

# **LST REVIEW**

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# **Violence Against Women**

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### **Editor's note .....**

This issue of the *LST Review* is devoted to violence against women. It carries the resolution of the UN Commission on Human Rights on the Elimination of Violence Against Women. We also carry excerpts from the 2001 report of the Special Rapporteur on Violence Against Women, Ms Radhika Coomaraswamy, which deals specifically with violence against women perpetrated by the State during times of armed conflict. The full report is available at the Trust for perusal.

In her report, Ms Coomaraswamy looks at the "unimaginable brutality perpetrated against women and girls in conflicts ranging from Afghanistan to Chechnya, from Sierra Leone to East Timor." She looks at the risks faced by girl children during armed conflict and the gaps in protection and assistance to women who are internally displaced. She also highlights action which can be taken both at the national and international level to eliminate violence perpetrated against women during armed conflict.

The Trust facilitated, in August 2001, the annual consultation of NGOs with the Special Rapporteur on Violence Against Women organised by the Asia Pacific Forum on Women, Law and Development (APWLD). In this issue we publish a paper presented at this consultation on Malaysia's Experience with the Domestic Violence Act of 1994. The paper looks at how the Women's Aid Organisation is monitoring the implementation of the Act. It also discusses its salient features and the protection it affords to women victims of domestic violence.



## **Elimination of Violence Against Women**

### **Commission on Human Rights Resolution 2001/49**

*The Commission on Human Rights,*

*Reaffirming* that discrimination on the basis of sex is contrary to the Charter of the United Nations, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments, and that its elimination is an integral part of efforts towards the elimination of violence against women,

*Reaffirming* the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights and the Declaration on the Elimination of Violence against Women,

*Recalling* all its previous resolutions on the elimination of violence against women, in particular its resolution 1994/45 of 4 March 1994, in which it decided to appoint a special rapporteur on violence against women, its causes and consequences,

*Recalling* the Beijing Declaration and Platform for Action of the Fourth World Conference on Women and follow-up action such as the agreed conclusions adopted by the Commission on the Status of Women on violence against women, and welcoming the outcome of the twenty-third special session of the General Assembly, entitled "Women 2000: gender equality, development and peace for the twenty-first century",

*Welcoming* the resolve expressed at the highest levels to combat all forms of violence against women, as contained in the United Nations Millennium Declaration,

*Taking note* of the Agenda for War-Affected Children adopted on 17 September 2000 at the International Conference on War-Affected Children and the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations,

*Noting* Security Council resolution 1325 (2000) on women and peace and security of 31 October 2000,

*Recalling* the inclusion of gender-related crimes and crimes of sexual violence in the Rome Statute of the International Criminal Court (A/CONF.183/9), which affirms that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence constitute, in defined circumstances, a crime against humanity and/or a war crime, and reiterating that acts of sexual violence in situations of armed conflict can constitute serious violations or grave breaches of international humanitarian law,

*Reaffirming* the responsibility of all States to put an end to impunity and prosecute those responsible for genocide, crimes against humanity and war crimes,

*Deeply concerned* that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, the girl child, women with disabilities, elderly women and women in situations of armed conflict, are especially targeted and vulnerable to violence,

1. *Welcomes* the work of the Special Rapporteur on violence against women, its causes and consequences, and takes note with appreciation of her report (E/CN.4/2001/73 and Add.1-2);

2. *Condemns* all acts of gender-based violence against women and in this regard calls, in accordance with the Declaration on the Elimination of Violence against Women, for the elimination of all forms of gender-based violence in the family, within the general community and where perpetrated or condoned by the State, and emphasizes the duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State, by private persons or by armed groups or warring factions, and to provide access to just and effective remedies and specialized, including medical, assistance to victims;

3. *Affirms* that the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life, and including domestic violence, crimes committed in the name of honour, crimes committed in the name of passion, traditional practices harmful to women, including female genital mutilation, and forced marriages;

4. *Also affirms* that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms;

5. *Strongly condemns* physical, sexual and psychological violence occurring in the family, which encompasses, but is not limited to, battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female infanticide, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

6. *Reminds* Governments that their obligations under the Convention on the Elimination of All Forms of Discrimination against Women must be implemented fully with regard to violence against women, taking into account General Recommendation No. 19 adopted by the Committee on the Elimination of Discrimination against Women at its eleventh session, reaffirms the commitment to accelerate the achievement of universal ratification of the Convention, and urges all States that have not yet ratified or acceded to the Convention to do so;

7. *Welcomes* the entry into force of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women on 22 December 2000;

8. *Urges* States parties to consider signing and ratifying the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;
9. *Welcomes* the adoption by the General Assembly of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime, and urges Governments to consider signing and ratifying or acceding to the Protocol;
10. *Stresses* the conclusions and recommendations of the Special Rapporteur that States have an affirmative duty to promote and protect the human rights of women and must exercise due diligence to prevent all forms of violence against women, and calls upon States:
- (a) To apply international human rights norms and to ratify and implement fully international human rights instruments that relate to violence against women;
  - (b) To condemn violence against women and not invoke custom, tradition or practices in the name of religion to avoid their obligations to eliminate such violence;
  - (c) To enact and, where necessary, reinforce or amend penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls subjected to any form of violence, whether in the home, the workplace, the community or society, in custody or in situations of armed conflict, to ensure that they conform with relevant international human rights instruments and humanitarian law, and to take action to investigate and punish persons who perpetrate acts of violence against women;
  - (d) To support initiatives undertaken by women's organizations and non-governmental organizations on the elimination of violence against women, including awareness-raising campaigns, to establish and/or strengthen, at the national level, collaborative relationships with relevant non-governmental and community-based organizations, and with public and private sector institutions, aimed at the development and effective implementation of provisions and policies relating to violence against women, including in the area of support services to respond to the needs of women and girl survivors of violence and to assist them in their full recovery and reintegration into society;
  - (e) To consider undertaking comprehensive, objective and easily accessible information campaigns about violence against women;
  - (f) To create, improve or develop, as appropriate, and fund training programmes, taking into account, *inter alia*, sex-disaggregated data on the causes and effects of violence against women, for judicial, legal, medical, social, educational, police, correctional service, military, peacekeeping, humanitarian relief and immigration personnel, in order to avoid the abuse of power leading to violence against women and to sensitize such personnel to the nature of gender-based acts and threats of violence so that fair treatment of female victims can be ensured;
  - (g) To sensitize all persons, men and women, to the causes and effects of violence against women and to highlight men's role in its prevention and elimination, to encourage and support men's initiatives to complement the efforts of women's organizations in this regard, and to encourage behavioural change by perpetrators of violence against women;

11. *Condemns* violence against women committed in situations of armed conflict, such as murder, rape, including systematic rape, sexual slavery and forced pregnancy, and calls for effective responses to these violations of international human rights and humanitarian law;

12. *Welcomes* efforts to eliminate impunity for violence against women in situations of armed conflict including by prosecuting gender-related crimes and crimes of sexual violence in the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda;

13. *Also welcomes* the inclusion of gender-related crimes in the Rome Statute of the International Criminal Court and its Elements of Crimes document, and urges States to consider ratifying or acceding to the Rome Statute of the International Criminal Court;

14. *Urges* the integration of a gender perspective in all future efforts to eliminate impunity;

15. *Urges* States to integrate a gender perspective into commissions of inquiry and commissions for achieving truth and reconciliation, and invites the Special Rapporteur to report, as appropriate, on these mechanisms;

16. *Also urges* States to provide gender-sensitive training to all actors, as appropriate, in peacekeeping missions in dealing with victims, particularly women and girls, of violence, including sexual violence, and in this regard acknowledges the important role of peace support operations personnel in eliminating violence against women, and calls upon States to promote, and relevant agencies of the United Nations system and regional organizations to ensure, implementation of the Ten Rules Code of Personal Conduct for Blue Helmets;

17. *Further urges* all States and the relevant organs, bodies and agencies of the United Nations system, and encourages regional organizations and humanitarian organizations, including the International Committee of the Red Cross, to ensure that a gender perspective is integrated into international humanitarian law awareness programmes;

18. *Calls upon* all parties to armed conflict to respect the civilian and humanitarian character of camps and settlements for refugees and internally displaced persons and to improve and strengthen the capacity of women affected by situations of armed conflict, including women refugees and displaced women, by, *inter alia*, involving them in the design and management of humanitarian activities so that they benefit from these activities on an equal basis with men;

19. *Urges* States to mainstream a gender perspective into national immigration and asylum policies, regulations and practices, as appropriate, in order to promote and protect the rights of all women, including the consideration of steps to recognize gender-related persecution and violence when assessing grounds for granting refugee status and asylum;

20. *Urges* Governments to include women in all peace, reconciliation and reconstruction activities and to ensure that all repatriation and resettlement programmes, as well as rehabilitation, reintegration and post-conflict reconstruction, address the special needs of women and take into account their specific, relevant experiences in formulating programmes;



21. *Stresses* the importance of mainstreaming a gender perspective into the preparations for and the work and the outcome of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and urges the inclusion of women in delegations to the Conference;
22. *Encourages* Governments and the United Nations system to ensure greater international cooperation in, and national attention to, acquiring data and developing indicators on the extent, nature and consequences of violence against women and girls, and on the impact and effectiveness of policies and programmes for combating this violence, and calls upon States to include in reports submitted in accordance with the provisions of relevant United Nations human rights instruments sex-disaggregated data and, whenever possible, information pertaining to violence against women and measures taken to implement the Declaration on the Elimination of Violence against Women and the Beijing Platform for Action;
23. *Requests* all Governments to cooperate with and assist the Special Rapporteur in the performance of her mandated tasks and duties, to supply all information requested and to respond to the Special Rapporteur's visits and communications;
24. *Welcomes* the efforts of the Special Rapporteur to seek information from Governments concerning specific cases of alleged violence in order to identify and investigate situations of violence against women, its causes and consequences, in particular, where appropriate, by sending joint urgent appeals and communications with other special rapporteurs;
25. *Invites* the Special Rapporteur to continue to cooperate with other special rapporteurs, special representatives, independent experts and chairpersons of the working groups of the special procedures of the Commission on Human Rights, including, where appropriate, undertaking joint missions and writing joint reports;
26. *Requests* special rapporteurs responsible for various human rights questions, United Nations organs and bodies, specialized agencies and intergovernmental organizations, and encourages human rights treaty bodies, to give consideration to violence against women within their respective mandates and to cooperate with and assist the Special Rapporteur in the performance of her mandated tasks and duties, and in particular to respond to her requests for information on violence against women, its causes and consequences;
27. *Renews* its request to the Secretary-General to continue to provide the Special Rapporteur with all necessary assistance, in particular the staff and resources required to perform all mandated functions, especially in carrying out and following up on missions undertaken either separately or jointly with other special rapporteurs and working groups, and adequate assistance for periodic consultations with the Committee on the Elimination of Discrimination against Women and all other treaty bodies;
28. *Requests* the Secretary-General to ensure that the reports of the Special Rapporteur are brought to the attention of the Commission on the Status of Women at its forty-sixth session, as well as to the attention of the Committee on the Elimination of Discrimination against Women;
29. *Decides* to continue consideration of the question as a matter of high priority at its fifty-eighth session.

**INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND  
THE GENDER PERSPECTIVE**

**VIOLENCE AGAINST WOMEN**

**Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45.**

**Violence against women perpetrated and/or condoned by  
the State during times of armed conflict (1997-2000)  
(Excerpts)**

**Executive summary**

Violence against women and girls continued unabated during the period covered by this report (1997-2000). Unimaginable brutality was perpetrated against women and girls in conflicts ranging from Afghanistan to Chechnya, from Sierra Leone to East Timor. The report illustrates how, since 1997, women and girls have been raped by government forces and non-State actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. They have been maimed or sexually mutilated, and often later killed or left to die. Women have been subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public, and to perform domestic chores while nude. Women and girls have been forced into "marriages" with soldiers, a euphemistic term for what is essentially repeated rape and sexual slavery, and they and their children have suffered disabilities as a result of exposure to chemical weapons.

The Special Rapporteur gives special attention in the report to the specific risks faced by girl children during armed conflict and the specific gaps in protection and assistance to women who are internally displaced. She also underscores her growing alarm about women being trafficked from refugee camps and other shelters set up for their protection, as well as being trafficked to service United Nations peacekeepers in countries where such peacekeepers are located. In particular, the Special Rapporteur expresses concern about the growing number of reports of rape and other sexual abuse committed by United Nations peacekeeping forces and staff, and by soldiers and staff associated with military bases around the world, and emphasizes

the particular responsibility that the Organization has for taking appropriate steps to prevent such abuse.

The Special Rapporteur also highlights the ongoing violence and discrimination that women face in the rehabilitation and reconstruction process, and notes that although women make up the majority of heads of household in most post-conflict situations, their families and their needs are rarely adequately factored into international donor and reconstruction programmes, or the distribution of humanitarian aid. The Special Rapporteur stresses that women must be brought into all levels of the United Nations, including in peacekeeping and civilian police units, and those with gender-specific expertises must be included in senior management throughout the Organization if the United Nations is to develop appropriate and effective policies to protect and assist women and girls during and after armed conflict. What is more, women must have a greater role in the peace process, during which time the framework for future government structures and administration are set in place, and a concerted effort must be made to involve women in society's efforts to address the past.

The report also documents the positive jurisprudential and structural developments that have taken place during the past four years; the international community has begun to develop precise legal standards to make clear, once and for all, that rape and other gender-based violence can be war crimes, crimes against humanity, and components of the crime of genocide, as well as torture or other cruel, inhuman and degrading treatment and enslavement. The report reviews the important work of the International Tribunals for the Former Yugoslavia and Rwanda that have set jurisprudential benchmarks for the prosecution of wartime sexual violence. In addition to the work of the ad hoc tribunals, the report discusses the single greatest development since the Special Rapporteur's last report - the approval on 17 July 1998 of the Statute of the International Criminal Court (ICC), known as the Rome Statute, which specifically defines rape and other gender-based violence as constituent acts of crimes against humanity and war crimes. The Rome Statute also addresses numerous structural issues - including the need to hire judges and prosecutors with special expertise in violence against women and children and the establishment of a Victim and Witness Unit - that are critical if the Court is to function as a progressive mechanism for justice for victims of gender-based violence.

The Special Rapporteur wishes to emphasize that there remains a significant gap between the international community's recognition that those who commit rape and other gender-based violence are legally liable and must be punished, and the political will of Member States to enforce international humanitarian and human rights law and insist that those who violate it are held accountable. The ongoing impunity of those who perpetrated Japan's system of military slavery during the Second World War is only one of many examples of an ongoing failure by Member States to investigate, prosecute and punish those found responsible for past acts of rape and sexual violence. This failure has contributed to an environment of impunity that perpetuates violence against women today. Whether the violence described in this report is investigated and punished, and whether such acts are prevented in the future depends ultimately on the firm commitment of the States Members of the United Nations.

## II. EMERGING LEGAL STANDARDS ON ARMED CONFLICT AND VIOLENCE AGAINST WOMEN

9. Since the Special Rapporteur's last report on violence against women during armed conflict, wartime violence against women has continued unabated. However, in the last few years there has been growing international recognition of the seriousness of these crimes and an international commitment to setting up a mechanism of accountability.

10. As the Special Rapporteur has noted in previous reports, rape and other gender-based violence during wartime has long been prohibited, although often ignored and rarely prosecuted. Only in recent years, following the systematic rape and sexual violence associated with the conflicts in Bosnia and Rwanda, has the international community begun to develop precise legal standards to make clear once and for all that such practices can be war crimes, crimes against humanity, and components of the crime of genocide, as well as torture or other cruel, inhuman and degrading treatment, and enslavement. Similarly, the mechanisms have only recently been created to facilitate the investigation and prosecution of such crimes, through the creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, and more recently the International Criminal Court (ICC).

### A. The International Criminal Court

11. The single greatest development since the Special Rapporteur's previous report (hereinafter the "1998 report") was the approval on 17 July 1998 of the Statute of the ICC, known as the Rome Statute. As of November 2000, 116 countries had signed and 23 had ratified the treaty, over one third of the number of ratifications necessary for the treaty to enter into force.

12. The Rome Statute makes explicit that rape and other gender<sup>1</sup> violence are among the most serious crimes of concern to the international community by specifically defining them as constituent acts of crimes against humanity and war crimes. According to the Statute, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention (in international armed conflict)<sup>2</sup> or constituting a serious violation of article 3 common to four Geneva Conventions (in a non-international conflict)<sup>3</sup> are war crimes. Similarly, the Statute defines crimes against humanity to include torture, as well as "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" when committed as part of a widespread or systematic attack directed

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<sup>1</sup> "Gender" for the purposes of the Statute is defined as "the two sexes, male and female, within the context of society". Rome Statute of the ICC, article 7 (3).

<sup>2</sup> Ibid., article 8 (2) (b) (xxii).

<sup>3</sup> Ibid., article 8 (2) (e) (vi).

against any civilian population.<sup>4</sup> Furthermore, the Statute defines “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.<sup>5</sup> The Statute also provides that persecution on the basis of gender - as well as on political, racial, national, ethnic, cultural, religious or other grounds - may constitute a crime against humanity.<sup>6</sup>

13. Although the Statute does not make specific reference to rape or other sexual violence in its article on genocide, following instead the language in the Convention on the Prevention and Punishment of the Crime of Genocide, its provisions can be used to prosecute rape and other sexual violence (see for example the *Akayesu* case cited below). The Statute provides that constituent acts of genocide include “causing serious bodily or mental harm to members of the group” and “imposing measures intended to prevent births within the group”.<sup>7</sup>

14. Also of importance, the treaty includes a non-discrimination clause, which requires that the application and interpretation of the law by the ICC:

“[M]ust be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender ...”<sup>8</sup>

15. Significantly, the Rome Statute gives specific recognition to the concerns of child soldiers, making the “conscripting or enlisting [of] children under the age of 15 years into the national armed forces or using them to participate actively in hostilities” a war crime.<sup>9</sup>

16. In addition to its substantive legal provisions, the Rome Statute deals with a number of structural issues that women’s rights activists viewed as critical if the Court were to function as a progressive mechanism for justice for victims of gender-based violence. In the selection of judges, the States parties must take into account the need for “a fair representation of female and male judges”, as well as appoint “judges with legal expertise on specific issues, including ... violence against women or children”.<sup>10</sup> The Office of the Prosecutor (OTP) is similarly required to appoint advisers with expertise on “sexual and gender violence and violence against children”.<sup>11</sup>

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<sup>4</sup> Ibid., article 7 (1) and (1) (g).

<sup>5</sup> Ibid., article 7 (2) (c).

<sup>6</sup> Ibid., article 7 (1) (h).

<sup>7</sup> Ibid., article 6 (b) and (d).

<sup>8</sup> Ibid., article 21 (3).

<sup>9</sup> Ibid., article 8 (2) (b) (xxvi).

<sup>10</sup> Ibid., article 36 (8) (a) (iii) and (b).

<sup>11</sup> Ibid., article 42 (9).

17. The Statute also makes specific provision for a Victim and Witness Unit, which will “provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims and others who are at risk on account of [their] testimony. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”<sup>12</sup>

18. Although many features of the ICC are sensitive to the issues raised by violence against women during wartime, the Rome Statute also has certain drawbacks with regard to the international human rights of women. The Statute defines “forced pregnancy” in article 7 (2) (f), as requiring the perpetrator to have “the intent” of affecting the ethnic composition of any population. This definition raises serious concerns as to why forced pregnancy of any kind should not be an offence. In addition, it seems to endorse prejudices with regard to ethnic purity by making certain kinds of forced pregnancy more offensive than others.

19. In addition, the Rome Statute defines “gender” in article 7 (3) as referring to “the two sexes, male and female, within the context of society”. This definition, by re-emphasizing the biological differentiation between men and women, prevents approaches that rely on the social construction of gender.

20. Finally the Rome Statute does not provide for witness incognito provisions with regard to the defendant once the case goes to trial. Though there are witness incognito provisions in the Statute, the drafters have preferred to place emphasis on the rights of the defendants over the safety of individual witnesses.

## **B. Case law of the International Criminal Tribunal for the Former Yugoslavia**

21. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has played a critical role in setting jurisprudential benchmarks for the prosecution of wartime sexual violence. The Office of the Prosecutor (OTP) has recognized that sexual violence not only constitutes a range of international crimes, such as war crimes, crimes against humanity and war crimes, but can also constitute torture, enslavement, serious bodily injury, and other relevant acts as long as the elements constituting these crimes are present in the act of sexual violence. To date, ICTY public indictments for crimes committed during the war in the former Yugoslavia have charged crimes of sexual assault as grave breaches of the Geneva Conventions, crimes against humanity, war crimes, and genocide. Moreover, the ICTY has publicly charged a number of alleged war criminals with command responsibility for crimes of sexual assault under article 7 (3) of the Statute.

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<sup>12</sup> Ibid., article 43 (6).

## The Tadic case

22. Dusko Tadic, a member of the Bosnian Serb forces operating in the municipality of Prijedor, was convicted by the Tribunal on 7 May 1997 for crimes against humanity and war crimes committed during the war in the former Yugoslavia.<sup>13</sup> Tadic, a low-level official at the notorious Omarska camp, was not convicted for directly committing an act of sexual assault,<sup>14</sup> but for his participation in a general, widespread and systematic campaign of terror that included beatings, torture, sexual assaults, and other physical and psychological abuse directed at the non-Serb population in the Prijedor region.<sup>15</sup>

23. It is particularly significant that in the *Tadic* case the Tribunal found the accused guilty of crimes against humanity for criminal acts of persecution that included crimes of sexual violence. Instead of falling back on the often heard claim that rape is a random or arbitrary act perpetrated by soldiers in search of an outlet for sexual energy, the Tadic decision states categorically that rape and sexual violence can be considered constituent elements of a widespread or systematic campaign of terror against a civilian population. It is not necessary to prove that rape itself was widespread or systematic but that rape was one of perhaps many types of crimes - the *spectrum* of which was committed on a widespread or systematic basis and comprised an aggressor's campaign of terror.<sup>16</sup>

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<sup>13</sup> On 11 November 1999, Tadic was sentenced to 25 years' imprisonment. That sentence was later reduced by the Appeals Chamber to a maximum of 20 years. International Criminal Tribunal of the Former Yugoslavia, Fact Sheet on ICTY Proceedings, November 2000.

