict. As described in Chapter 1, there is no shortage of recognition within the UN system of the need to provide compensation for victims of human rights and crime, including women subjected to sexual violence during armed conflict. The UNCC provides a good precedent, but unfortunately it appears to be confined to the circumstances of the conflict in the Persian Gulf.

The most effective approach to compensation is the establishment of an international compensation fund to operate parallel to international criminal proceedings.\(^5^4\) This would allow the benefits flowing from the administrative nature of the UNCC to be replicated, thereby maximising flexibility in the payment of claims. It would also provide victims with access to compensation regardless of whether anyone is ultimately found criminally responsible for the acts committed against them. The fund could also be used to finance programs for redress at the local level.

Funds could be drawn from a variety of sources. First, as was the case with Iraq, states who have violated the *jus ad bellum*, or whose armed forces have violated the *jus in bello* should be required to contribute to the fund on the basis of principles of state responsibility, and as a matter of moral duty. As Ferencz argues:

"It is the legal and moral obligation of the government in whose name and on whose behalf the deeds were committed to see to it that the victims of the crimes receive just compensation for the injuries unlawfully inflicted upon them."\(^5^4\)

Secondly, fines could be imposed upon convicted war criminals and paid into the general compensation fund.\(^5^6\) Finally, the international community must itself take responsibility for

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54 Amnesty International propose *inter alia* the creation of an international civil court or claims court to operate in parallel with any permanent international criminal court that may be established in the future. See Amnesty International, *Establishing a Just Fair and Effective International Criminal Court* (IOR 40 05 94, October 1994), pp 58-59.


56 Article 47(3) of the ILC's 1994 *Draft Statute for a Permanent International Criminal Court* contained a similar proposal whereby fines levied against convicted individuals could be transferred *inter alia* to "a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime. *See Report of the International Law Commission on the Work of its Forty-Sixth Session*. UN GAOR, 49th Sess., supp No 10 at 29-40 UN Doc A/49/10.
ensuring that adequate funds for compensation are made available. Given that issues of international peace and security are at stake, there is a clear rationale for financial contributions by member states of the UN. We must recognise that the restoration of international peace and security is an expensive exercise. The international community must be prepared to invest resources into the recovery of individuals, and thereby the communities affected by armed conflict.
CONCLUSION

The problem of women and armed conflict raises a kaleidoscope of complex issues. In seeking to address one small aspect of the problem this thesis has scrutinised many areas of international law, raising some questions worthy of further consideration. In these concluding remarks, I draw together some of the common threads of the discussion, and comment upon possible future applications of the analysis.

I began by identifying a problem, namely the recovery of women subjected to sexual violence during armed conflict. My aim was to determine how the international legal system responds to that problem through an examination of action taken by the Security Council. I began in Chapter 1 by considering the way that the prosecution of persons committing violations, and the provision of compensation, operates to assist the recovery of female victims. At this point one of the recurrent themes of this thesis arose, namely the difficulty of generalising about redress for women as a group. Cultural factors inhibiting women from speaking out are frequently raised as a justification for failing to take action. However, as the story of the “comfort women” clearly shows, silence compounds, rather than minimises the suffering of these women. In chapter 3 I considered similar arguments that cultural factors have prevented the international community taking action to redress sexual violence in Rwanda. However, upon closer examination it becomes clear that the international community has used these cultural factors as a convenient justification for its failure to devote the effort and resources required to deal sensitively with the issue. In the final analysis, it is a question of whether the world is committed enough to the problem to tackle these hard issues in a flexible and thoughtful manner. We must present women with a viable choice.

I have argued that gender is an important determinant of the way a person experiences armed conflict, their position in society at the conclusion of hostilities, and their subsequent treatment within the international legal system. However, gender is not the only relevant factor and this has been acknowledged throughout.

In the first instance, the provision of redress to women affected by sexual violence is constrained by the same limitations as the provision of redress to other victims of armed conflict. As demonstrated in Chapter 2, the law of armed conflict is structured in a way that
gives minimal consideration to the interests of victims, and in this way substantially differs from international human rights law. There is no clear right to individual compensation, particularly for victims of internal conflicts, and certainly there is no established mechanism for individuals to claim compensation. Similarly, the international legal system gives war victims little scope to petition for other types of redress. It is for states to take action at the domestic level, or to cooperate at the international level to prosecute offenders. However, not all violations of the law of armed conflict are regarded as equally serious. The hierarchy is clearly demonstrated by the grave breach provisions of the *Geneva Conventions*. A similar prioritising of values is embedded in the Security Council’s decision to take action to enforce the law of armed conflict. It reflects a determination that some violations of the law constitute an injury to the international community at large, and so warrant action at the international level. Thus the extent to which victims are accorded the redress associated with seeing their violators brought to justice, depends upon the extent to which their interests, and the interests of the international community coincide.