<sup>14</sup> The original indictment in the *Tadic* case charged Tadic with the rape of a woman detainee, Witness F. As the trial drew near, Witness F. withdrew and refused to testify. Some observers claimed that the witness withdrew because she was too frightened to testify and many viewed her retreat as emblematic of the Tribunal's failure to provide adequate witness protection, particularly to women survivors of sexual assault. Witness F.'s refusal to participate forced the Prosecutor to amend the indictment, withdrawing the rape charges against Tadic. The Tribunal thus turned to a consideration of the broader setting in which Tadic operated an environment characterized, in part, by brutal sexual violence. See for example, Kelly Askin, Sexual Violence in ICTY and ICTR Indictments and Decisions: The Current Status of Prosecutions Based on Gender-Based Crimes Before the ICTY and ICTR: Developments in the Protection of Women in International Humanitarian Law, *American Journal of International Law*.

<sup>15</sup> *Prosecutor v. Tadic*, Indictment, para. 2.6.

<sup>16</sup> The *Tadic* court stated that the crime of persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to a targeted group. *Prosecutor v. Tadic*, Judgement, 7 May 1997, para. 704. In important dicta, the court also addresses the issue of whether a single act can constitute a crime against humanity: clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution. *Ibid.*, para. 649 quoting Henri Meyerowitz in the report of Special Rapporteur D. Thiam of the International Law Commission (A/CN.4/466), para. 89.

## The Blaskic case

24. Tihomir Blaskic, a colonel in the armed forces of the Croatian Defence Council (HVO) and Chief of the Central Bosnia Operative Zone of the HVO armed forces during the events for which he was indicted by the ICTY, was charged with both direct criminal responsibility and command responsibility for crimes against humanity, including rapes committed at detention centres. On 3 March 2000, Blaskic was convicted for a range of humanitarian law violations, including war crimes, grave breaches and crimes against humanity against the Bosnian Muslim population of central Bosnia.<sup>17</sup> He was not convicted for directly committing the crimes enumerated in the indictment but on the basis that he “ordered, planned, instigated or otherwise aided and abetted in the planning, preparation, or execution of those crimes”.<sup>18</sup>

25. The judgement is important, among other things for its extended discussion of what constitutes a crime against humanity. The court lists four elements that comprise “a systematic attack”, including “the perpetration of a criminal act on a very large scale against a group of civilians or *the repeated and continuous commission of inhuman acts linked to one another*” (emphasis added).<sup>19</sup> The court’s discussion of crimes against humanity is a positive contribution to the development of rape as a war crime. Under both the *Tadic* and *Blaskic* interpretations of crimes against humanity, the rape and sexual assault of women need not in and of itself be widespread or systematic but sexual violence can be a constituent element of a widespread or systematic campaign involving other criminal acts.

## The Celebici case

26. On 16 November 1998, the ICTY issued its first decision convicting a Bosnian war criminal specifically for crimes of sexual violence, among other war crimes. The court found Hazim Delic, a Bosnian Muslim and deputy camp commander at the Celebici prison camp, guilty of raping and sexually assaulting two Bosnian Serb women held prisoner in the camp in 1992, and convicted him of, among other things, a grave breach (torture) and war crimes (torture) for the rapes.<sup>20</sup> The court also found Zdravko Mucic, a Bosnian Croat camp commander, to have command responsibility for the abuses committed against detainees in the

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<sup>17</sup> *Prosecutor v. Blaskic*, No. IT-95-14, Judgement, 3 March 2000. Blaskic was acquitted on charges of committing genocide.

<sup>18</sup> ICTY Statute, article 7 (1).

<sup>19</sup> *Prosecutor v. Blaskic*, Judgement, para. 203. The other three elements were: (a) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; (b) the perpetration and use of significant public and private resources, whether military or other; and (c) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

<sup>20</sup> *Prosecutor v. Delalic, et al.*, Case No. IT-96-21-A, 16 November 1998. For other acts, Delic was also convicted of wilful killing and murder, torture, inhuman and cruel treatment, causing great suffering or serious injury, and the unlawful confinement of civilians.



Celebici camp, including killings, torture, sexual assaults, beatings, and other forms of cruel and inhuman treatment.

27. The judgement confirms that rape and sexual violence can be acts of torture; the Trial Chamber underscored that a prohibited purpose of torture is “for discrimination of any kind”, including gender discrimination;<sup>21</sup> the court found a camp commander responsible for the sexual violence committed by his subordinates; the court adopted the broad and progressive definition of rape articulated by the *Akayesu* court (see below); and the court emphasized that rape and sexual violence result not only in physical but also psychological harm.

28. Hazim Delic was sentenced to 20 years’ imprisonment for crimes committed at the Celebici camp, despite the prosecution’s request for a life sentence. Delic was found not guilty for command responsibility for any crimes committed by his subordinates, although he was the deputy camp commander under Mucic and evidence of his de facto control over camp guards is littered throughout the judgement.<sup>22</sup> The prosecution has appealed both Delic’s sentence and the verdict. Mucic, Delic and Landzo have all appealed their convictions.

### The Furundzija case

29. Anto Furundzija, a local commander in Vitez in a special HVO military police unit, was convicted on 10 December 1998 of torture as a co-perpetrator in the rape of a Bosnian Muslim woman during interrogation, as well as of aiding and abetting in the rape.<sup>23</sup> The case was the first ever prosecuted exclusively on crimes of sexual violence before an international tribunal and contains a number of progressive contributions to the jurisprudence of rape as a war crime. The court confirmed, among other things, the status of rape as a war crime, particularly under common article 3 of the Geneva Conventions dealing with internal armed conflicts;<sup>24</sup> accepted the *Akayesu* definition of rape but formulated a set of elements that expressly prohibits forced oral sex;<sup>25</sup> and stated that the elements of torture in armed conflicts include that at least one of

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<sup>21</sup> The *Celebici* court further notes that the United Nations has recognized that violence directed against a woman because she is a woman, including acts that inflict physical, mental or sexual harm or suffering, represent a form of discrimination that seriously inhibits the ability of women to enjoy human rights and freedoms. Thus, the court supported the view that gender discrimination can provide a basis for prosecuting rape as torture. *Delalic, et al.*, Judgement, para. 493.

<sup>22</sup> For example, numerous witnesses testified that Delic was a commander with all the requisite power the position implies. *Ibid.*, para. 798.

<sup>23</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998.

<sup>24</sup> *Ibid.*, paras. 165-171.

<sup>25</sup> The objective elements of rape include:

- (i) the sexual penetration, however, slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.

the persons involved in the torture be a public official or from “any other authority-wielding entity”,<sup>26</sup> thus opening the door for a range of actors, including paramilitaries and other “irregulars” who raped and sexually assaulted women in the war in the former Yugoslavia with the tacit approval and support of the various militaries, as potential torturers.<sup>27</sup>

30. Unfortunately, the court also made a number of procedural decisions that raise concern. In a controversial ruling, the court subpoenaed records from a women’s counselling centre in Bosnia concerning psychological treatment that Witness A. had received in the aftermath of her rapes. After an in camera review to “determine its relevance and whether it should be disclosed to the parties”<sup>28</sup> the Chamber decided that the counselling documents should be disclosed to the defence and the prosecution.<sup>29</sup> Although Furundzija was ultimately convicted, and his conviction upheld on appeal,<sup>30</sup> the procedural decisions taken by the court, particularly with respect to the disclosure of Witness A’s personal counselling records, must be of concern especially for the possible negative impact on other women coming forward to cooperate with the Tribunal.

### **The Foca case**

31. In June 1996, the ICTY issued an indictment against eight Bosnian Serbs for a range of sexual offences committed against women in Foca.<sup>31</sup> As the ICTY noted, the indictment was of

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Ibid., para. 185. The court states that forced oral sex can be just as humiliating and traumatic for the victim as vaginal or anal penetration and that a broad definition of what constitutes a rape comports with the fundamental principle of protecting human dignity. Ibid., para. 184.

<sup>26</sup> Ibid., para. 162.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., para. 26.

<sup>29</sup> The ICTY rules do not include a special privilege for medical or counselling records. Many critics of the *Furundzija* court’s actions have called on the ICTY to amend the Rules of Procedure and Evidence to include a privilege for medical or rape counselling records that would prohibit their disclosure unless the court is convinced, after in camera review, of the defence’s contention that the records are not only relevant but exculpatory. The final version of the Rules of Procedure and Evidence of the ICC does recognize as privileged those communications between a person and his or her medical doctor, psychiatrist, psychologist or counsellor under rule 73 (3). Preparatory Commission for the International Criminal Court, report of the Working Group on Rules of Procedure and Evidence (PCNICC/2000/WGRPE/L.8), 27 June 2000, p. 5.

<sup>30</sup> *Furundzija*, Case No. IT-95-17/1-A, Appeals Judgement, 21 July 2000.

<sup>31</sup> Between July 1992 (April 1992 for Vukovic) and February 1993, the accused are charged with raping women in detention facilities; taking women out of detention centres to houses, apartments and hotels to rape them; forcing women to undress and dance nude before groups of soldiers and police; engaging in gang rape and public rapes; detaining women in houses and apartments used as brothels; forcing women to perform domestic chores in houses and apartments, as well as forcing them to submit to sexual assaults; and selling women in exchange for money. The rapes included vaginal, anal and oral penetration and fellatio. Kunarac is charged with command responsibility for the acts of sexual violence

major legal significance because it was “the first time that sexual assaults had been diligently investigated for the purpose of prosecution under the rubric of torture and enslavement as crimes against humanity”.<sup>32</sup> The *Foca* case can be distinguished from the *Tadic* and *Blaskic* cases in that the accused are charged with crimes against humanity for a widespread or systematic campaign of sexual violence against women. Thus, rape and sexual assault in and of themselves were systematic, constituting “the perpetration of a criminal act on a very large scale against a group of civilians” required for a charge under crimes against humanity.<sup>33</sup> The trial is currently under way and a judgement is anticipated before the end of the year.

32. The ICTY has indicted a number of individuals for command (or superior) responsibility<sup>34</sup> for crimes of sexual violence. As noted above, in the *Celebici* case, defendants were convicted not because they were physical perpetrators, but because of the rape and sexual violence of those under their command. Others, including Radovan Karadzic, have been indicted for crimes, including rape and sexual violence, committed by those under his leadership.

33. On 27 May 1998, the ICTY indicted a sitting Head of State, Yugoslav President Slobodan Milosevic, then President of Yugoslavia, for violations of the laws or customs of war and crimes against humanity by military and police units operating in Kosovo during the first five months of 1999.<sup>35</sup> Milosevic is charged for his own acts, as well as his superior responsibility. Although the indictment did not include charges related to sexual violence, representatives of the ICTY have stated publicly that they intend “to investigate, and where appropriate indict and prosecute perpetrators” of sexual violence in the province.<sup>36</sup>

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committed by his subordinates. Many of the victims were children; one girl was 12 and one 15 at the time they were raped and serially sexually abused at Foca. Many of the women were serially raped over long periods of time. Many suffered permanent gynaecological damage as a result of the abuse, including one woman who can no longer conceive as a result of such damage. The indictments also recount the rape of a woman seven months pregnant.

<sup>32</sup> ICTY press release, 27 June 1996.

<sup>33</sup> *Blaskic*, Judgement, note 179.

<sup>34</sup> The doctrine of command responsibility holds those in positions of superior authority liable for the acts of their subordinates. See ICTY Statute, article 7 (3).

<sup>35</sup> In addition to Milosevic, Milan Milutinovic, the President of Serbia, Nikola Sainovic, Deputy Prime Minister of the Federal Republic of Yugoslavia, Dragoljub Ojdanic, Chief of Staff of the Yugoslav Army, and Vlajko Stojiljkovic, Minister of Internal Affairs of Serbia, were also indicted.

<sup>36</sup> ICTY press release, “ICTY Prosecutor, Carla Del Ponte, releases background paper on sexual violence investigation and prosecution”. The Hague, 8 December 1999.

### C. Case law of the International Criminal Tribunal for Rwanda

34. As of December 2000, the International Criminal Tribunal for Rwanda (ICTR) has publicly indicted 45 persons, of which five indictments include charges of sexual violence. Forty-three accused are in custody either on trial, awaiting trial or serving a sentence.

#### The Akayesu case

35. The ICTR decision in *Prosecutor v. Akayesu*,<sup>37</sup> issued on 2 September 1998, recognized for the first time that acts of sexual violence can be prosecuted as constituent elements of a genocidal campaign. Jean-Paul Akayesu, then Mayor of Taba commune, was charged with genocide, crimes against humanity, and war crimes<sup>38</sup> and with having known that acts of sexual violence were being committed and having facilitated the commission of such acts by permitting them to be carried out on commune premises.<sup>39</sup> Akayesu was also charged with being present during the commission of crimes of sexual violence and thus of encouraging these crimes.<sup>40</sup>

36. The *Akayesu* judgement is unequivocal in its pronouncement that the crimes of sexual violence committed in the Taba commune and throughout Rwanda constituted acts of genocide:

“[R]ape and sexual violence ... constitute genocide in the same way as any other act as long as they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such ... Sexual violence was an integral part of the process

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<sup>37</sup> *Prosecutor v. Akayesu*, ICTR-96-4, 13 February 1996, amended ICTR-96-4-I, 17 June 1997.

<sup>38</sup> The indictment defines acts of sexual violence to include “forcible sexual penetration ... and sexual abuse, such as forced nudity”. *Ibid.*, para. 10A. The original *Akayesu* indictment did not include any charges for crimes of sexual violence despite overwhelming evidence of mass rapes at Taba commune. A lack of political will among some high-ranking Tribunal officials as well as deficient investigative methodologies employed by some of the investigative and prosecutorial staff of the ICTR accounted for this omission. The indictment was amended after numerous Tutsi women testified and spoke out publicly about sexual violence in Taba commune. See also Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, September 1996, detailing the massive amount and systematic nature of sexual violence during the Rwandan genocide. In June 1997, the *Akayesu* indictment was amended to reflect the pivotal role that sexual violence played in the genocide of Tutsis in Taba commune.

<sup>39</sup> During the *Akayesu* trial, several Tutsi women testified that they were subjected to repeated collective rape by militia in and around the commune office, including in view of Akayesu. They spoke of witnessing other women being gang-raped and murdered while Akayesu stood by. In one instance, Akayesu was present during such a rape/murder and reportedly told the rapists, “[n]ever ask me again what a Tutsi woman tastes like”. *Prosecutor v. Jean Paul Akayesu*, Prosecution’s Closing Brief, volume I, 29 April 1998, para. 165. In addition, victims and witnesses at trial described other acts of sexual violence including public rape, rape with objects such as machetes and sticks, sexual slavery, forced nudity, and the rape of girl children.

<sup>40</sup> *Akayesu*, Amended Indictment, para. 12B.

of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”<sup>41</sup>

37. The Trial Chamber convicted Akayesu of the crime of genocide finding “beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the *bureau communal* and that women were being taken away from the *bureau communal* and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence. In fact, there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence.”<sup>42</sup>

38. The *Akayesu* court made a significant contribution to the evolving jurisprudence of rape as a war crime by articulating a broad definition that squarely places rape on an equal footing with other crimes against humanity. The *Akayesu* definition reconceptualizes rape as an attack on an individual woman’s security of person, not on the abstract notion of virtue and not as a taint on an entire family’s or village’s honour. Also of significance, the court defined sexual violence to include forced nudity, firmly establishing that acts of sexual violence are not limited to those involving penetration or even sexual contact.<sup>43</sup> The judgement states clearly that “The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.” The “Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.”<sup>44</sup> The *Akayesu* definitions of rape and sexual violence have been embraced by the ICTY and have served as the internationally accepted definition for crimes of sexual violence in all of the ICTY cases to date (see *Celebici* and *Furundzija* cases discussed above).

### **The Musema case**

39. On 27 January 2000, the ICTR held that Alfred Musema, director of the Tea Factory in Gisovu, had himself attacked Tutsis, and had incited his employees at the factory to attack Tutsis, during violent attacks in April and May 1994. Musema was also found to have raped a young Tutsi woman named Nyiramusugi, as four other men held her down,<sup>45</sup> then to have left, while the four also raped her and left her for dead. The court held that Musema had individual responsibility both for his own act of rape, as well as for aiding and abetting the other rapists. The court found that the evidence presented - considering both the murders as well as acts of serious bodily and mental harm, including rape and other forms of sexual violence - amounted to

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<sup>41</sup> *Akayesu*, Judgement, 2 September 1998, para. 31 (under sect. 7.8, Count 1 - Genocide, Count 2 - Complicity in Genocide).

<sup>42</sup> *Ibid.*, para. 52.

<sup>43</sup> *Akayesu*, Amended Indictment, para. 10A.

<sup>44</sup> *Akayesu*, Judgement, paras. 596-598, sect. 6.4, Crimes against Humanity.

<sup>45</sup> *Prosecutor v. Musema*, ICTR-96-13-I Judgement, 27 January 2000, para. 907.

genocide. With regard to sexual violence, the court stated: “acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such.”<sup>46</sup> Significantly, the court also found that “the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramasugi by the Accused was consistent with the pattern of this attack and formed a part of this attack”, and therefore found Musema guilty of crime against humanity (rape).<sup>47</sup> Musema was sentenced to life imprisonment.

40. In addition to the cases above, a number of cases dealing with sexual violence are currently pending. Arsène Shalom Ntahobali, a local store manager, was indicted along with his mother Pauline Nyiramashuhuko, the former Minister for Women’s Development and Family Welfare, on charges of genocide, crimes against humanity and violations of common article 3. He is accused, among other things, of having set up a roadblock where members of the Tutsi ethnic group were kidnapped, abused and killed. Ntahobali is also charged with raping Tutsi women, and both he and his mother are charged with forcing Tutsi women to undress in public.<sup>48</sup> The amended indictment against Laurent Semanza also includes charges of sexual violence; the Prosecutor will present evidence at trial that the accused encouraged paramilitaries to rape Tutsi women. His trial began on 16 October 2000, and is continuing.<sup>49</sup> Similarly, in the amended indictment against Ignace Bagilishema, the bourgmestre of Mabanza from 1980 to 1994, the Prosecutor alleges that the defendant incited Hutus to rape Tutsi women before killing them.<sup>50</sup>

### III. FUTURE DIRECTIONS AND UNRESOLVED ISSUES

41. The ICTY has made significant progress in the indictment and prosecution of alleged perpetrators of crimes of sexual violence. However, only a little over half of those publicly indicted are now in custody. Numerous Bosnian women have told international human rights groups that they fear testifying at the ICTY and then returning to their pre-war homes because most of the alleged perpetrators still live in these areas and wield power as politicians, municipal officials, police officers and businessmen. Efforts must be intensified to arrest those who have been indicted. Similarly, women’s rights activists from Rwanda have warned that lack of information about the ICTR and lack of “trust that the court will actually take the measures

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<sup>46</sup> Ibid., para. 933.

<sup>47</sup> Ibid., para. 966.

<sup>48</sup> *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-I, 26 May 1997.

<sup>49</sup> *Prosecutor v. Semanza*, Case No. ICTY-97-20-I, Amended Indictment, 23 June 1999.

<sup>50</sup> *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-I, Amended Indictment, 17 September 1999.

necessary to protect them from being publicly identified” are reasons that women victims of sexual violence do not come forward to speak to ICTR investigators.<sup>51</sup>

42. The fact that war criminals continue to live freely in close proximity to potential witnesses and that witnesses still fear public exposure has serious implications for the work of the Tribunals and makes the need for aggressive witness protection programmes essential. Particularly during pre- and post-trial phases, there need to be more adequate protective and support measures for witnesses and their families. Long-term protective measures - in the form of resettlement, anonymity, asylum - have been extremely rare and offered only in the most exceptional circumstances. While significant progress has been made on the jurisprudential front with respect to war crimes prosecutions for sexual violence, that progress must be reinforced by a concerted effort to implement witness protection mechanisms that instil confidence and provide personal security for women who want to testify.

43. The ICTY should revise its rules of procedure to include a privilege for medical or rape counselling records that would prohibit their disclosure unless the court is convinced, after in camera review, of the defence’s contention that the records are not only relevant but exculpatory.

#### **IV. GENERAL ISSUES RELATING TO VIOLENCE AGAINST WOMEN AND ARMED CONFLICT (1997-2000)**

##### **A. Unimaginable brutality**

44. Violence against women during wartime continues to involve horrendous crimes that must shock the conscience of humanity. Despite the significant progress that has been made in recent years to strengthen legal prohibitions against rape and other sexual violence, women and girls throughout the world continue to be the victims of unimaginable brutality. As the case studies illustrate, gender-based violence can take a variety of forms. Since 1997, women and girls have been raped - vaginally, anally and orally - sometimes with burning wood, knives or other objects. They have been raped by government forces and non-State actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. They have been maimed or sexually mutilated, and often later killed or left to die. Women have been subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public, and to perform domestic chores while nude.