Comparing the response to sexual violence in the former Yugoslavia and Rwanda provides a clear focus for determining the extent to which the interests of women and the interests of the international community coincide. Chapter 3 set out the contradictory response of the Security Council to sexual violence in the former Yugoslavia and Rwanda. A review of the response to sexual violence in the former Yugoslavia in isolation leads to the conclusion that great progress has been made towards incorporating the perspective of women into the international community’s hierarchy of values. Not only has sexual violence in that conflict been taken seriously, but there has also been an appreciation of the difficulties victims face when testifying about their experience within the legal system.

However, consideration of the response to sexual violence in Rwanda highlights the importance of rigorously analysing exactly which factors prompted the Security Council’s unprecedented response to sexual violence in the former Yugoslavia. Attempts to understand the disparate response demonstrates the convergence of many relevant factors, including the political reality of the UN system, race and gender.

With respect to the political realities of the UN system, there is no doubt that the operational difficulties confronting the ICTR in its initial phase were partly caused by a lack of commitment by the UN to ensuring its effective performance. The influence of key
individuals within the institutional framework is also an important factor explaining the progressive response to sexual violence in the former Yugoslavia, as is the role played by NGOs.

I raised the fact that domestic legal systems in the west, in particular the United States, have a history of viewing sexual violence against black women in a very different way to sexual violence against white women. Given the domination of western values in the Security Council, I suggested that the convergence of race and gender was a factor influencing the outcome for Rwandese women. Clearly, the treatment of African women within the international legal system is a complex issue, and one worthy of further consideration.

Another critical factor explaining the difference in response relates to the construction of sexual violence in the two conflicts. Whether reflective of reality or not, there was certainly a perception within the international community that sexual violence in the former Yugoslavia was carried out in close association with a policy of “ethnic cleansing”. It was intended to damage the Muslim community as a whole. By contrast, despite the vast scale, acts of sexual violence in Rwanda were not perceived to be part of an orchestrated plan. Rather, they more closely resembled the traditional type of sexual violence in armed conflict motivated by the attitude that women are property and the spoils of war. The international community’s tepid response suggests that sexual violence of this sort is not a matter that shocks the conscience of the international community. Certain assumptions are made about the types of crimes that are most serious, and which thereby require redress by the international community. Embedded in these assumptions is a tendency to ignore crimes committed against women predominately on the basis of their gender.

The discussion in Chapter 4 also revealed a convergence of factors determining the likelihood that victims of sexual violence will be provided with compensation. The creation of the UNCC is a progressive development that recognises sexual violence amongst the category of war-losses requiring compensation. Flexible procedures were adopted to facilitate the presentation of claims by women. However, the existence of the UNCC to begin with, is tied to the political and economic factors surrounding the Gulf War. It was motivated as much by a desire to sanction an international pariah as it was by the desire to see victims compensated.

\[1\] My thanks to Karen Knop for her comments on this point.
Most importantly, Iraq's oil exporting capacity provided a convenient pool from which to draw funds, and largely relieved the international community from having to commit its own resources. Consequently, it is no real surprise that, in the absence of similar factors, the Security Council avoided the issue of compensation for the victims of conflicts in the former Yugoslavia and Rwanda. In doing so, it reverted to an approach that emphasises property interests, which is more likely to be of benefit to men than women.

**Future Applications of the Analysis: a Permanent International Criminal Court**

The creation of the ICTY and ICTR is regarded by many as an important prelude to the establishment of a permanent international criminal court. Proposals for such an institution have been on the UN agenda for over half a century.\(^2\) It appears that the creation of a permanent court is now close to reality. In 1994 the ILC delivered its proposed *Draft Statute for an International Criminal Court* and further deliberations have been carried out in various forums since then.\(^3\) It is anticipated that the statute for the proposed court will be adopted during an international conference scheduled for 1998.

This thesis has several implications for the present negotiations for a permanent court. In the first instance, it is critical that the perspective of victims be incorporated into the statute of the permanent court in a central way. The issue of compensation for victims warrants serious consideration. It is also essential that the permanent court be responsive to the needs of both men and women. The statute should expressly include crimes that particularly affect women, like sexual violence. However, it is also important to ensure that the mechanisms for instituting investigations and initiating prosecutions are responsive to the seriousness of crimes committed against women. In this respect, a balanced gender composition should be a priority.

The lessons of Rwanda must not be overlooked. Women now form a substantial majority of the population in Rwanda and the majority of these women have been affected by sexual

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\(^2\) In 1948 the GA called upon the ILC to consider the desirability of establishing an international criminal court. See UN GA Res 260 B III, UN Doc A/810 (1948).

\(^3\) ILC Draft Statute for an International Criminal Court. Report of the International Law Commission on the Work of its Forty-Sixth Session, UN GAOR, 49th Sess., supp No 10 at 29-40 UN Doc A/49/10. Since then work on the topic has been carried out by: the Ad Hoc Committee on the Establishment of an International Criminal Court: The Sixth Committee of the GA (See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50 UNGAOR Supp. (No.22) UN Doc. A/50/22 (1995)); and the Preparatory Committee established by the GA in December 1995(GA Res. 50/46 (Dec 11 1995)).
violence. That the international community does not consider the provision of redress to these women to coincide with its own interests is a tragedy. It raises serious questions about how far the international community has really progressed towards incorporating the perspective of women into its hierarchy of values.
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