45. Women and girls have also been abducted or held captive, forced to do domestic work - cleaning, cooking, serving - or other labour, in addition to any sexual “services” that may be demanded of them.<sup>52</sup> Sometimes women and girls are forced into “marriage”; a soldier will

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<sup>51</sup> Human Rights Watch, *World Report 2001*, p. 457.

<sup>52</sup> In the indictment of Dragoljub Kunarac, the defendant is alleged to have held women in the military headquarters and forced them to provide sexual and domestic services. The defendant was charged with

identify a woman as his “wife”, sometimes forcing her to go with him from region to region and other times passing her on to others; all the while she is raped and otherwise mistreated. Such forced marriages are enslavement as defined by the ICC (see above), and may also be torture or other cruel, inhuman and degrading treatment.

### **B. Chemical weapons**

46. Modern warfare has often entailed the deployment of chemical weapons, the use of which is now clearly banned by the Rome Statute of the ICC. Use of such weapons is a war crime and a crime against humanity. The Special Rapporteur has recently received a number of testimonies of victims of the use of chemical weapons, especially from Viet Nam. The victims have suffered disabilities related to their reproductive organs and have given birth to children with severe disabilities. The consequences resulting from the use of chemical weapons can be devastating, not only for the victim concerned but also for the next generation, unborn at the time of the armed conflict.

### **C. Role of non-State actors**

47. The impunity of non-State actors for violations of human rights and humanitarian law is an issue that deserves serious international consideration. The large majority of conflicts today are internal ones involving armed opposition forces fighting against government units.<sup>53</sup> Although rape and sexual violence are often committed by government forces, non-State actors also commit serious abuses against women and girls and often target the civilian population, including in particular women and children, as a tactic of war. Rebel forces are also responsible for the vast majority of abductions of children, including girls, for sexual slavery and/or to use as child soldiers. In some conflicts, rebel soldiers engage in forced marriage and abduction of young girls living in villages near their camps. The provisions of common article 3 of the Geneva Conventions regulate the conduct of all belligerents to a conflict, including armed opposition forces. Non-State actors, just as government forces, can be held accountable for violations of international humanitarian law and will be subject to the jurisdiction of the ICC, once it is established. There are, however, particular difficulties in enforcing international standards with regard to non-State actors. In particular, there are often limited means of exerting pressure on non-State actors. Additional efforts need to be made in this area to increase pressure on non-State actors to abide by international humanitarian law and to exert political, economic and other pressure on the friendly Governments that finance, arm or otherwise support abusive rebel forces.

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the crime of enslavement. *Prosecutor v. Gagovic and Others* (“Foca” case), Case No. IT-96-23, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 October 1998.

<sup>53</sup> In addition, in many conflicts Governments use paramilitaries, either officially or informally linked to the Government. For purposes of this discussion, such paramilitary units are considered State agents, for whose conduct the State is accountable.



#### D. The female child

48. In recent years, the international community has focused increasing attention on the problem of child soldiers and children in conflict. It is now widely recognized that armed conflict has a different and more damaging long-term impact on children, and that female children may face specific risks that are different from those of boys. As is reflected throughout the case studies below, girls face many if not all of the risks that are experienced by women during armed conflict. They are often victims of rape and other sexual violence, and may be abducted and forced to serve a number of distinct and overlapping roles, such as porters, cooks, combatants and sexual slaves. Girls who are orphaned or separated from their families during armed conflict are also particularly vulnerable to sexual violence and exploitation, including trafficking into forced prostitution. And while they may find themselves responsible for the shelter and feeding of younger siblings, they encounter numerous obstacles that make these tasks difficult because of their age and gender.

49. While women and girls often experience similar types of violence, the physical and mental impact on girls can be much more damaging. Girls who are raped or abducted and forced to provide sexual services for male combatants are at great risk of contracting sexually transmitted diseases, HIV/AIDS, as well as numerous complications related to pregnancy and abortion. This is particularly true for those who are not yet sexually mature. And girls may find it particularly difficult to reintegrate into their families and communities once the conflict is over. The extreme suffering that armed conflict inflicts on girls and the many roles girls are often forced to play during conflict and long after has been recognized by the Secretary-General, in his historic report on children in armed conflict.<sup>54</sup>

50. Girls also participate, either voluntarily or by force, in government armies, paramilitaries and militias, or armed opposition groups in over 30 countries in the world.<sup>55</sup> While these girls often face all of the dangers associated with being a child soldier, they may also be forced to provide sexual services or face other gender-specific abuse. There has been growing international condemnation of the use of child soldiers,<sup>56</sup> culminating, on 25 May 2000, in the

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<sup>54</sup> *Children in armed conflict: report by the Secretary-General*, A/55/163-S/2000/712, 19 July 2000, para. 34.

<sup>55</sup> In case studies from El Salvador, Ethiopia and Uganda, it was found that reportedly a third of child soldiers were girls. Coalition to Stop the Use of Child Soldiers, *Girls With Guns: An Agenda On Child Soldiers For Beijing Plus Five* ([http://www.child-soldiers.org/themed\\_reports/beijing\\_plus.html](http://www.child-soldiers.org/themed_reports/beijing_plus.html)), p. 1. See also Susan McKay and Dyan Maurana, "Girls in militaries, paramilitaries, and armed opposition groups", unpublished, p. 5.

<sup>56</sup> The International Labour Organization (ILO) Worst Forms of Child Labour Convention, 1999, came into force on 19 November 2000, prohibiting forced or compulsory labour, including the forced recruitment of child soldiers (ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999). The Commission on Human Rights in resolution 1999/80 called upon all States, among other things, to take effective action against violations of girls' human rights and fundamental freedoms (para. 7). The special situation of child soldiers was also addressed in the Rome Statute of the ICC, which identified the conscription, enlistment or active use in hostilities of child soldiers under the age of 15 as a war crime (art. 8 (2) (b) (xxvi)).

adoption by the General Assembly of a new Optional Protocol to the Convention on the Rights of the Child that bans forced recruitment and conscription under the minimum age of 18, and requires States to raise their minimum age for voluntary recruitment to at least 16.<sup>57</sup> By year's end, 70 countries had already signed the treaty and 3 had ratified it.

51. As has been noted above, girls may find it more difficult to reintegrate into their families and communities after the end of a conflict because they have been sexually abused or forced to be wives of enemy forces, and they may face other obstacles to rehabilitation that are both gender and age specific. Girls may, for example, find it difficult to feed and shelter themselves or others because of discrimination in laws, such as inheritance laws. As the Special Representative for Children and Armed Conflict has noted, in post-genocidal Rwanda, an estimated 40,500 households are headed by girls. However, at the time of his visit to Rwanda in February 1999, Rwandese law did not allow women or girls to inherit land, including farm land necessary for their very subsistence.<sup>58</sup> As a result of Special Representative Otunnu's efforts, the Government of Rwanda enacted legislation in March 2000 allowing women and girls to inherit property.<sup>59</sup>

52. Despite the specific needs and experiences of girls in armed conflict, girls are often the last priority when it comes to the distribution of humanitarian aid and their needs are often neglected in the formulation of demobilization and reintegration programmes. There is growing recognition that the specific needs of girls require special protective measures, both during armed conflicts and in post-conflict situations. Following an open debate on 25 August 1999, the Security Council adopted a landmark resolution urging "all parties to armed conflicts to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance".<sup>60</sup>

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<sup>57</sup> General Assembly resolution 54/263 of 26 June 2000, annex I, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The Optional Protocol also calls on non-State actors to stop the recruitment and use of children under 18.

<sup>58</sup> Additional report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr. Olara Otunnu, submitted in accordance with General Assembly resolution 53/128 (E/CN.4/2000/71 of 9 February 2000), para. 45.

<sup>59</sup> "Special Representative for Children and Armed Conflict welcomes Rwandan law allowing girls to inherit property", press release HR/4465, 20 March 2000.

<sup>60</sup> Security Council resolution 1261 (1999) of 25 August 1999, para. 10. Similarly, on 11 August 2000, the Security Council underlined:

"the importance of giving consideration to the special needs and particular vulnerabilities of girls affected by armed conflict, including, *inter alia*, those heading households, orphaned, sexually exploited and used as combatants, and urges that their human rights, protection and welfare be incorporated in the development of policies and programmes, including those for prevention, disarmament, demobilization and reintegration". Security Council resolution 1314 (2000) of 11 August 2000, para. 13.

## **E. Trafficking of women in and out of conflict zones**

53. During wartime, women are often trafficked across borders to sexually service combatants to the armed conflict. Armed conflict increases the risk of women and girls being abducted and forced into sexual slavery and/or forced prostitution. Although most conflicts are now internal ones, women and girls may be transported across international borders, often to camps of soldiers or rebels located in the territory of a neighbouring State. At least some of these abductions result in women and girls being sold to others and trafficked to other regions or countries. The Governments which host and support the rebel forces also assume a specific obligation to stop the trafficking in human beings and to hold accountable those found responsible for such crimes. The Special Rapporteur has received reports of women being trafficked from refugee camps and other places of shelter given for their protection. She has also received reports of women being trafficked to service United Nations peacekeepers in countries where such peacekeepers are located. The trafficking of women in the context of armed conflict is now seen as a war crime and a crime against humanity. It is important that such trafficking be curtailed, exposed and the perpetrators punished, even if such punishments involve United Nations personnel.

## **F. Internally displaced women**

54. Women and children face rape and other gender-based violence and abduction, not only during armed conflict but in flight, as well as once they have fled the conflict area. In her 1998 report, the Special Rapporteur discussed in detail the particular concerns of refugee women and the factors that impact their security differently from that of men.<sup>61</sup> However, since 1997, the Special Rapporteur has become increasingly concerned with the problem of women who are internally displaced. With the epidemic of internal conflicts around the world, it has become abundantly clear that internally displaced persons (IDPs) - the majority of whom are women and children<sup>62</sup> - are particularly vulnerable to violence and abuse. Unlike refugees, IDPs do not have access to legally binding international standards that are specifically designed for their protection and assistance,<sup>63</sup> nor is there an international monitoring agency specifically mandated to provide protection and assistance to IDPs in the same way that UNHCR does for refugees.

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<sup>61</sup> For a detailed discussion of the factors that affect refugee women, see the 1998 report (E/CN.4/1998/54), paras. 166-178.

<sup>62</sup> Women and children make up the overwhelming majority of refugees and internally displaced persons around the world - most estimates indicate that women and children make up at least 80 per cent of all displaced persons worldwide. For example, in Colombia women and children make up approximately 80 per cent of all internally displaced. Some 58 per cent of the internally displaced are women while 55 per cent are under 18 years of age. Report of the Representative of the Secretary-General on internally displaced persons submitted in accordance with Commission resolution 1999/47, addendum. Profiles in displacement: follow-up mission to Colombia (E/CN.4/2000/83/Add.1 of 11 January 2000), para. 32.

<sup>63</sup> The treatment of IDPs is governed, however, by international human rights and humanitarian law.

55. There has been growing international recognition of the particular problems of IDPs, culminating in the Guiding Principles on Internal Displacement submitted by Mr. Francis Deng, Representative of the Secretary-General, to the Commission on Human Rights. The Guiding Principles specifically recognize the particular concerns of IDP women and children, call for IDP women to be included in all phases of planning and distribution of humanitarian assistance, and for IDPs to be protected from all forms of violence including rape and other gender-specific violence, including forced prostitution.<sup>64</sup> Although essentially a restatement of existing international human rights and international humanitarian law, the Guiding Principles represent a significant achievement. Nevertheless, many IDPs still do not have access to humanitarian assistance or international protection. Although a State is obliged to protect its citizens, it is often the perpetrator of the very violence that causes displacement as well as the obstacle to international efforts to protect and provide humanitarian assistance to IDPs. Women and children, who make up the vast majority of IDPs, cannot hope to have adequate protection and assistance until States abide by their obligations under international human rights and humanitarian law pertaining to IDPs, and the international community develops a more consistent and coherent protection-oriented response to the problem of internal displacement.<sup>65</sup>

56. There has been growing recognition that the failure to include women in the design and construction of refugee camps, as well as in decisions about the distribution of humanitarian assistance, has unwittingly placed refugee women in ongoing danger. Recent calls for the mainstreaming of a gender perspective in all aspects of conflict and post-conflict responses, including in the design and construction of shelter and programmes for the distribution of humanitarian assistance, apply with equal force to the internally displaced.

### **G. Militarization**

57. Evidence from around the world seems to suggest that armed conflict in a region leads to an increased tolerance of violence in the society. A growing body of evidence indicates that the militarization process, including the ready availability of small weapons, that occurs leading up to and during conflicts, as well as the process of demobilization of often frustrated and aggressive soldiers after a conflict, may also result in increased violence against women and girls. When a peace agreement has been reached and the conflict brought to an end, women often face an escalation in certain gender-based violence, including domestic violence, rape, and trafficking into forced prostitution.<sup>66</sup> The correlation between domestic violence and violence

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<sup>64</sup> Document E/CN.4/1998/53/Add.2 of 11 February 1998, principle 11. See also principle 4. The Guiding Principles are also available on the OHCHR Web site ([www.unhcr.ch](http://www.unhcr.ch)) in 16 languages.

<sup>65</sup> Internally displaced persons: report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1999/47 (E/CN.4/2000/83), paras. 35-37.

<sup>66</sup> A recent UNIFEM study on violence against women in post-conflict Kosovo concluded that, while domestic violence existed before the war, "it appears to have increased since the conflict. Possible explanations ... [include] increased acceptability of violence as a way to solve problems, the breakdown

during war has concerned many scholars and activists in conflict-ridden areas. A report on violence against women in the IDP/refugee camps in West Timor shows very high incidence of domestic violence and sexual harassment in the camps.<sup>67</sup> Unfortunately many of the peace agreements and the processes of reconstruction after the conflict do not take note of these considerations.

#### H. United Nations peacekeepers/military bases

58. Women may also be exposed to violence by the international authorities or forces assigned to protect them. There have been a growing number of reports of rape and other sexual abuse being committed by United Nations peacekeeping forces and staff, most notably the 1999 murder of an 11-year-old Albanian girl in Kosovo by an American soldier.<sup>68</sup> Similarly, although clearing the Italian army of widespread abuse during its 1992-1995 peacekeeping operation in Somalia, an Italian investigative commission did conclude that the peacekeepers had committed abuses, such as the rape of a Somali woman with a stick of explosives. Reports of torture, rape and murder or other serious abuses by peacekeeping units have also been reported in Mozambique, Angola, Cambodia and Bosnia.

59. Some commentators have also noted that military contractors linked to peacekeeping forces and United Nations Police typically increase the demand for prostitution and may even participate in the trafficking of women into forced prostitution. A report prepared by the High Commissioner for Human Rights and the United Nations Mission to Bosnia and Herzegovina (UNMIBH) found widespread complicity by local police, as well as by some international police and members of the Stabilization Force (SFOR), in the trafficking of women into Bosnia.<sup>69</sup> The report discussed one case in which an SFOR civilian paid 7,000 deutsche mark (US\$ 3,057) to purchase two women from a brothel owner and notes that "NATO declined to waive the SFOR member's diplomatic immunity; he left Bosnia without legal repercussions."<sup>70</sup>

60. The problem of abuse in children by peacekeepers has been recognized by, among others, Graça Machel. In her September 2000 report on the impact of armed conflict on

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powerlessness amongst the community ...". *No Safe Place: Results of an Assessment on Violence against Women in Kosovo* (sect. 6 on domestic violence - First Incidence of Violence), UNIFEM, Prishtina, April 2000.

<sup>67</sup> Tim Kemanusian, Timor Barat Sekretariat, Report of VAW Investigations in IDP/Refugee Camps in West Timor, Kupang-ntt, Indonesia, August 2000.

<sup>68</sup> See, for example, George Boehmer, Tragedy in Kosovo ([www.abcnews.go.com/sections/world/DailyNews/kosovo000412.html](http://www.abcnews.go.com/sections/world/DailyNews/kosovo000412.html)), 12 April 2000.

<sup>69</sup> UNMIBH/OHCHR, "Report on Joint Trafficking Project of UNMIBH/OHCHR", May 2000. Between March 1999 and March 2000, UNMIBH and OHCHR intervened in 40 cases of trafficking and possible trafficking in persons, involving 182 women. The report states that, "In approximately 14 cases ... there was compelling evidence of complicity by police, primarily local officers but also some international police, as well as foreign military (SFOR troops)."

<sup>70</sup> *Ibid.*, p. 7.

children, Ms. Machel stated that “the arrival of peacekeeping troops has been associated with a rapid rise in child prostitution. These and other acts of violence committed by peacekeeping personnel against women and children are rarely reported or investigated. Even though the United Nations has taken some action to control the behaviour of peacekeeping personnel, it is still relatively rare for disciplinary measures to be taken.”<sup>71</sup>

61. Women in Japan (Okinawa), the Philippines and the Republic of Korea have also expressed concern that United States military bases and forces present in their countries create increased risk of rape and other sexual violence.<sup>72</sup> On 8 November 2000, for example, a United States soldier was sentenced by the Seoul High Court to six years in prison for the strangling death of a 31-year-old waitress who refused to have sex with him.<sup>73</sup> The presence of army bases near civilian populations increases risks of certain kinds of violence. It is important that the host Government and the Government in command of the armed forces take the necessary precautions to prevent such violence and act speedily to prosecute and punish the perpetrator once the violence is committed.

62. Peacekeeping forces and international police are often not sufficiently responsive to women’s protection needs or fail to make it a priority to solve rape and other crimes of sexual violence, thereby perpetuating an atmosphere of impunity in areas under their control. In recognition of this problem, on 17 September 1999, the Security Council adopted a resolution in which it noted “the importance of including in the mandates of peacemaking, peacekeeping and peace-building operations special protection and assistance provisions for groups requiring particular attention, including women and children”, and requested the Secretary-General to ensure that United Nations personnel involved in such activities “have appropriate training in international humanitarian, human rights and refugee law, including child and gender-related provisions ...”.<sup>74</sup> Furthermore, there is growing recognition that greater efforts must be made to place women in peacekeeping and civilian police units, and to ensure that a senior staff person is assigned specific responsibility for gender-based violence.

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<sup>71</sup> Graça Machel, *The Impact of Armed Conflict on Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children*, report presented at the International Conference on War-Affected Children, Winnipeg, Canada, 10-17 September 2000, p. 19.

<sup>72</sup> Japan NGO Report Preparatory Committee, *Women 2000: Japan NGO Alternative Report*, 13 August 1999 ([http://www.jca.apc.org/fem/bpfa/NGOreport/E\\_en\\_Conflict.html](http://www.jca.apc.org/fem/bpfa/NGOreport/E_en_Conflict.html)). Report prepared for the “Beijing + 5” Special Session of the General Assembly in June 2000.

<sup>73</sup> “U.S. soldier sentenced to 6 years in prison for murdering barmaid”, *The Korea Herald*, 8 November 2000.

<sup>74</sup> Security Council resolution 1265 (1999) of 17 September 1999, paras. 13 and 14.

## I. Reconstruction programmes

63. Women also often face violence, discrimination and indifference to their needs in the rehabilitation and reconstruction process, ensuring that their security and subsistence concerns will go unanswered. Although in post-conflict situations the majority of heads of households are often women, women face discrimination at every turn in trying to feed and house their families, and their needs are rarely adequately factored into international donor and reconstruction programmes, or the distribution of humanitarian aid. Women in Rwanda were hindered in their efforts to feed and shelter their families by discriminatory inheritance laws that have only recently been changed. What is more, reconstruction programmes often ignore the special needs of these female-headed households, directing their attention and resources to work projects for the male population. The absence of adequate attention to the special problems that female heads of household, many of them war widows or orphaned, face in trying to feed their families, the failure to take these concerns into account in the distribution of humanitarian assistance, and the lack of initiatives by the donor community to support work projects that specifically include women compound historical discrimination in many societies and can ultimately force women to turn to prostitution as the only means of supporting their family.

## J. Women in the peace process

64. In recent times, women's groups have pointed to the lack of involvement of women at the highest levels of most peace processes. Many post-conflict concerns can only be addressed if women have a greater role in the peace process, during which time the framework for future government structures and administration are set in place. The Security Council has recently reaffirmed the "important role of women in the prevention and resolution of conflicts and in peace-building", and has stressed "the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security ...".<sup>75</sup> It is incumbent upon the international community to insist on the full participation of women to ensure that any peace agreement and post-conflict structure reflects the specific experiences of women and girls, and that special steps are taken to address their specific concerns.<sup>76</sup> In this regard, it is important to note and place on record the important role played by women's groups in the Northern Ireland and Sierra Leone peace processes. Women's groups in Burundi, Sri Lanka and Jerusalem have also been very active in struggling for peace and reconciliation.

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<sup>75</sup> Security Council resolution 1325 (2000) of 31 October 2000, preamble.

<sup>76</sup> One positive example: women's and human rights groups in Burundi have been striving for greater participation of women in the peace process. Ultimately the women's groups were granted Permanent Observer Status at the talks. On 16 August 2000, all negotiating parties to the Burundi peace negotiations agreed to accept many recommendations that had been put forward by Burundi women's groups representing all 19 negotiating political parties. The recommendations include: the establishment of mechanisms to punish and put an end to war crimes such as rape and sexual violence; guarantees for women's rights to property, land and inheritance; measures to ensure women's security and safe return; and guarantees that girls have the same rights as boys to all levels of education. UNIFEM press release, "Consensus reached on women's centrality to a new Burundi", 16 August 2000.

## K. Accountability/truth and reconciliation

65. Because women and girls have different experiences during armed conflict, often suffering violence and other abuse that is specific to their gender, it is evident that women must be fully involved in society's efforts to address the past. Without a gender-sensitive approach and a conscious effort to bring women into the process women's voices and experiences are often lost. This was the experience of the South African Truth and Reconciliation Commission (TRC), for example, which found that women often viewed themselves as the "wives, mothers, sisters and daughters of the active (mainly male) players on the public political stage" and downplayed or remained silent about their own suffering.<sup>77</sup> Women were particularly likely to remain silent about the sexual violence they had experienced. Owing to strong advocacy by women's and human rights groups, the TRC decided to take special steps to encourage women to testify, including by holding three special women's hearings in Cape Town, Durban and Johannesburg.<sup>78</sup> "These hearings brought to light the particularly gendered ways in which women experienced human rights violations and furthered the process by which the commissioners distinguished less and less between what were originally perceived as primary and secondary victims."<sup>79</sup>

## L. Impunity/accountability

66. The failure to investigate, prosecute and punish those found responsible for rape and sexual violence has contributed to an environment of impunity that perpetuates violence against women today. One can only hope that, with regard to rape and other sexual violence, the important work of the ICTY and ICTR, as well as the relevant language in the Rome Statute of the ICC, indicate an end to international tolerance for violence against women. However, the failure to enforce international humanitarian law and to hold accountable those who violate it has not been and is not now primarily a problem of legal definitions and sufficient legal precedent. It will ultimately depend on the firm commitment of the States Members of the United Nations whether the violence described below is investigated and punished, and whether future such acts are prevented.

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<sup>77</sup> Truth and Reconciliation Commission Final Report, vol. 4, chap. 10, Special Hearing: Women, p. 1. Available at (<http://www.polity.org.za/govdocs/commissions/1998/trc/4chap10.htm>).

<sup>78</sup> Ibid.

<sup>79</sup> Donna Ramsey Marshall, *Women in War and Peace*, United States Institute of Peace, August 2000, p. 21, quoting the Truth and Reconciliation Commission Final Report.



## VI. RECOMMENDATIONS

### A. International

114. Following on the recommendations contained in the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations, as well as numerous statements, resolutions and decisions by the United Nations, the Organization should take immediate steps to ensure that the representation of women is increased in all institutions of the United Nations and at all levels of decision-making, including as military observers, police, peacekeepers, human rights and humanitarian personnel in United Nations field-base operations, and as special representatives and envoys of the Secretary-General. Important measures should include:

(a) The creation of a Gender Unit and the appointment of senior gender advisers within the Department for Peacekeeping Operations, as well as the appointment of senior gender advisers and child protection advisers with gender-sensitive training to all field missions;

(b) An increase in the number of women appointed as special representatives to conflict areas, in key posts responsible for peacekeeping missions and the distribution of humanitarian assistance;

(c) The inclusion of gender advisers in the Integrated Mission Task Forces proposed in the report of the Panel on United Nations Peace Operations (the Brahimi report) (A/55/305-S/2000/809).

115. The Organization should take concrete steps to mainstream a gender perspective in all United Nations activities, most urgently in those areas that affect the physical security of women and girls, including in field operations, in peacekeeping, and in military and police forces. Not only will gender mainstreaming ensure greater participation of women in the key operations of the organization, it will improve the responsiveness of the United Nations to the special concerns of women and girls that are outlined in this report. These steps should include:

(a) The establishment of a clear mandate for all peacekeeping missions to prevent, monitor and report on violence against women and girls, including all sexual violence, abduction, forced prostitution and trafficking;

(b) The establishment of comprehensive training on gender issues for all peacekeeping staff in the field, as well as staff of the Department for Peacekeeping Operations based in New York;

(c) The elaboration of uniform procedures and disciplinary measures for peacekeeping personnel who violate international standards, in particular those related to violence against women and girls. Special ad hoc tribunals to try peacekeepers for war crimes and crimes against humanity should also be considered in the areas where peacekeepers operate.

116. The Organization should take specific steps to ensure that peacekeeping personnel who commit abuses in violation of human rights and humanitarian law, including those against women and girls, are held accountable. Member States who contribute troops to peacekeeping operations should not only abide by a code of conduct, but should investigate all allegations of such violations and prosecute those found responsible. All such investigations and their outcome should be made public, including in regular reports to the Secretary-General. Following on the recommendation by Graça Machel in her September 2000 report on children in armed conflict, the Special Rapporteur also urges that an ombudsperson or other disciplinary and oversight mechanism be created within all peace support operations.

117. The United Nations should ensure that women are represented in all ceasefire and peace negotiations, and that gender issues are an integral part of these processes. Special efforts should be made to engage local women's NGOs in the peace negotiations.

118. The wartime experiences and post-conflict needs of women and girls must be fully taken into account in the formulation of repatriation and resettlement plans, as well as demobilization, rehabilitation, reintegration and post-conflict reconstruction programmes. In addition:

(a) Rehabilitation programmes must take into account the often widespread nature of sexual assault and rape and formulate programmes to address the specific needs of survivors of sexual assault;

(b) Programmes must be developed to address the special needs of female ex-combatants;

(c) Special initiatives must also be developed to ensure that the security and subsistence concerns of war widows and other female heads of household are adequately addressed.

119. A full-scale assessment of the impact of armed conflict on women, as called for by Security Council resolution 1325 (2000), is urgently needed so as to provide the information necessary for the formulation of more effective programmes for the protection and assistance to women and girls.

120. Taking note of the important recommendations made by the Secretary-General in his July 2000 report to the Security Council on Children and armed conflict (A/55/163-S/2000/712), additional research and monitoring should be conducted regarding the impact of conflict on girls, as well as on the impact of international programmes intended to protect girls in wartime and to respond to their needs, so as to improve programming and protection.

121. The international community should work towards the creation of an international body, similar to the Office of the United Nations High Commissioner for Refugees (UNHCR), that would be specifically mandated to protect and assist IDPs, or at least a centralized coordinating

mechanism so that there can be a quick and uniform international response to situations of internal displacement, as has been outlined by the Representative of the Secretary-General.

122. Although already under way, greater efforts must be made to ensure the participation of women and girls in the design of refugee and IDP camps and the distribution of humanitarian aid. Appropriate steps must also be taken to improve lighting, change camp layout, increase security patrols, address provision of firewood, locate water sources and latrines in safe areas, and employ women guards.

123. The United Nations should initiate programmes to inform non-State actors of their obligations under international humanitarian law and the specific impact that the establishment of the ICC may have on them.

## **B. National**

124. All States should ratify the relevant international instruments, including the Rome Statute of the ICC, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the ILO Worst Forms of Child Labour Convention (No. 182), and the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination, and ensure that the legal standards created therein are fully respected and that those who violate these instruments are held accountable.

125. All Governments and non-State actors should abide by and ensure enforcement of the Guiding Principles on Internal Displacement. States should provide protection and assistance to those displaced within their territory and should guarantee unconditional and unhindered access of international and domestic humanitarian agencies to the displaced.

126. States must ensure the safety of camps for refugees and IDPs, especially against infiltration by armed groups, and must adopt effective measures to guarantee the particular security concerns of women and children displaced by conflict, including measures against rape and other gender-based violence.

127. States should refuse to provide arms, or financial or political support for Governments or non-State actors who violate international humanitarian law, including by committing rape or other sexual violence against women and children. States must also take extra precautions to ensure that armed groups do not use their territory to hold abducted women and girls or to traffic them into forced prostitution or forced labour.

128. States should create gender-sensitized training and education programmes for their armed forces and civilian police and peacekeeping units that include instructions on their responsibilities towards the civilian population, particularly women and children. In this regard,

States should elaborate and enforce a code of conduct for their military and civilian personnel based abroad and should hold those who violate the code accountable.

129. Member States should make sure that the representation of women is increased in lists of nationals available for secondment as military observers, police, peacekeepers, human rights and humanitarian personnel and special representatives.

130. Member States should provide the financial and political support to ensure adequate gender-sensitive training and sufficient numbers of senior gender advisers, as well as child protection officers, for key United Nations agencies working with peacekeeping, humanitarian assistance and post-conflict rehabilitation and reconstruction.

131. Governments that are involved in funding reconstruction programmes should make sure that these programmes take into consideration the special needs and wartime experiences of women and girls in formulating programmes. In particular, States should develop gender-sensitive programmes, including health care and trauma counselling, to deal with the special needs of young girls and women who have been sexually abused and raped during armed conflicts.

132. Governments that are currently faced with conflict and/or a post-conflict situation should include women in all reconciliation and reconstruction activities, and ensure that all repatriation and resettlement programmes, as well as rehabilitation, reintegration and post-conflict reconstruction, address the special needs of women and take into account their specific wartime experiences in formulating programmes.

133. States should develop and improve national systems for the collection of comprehensive and data disaggregated by gender.

134. In countries where there is armed conflict, women and women's groups should be fully involved in the peace process and special efforts should be taken to ensure that women's needs and interests are included in the political negotiations.

135. Mechanisms for accountability with regard to war crimes and human rights abuses should ensure that cases involving violence against women are prosecuted and the perpetrators brought to justice. Compensation for the victims should also be considered. All peace negotiations should include such provisions.

# **MALAYSIA'S EXPERIENCE WITH THE DOMESTIC VIOLENCE ACT 1994 (ACT 521) MALAYSIA\***

*Nallammah Josiah, Lee Shook Fong & Wathshalah G. Naidu\*\**

## **INTRODUCTION**

On 7 March 1996, a group of 40 women organised a demonstration outside a plush hotel and thrust a memorandum into the hands of a female Minister in charge of the Domestic Violence Act (DVA). The memorandum called for the implementation of the DVA, which was passed by the Malaysian Parliament in 1994 but had since remained a dead letter. The Minister had cited religious sensitiveness as a reason for the delay in the implementation of the Act.

The next few months saw women's groups, the public and the media urging the Minister to implement the Act. "Move It Minister" screamed a critical editorial in a leading English daily. Finally on 1st June, it was announced that the Act will take effect. Almost immediately the Women's Aid Organisation (WAO) started monitoring the workings of the Act. Today after five years of the DVA, women's groups have started lobbying for specific reforms both in the substance of the law and its procedure.

## **BACKGROUND TO THE DVA 1994 (ACT 521) MALAYSIA**

The DVA campaign started in 1985, when women's groups came together and formed a Joint Action Group Against Violence (JAG). After 11 years - four years of campaigning by women's groups, five years of negotiations, and two years of waiting for an enforcement date - the Act was passed by Parliament in May 1994.

The Joint Action Group Against Violence Against Women (JAG) made numerous concessions to make this Act acceptable to all, in particular to the Muslim religious authorities.

### **An Act Applicable to all Malaysians: Muslims and people of other faiths**

The DVA was originally designed to grant both civil and criminal remedies for victims of domestic violence, irrespective of religious or cultural considerations. Civil remedies were to include issues of maintenance, custody, and divorce, while criminal measures were to expedite protection order procedures and empower police to arrest the offender and/or have him removed from home.

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In Malaysia, under the Federal Constitution Muslims are governed by Shariah Law in all matters relating to the family. Efforts to include civil remedies in the DVA met with objections that, for Muslims, domestic violence proceedings fall under Shariah jurisdiction. Furthermore, Islamic authorities claimed that Shariah Law provides adequate remedies and protection to Muslim victims of domestic violence. Section 127 of the Islamic Family Law (Federal Territory) Act, 1984 (Act 303), makes ill-treatment or cruelty to a wife an offence punishable with a fine or imprisonment or both.<sup>1</sup> Section 52(h) of the Act specifies cruelty to a wife as grounds for a fasakh divorce.<sup>2</sup> Given these provisions, Islamic authorities argued that a domestic violence bill applicable to Muslims was not necessary.<sup>3</sup>

Women's NGOs maintained, however, that limitations to the Islamic Family Law existed, evidenced by "frequent complaints from women and even Shariah lawyers seeking redress in cases of divorce, polygamy, maintenance and *harta sepencarian* (common property)."<sup>4</sup> Women's groups also argued against having one law for Muslims and one law for non-Muslims based on the experiences of legislation governing polygamy.

If one law applies to Muslims and another law to non-Muslims, states are given the power to enact their own statutes, limiting uniformity among states and creating potential loopholes for circumventing the law. In the case of polygamy, individuals wishing to avoid restrictive polygamy regulations frequently move to another state where the law is more lenient.<sup>5</sup>

Although Shariah Law has jurisdiction over all family matters for Muslims, criminal matters fall under the administration of the federal government, with criminal law applying equally to both Muslims and non-Muslims. *Therefore, attaching domestic violence to the Penal Code and Criminal Procedure Code enabled domestic violence to be classified as criminal behaviour while ensuring applicability of the Act to all Malaysians.*<sup>6</sup> The provisions of the Domestic Violence Act 1994, Malaysia, are, therefore, to be read together with the provisions of the Penal Code, which defines various acts of violence as criminal offences.

## THE DVA 1994 (ACT 521) MALAYSIA

The DVA defines domestic violence to mean the commission of any of the following acts:

- wilfully or knowingly placing, or attempting to place in the victim fear of physical injury;
- causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;

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<sup>1</sup> *Islamic Family Law (Federal Territories) Act 1984 (Act 303)*, 1996. Kuala Lumpur: International Law Book Service.

<sup>2</sup> *Ibid.* 33-34.

<sup>3</sup> Othman: 6

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Monitoring the DVA (1994), Malasia, A Report by WAO, p 4.

- compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain.
- Confining or detaining the victim against the victim's will; or
- Causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim.

By a person against:

- his or her spouse;
- his or her former spouse;
- a child;
- an incapacitated adult; or
- any other member of the family.

### **What protection does the DVA provide?**

When a complaint is made to the police regarding an offence under the DVA, the court may issue an Interim Protection Order (IPO) while the police are investigating the case. This means that the victim can obtain an IPO before the perpetrator is formally charged with committing an offence. If a person is charged in court after police investigations are completed, the court may then issue a Protection Order (PO). The court may also attach additional orders to the PO, which may include:

- granting exclusive occupation to any protected person of the shared residence or a part of it;
- prohibiting the perpetrator from entering the protected person's place of residence;
- requiring the perpetrator to avoid making written or telephone communication with the protected person except in specified limited circumstances;
- requiring the perpetrator to permit the protected person to have continued use of a vehicle which she/he has ordinarily been using.

### **What other provisions does the DVA provide?**

- The victim may also seek compensation in respect of personal injuries or damage to property or financial loss suffered as a result of the violence.
- The court may also order the parties concerned be referred to a conciliatory body or for appropriate counselling instead of or in addition to issuing a PO.
- The Act also encourages any person (for example, neighbours, friends or relatives) who believes an offence is being committed to give information to an enforcement officer, i.e. a police officer or a welfare officer.
- The DVA also provides for the enforcement officers to accompany the victim to her previous residence to collect personal belongings.

## How does the DVA, 1994 (Act 521) Malaysia, work?

### *Classification & Procedures for Domestic Violence:*

The definition of the crime of domestic violence *is dependent not on the DVA itself but the Penal Code*. The DVA provides for ancillary relief (Interim Protection Orders (IPOs) and protection orders, counselling etc.) but definition of the act of domestic violence, investigation and prosecution depends on the Penal Code and the Criminal Procedure Code.

The implementation of the DVA did not establish domestic violence as a specific crime punishable by new penalties. Rather, criminal remedies for domestic violence are available under Malaysia's Penal Code for hurt, grievous hurt, criminal force, and assault.<sup>6</sup>

Police procedures for all criminal cases are determined by the classification of a case as a **seizable** or **non-seizable** offence. According to the Criminal Procedure Code, the classification of a case as a seizable offence requires an officer to conduct immediate investigations into the facts of the case and "to take such measures as may be necessary for the discovery and, where not inexpedient, arrest of the offender."<sup>8</sup> In the event of a seizable offence, Police officers may arrest an offender without warrant. For non-seizable offences, however, police may not proceed with a case without orders to investigate from the Deputy Public Prosecutor (DPP) and are not able to arrest an offender without warrant.

Most domestic violence cases in Malaysia are classified by police as non-seizable (Section 323 of Penal Code) offences. According to a *New Straits Times* article, of 340 cases investigated by police in Kuala Lumpur between 1 June 1996 and 1 March 1997, 268 of the cases, or 78.8%, were classified as Section 323 offences.<sup>9</sup>

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<sup>6</sup> Under the DVA, domestic violence offences are classified according to the following Penal Code sections:

- 323 – Punishment for voluntarily causing hurt.
- 324 – Voluntarily causing hurt by dangerous weapons or means.
- 325 – Punishment for voluntarily causing grievous hurt.
- 326 – Voluntarily causing grievous hurt by dangerous weapons or means.
- 341 – Punishment for wrongful restraint.
- 342 – Punishment for wrongful confinement.
- 352 – Punishment for using criminal force otherwise than on grave provocation.
- 354 - Assault or use of criminal force to a person with intent to outrage modesty.
- 355 - Assault or criminal force with intent to dishonour a person, otherwise than on grave provocation.
- 357 – Assault or criminal force in attempting to wrongfully to confine a person.
- 376 – Punishment for rape.
- 426 – Punishment for committing mischief.
- 506 – Punishment for criminal intimidation.

Begum, Fawziah. 7 October 1996. "Implementing the Domestic Violence Act, 1994". Paper prepared for the "Workshop on Gender Perspective in Family Violence" organised by HAWA.

<sup>8</sup> Section 110, Criminal Procedure Code (F.M.S. Cap. 6). 1986. Kuala Lumpur: ILBS.

<sup>9</sup> "340 Reports of Domestic Violence," *New Straits Times*, 13 March 1997.



## *Interim Protection Orders (IPO)*

The Interim Protection Order (IPO) is a court order to stop the abusive husband, parent, or relative from committing further acts of violence against the complainant. The IPO is valid as long as investigations are being carried out by the police.

The protection that the DVA offers is an important role of the Act and most victims of domestic violence look at this protection as an urgent and secure measure from further violence. Protection by the State is also seen as a message to abusive men that violence is not tolerated, nor acceptable, and that it is punishable.

## **THE WAO MONITORING PROJECT**

In June 1996, as soon as it was announced that the DVA will be implemented, WAO social workers decided to monitor and document how a woman will be protected under the DVA and monitor all the agencies involved in providing this protection.

WAO recognised our organisational responsibility to monitor the implementation of the DVA and that it was crucial to evaluate the impact of the DVA to:

- achieve better protection for battered women
- identify best practices that offer better protection
- identify obstacles that prevent women from protection
- inform state and non-state agencies of critical areas of concern
- offer recommendations for improvement and to bring about these changes
- expand public understanding of the DVA.

## **Scope of the Monitoring Project**

Between June 1996 – July 2001 WAO has assisted more than 300 women to obtain protection under the DVA either through our Refuge or Telephone Counselling services. Women call us from all over Malaysia. There are 14 states in Malaysia and WAO is situated in Selangor next to Kuala Lumpur, which is a Federal Territory. We have recorded the details of 30 women who faced specific problems within Selangor and Kuala Lumpur. WAO also interviewed social workers and agencies in the state of Penang, north of West Malaysia.

In the first year of implementation of the DVA there was an immediate 150% increase in police reports:

<u>Year</u>	<u>No. of Reports</u>
1995	1409
1996	2319
<b>1997</b>	<b>5736</b>
1998	6041
1999	3806
2000	3468
2001(Jan – Feb)	493

Criminal Investigation Department, The Royal Police Force of Malaysia, April 2001.

### **The process of getting an IPO**

Ideally an IPO should be issued within 24 hours. However, the lengthy and bureaucratic procedure places a strain on a woman seeking protection. It can be time consuming as the process can take anywhere from one day to 24 days. However, while the process of the IPO demanded that a woman had to apply through the welfare officers, one district within Selangor, allowed the application for an IPO directly to the magistrate thus minimizing the time spent at the welfare office.

### **The difficulties of getting actual protection**

Once a woman obtains an IPO, the 2<sup>nd</sup> phase of this protection of serving the IPO on the perpetrator and being assured of protection upon violation of the order has also proved to be a challenge. To date, WAO has recorded and documented four cases of women who had faced difficulties once they obtain the IPO as they were not able to get the necessary protection.

## **THE POSITIVE IMPACT OF THE DVA**

### **The criminalisation of domestic violence**

The recognition that domestic violence is not a private matter but a crime under the Penal Code, an offence punishable by law, has sent a clear message to the community at large that domestic violence is a serious issue. In the initial years of implementation there were complaints that police were not taking down complaints from women. However, a 1998 directive from the Inspector General of Police to the police to take down all reports and no one should be turned away reinforced the message that the police are not dealing with a private family matter.

## **Change of attitude among law enforcement officers**

When the Act was first implemented, the key agencies, i.e. the police, welfare officers and the courts agreed on a protocol whereby any woman who wanted protection must go to a welfare officer who will assess her case. Reconciliation was of paramount importance; the welfare officer was expected to play a key role in bringing together the couple and saving the marriage. The IPO was viewed as a last resort. Women's groups were not involved in developing this protocol.

Women were faced with a welfare officer who was adamant on speaking to the husband, as the protocol demanded this. In 1997 a welfare officer in Selangor showed to WAO the written protocol for welfare officers instructing them to speak to the abuser, the relatives and directing the couple to a Counselling Body if necessary. The IPO was facilitated only if these interventions proved ineffective. WAO started documenting and highlighting this to the media, pointing out that the process was not only an obstacle to women but, in fact, endangered them. Furthermore, it did not take into account her decision not to have any contact with her abuser.

However, from 1998 onwards there was a change in attitude in the implementation of this protocol by welfare officers in Selangor and Kuala Lumpur. The officers themselves realised that reconciliation is not the answer to protection and a number of perpetrators were not even interested in talking through their problems. Welfare officers started processing the applications for IPOs immediately without going through the reconciliation process. Reconciliation and marriage counselling were initiated only upon requests from the women victims.

In a sense the welfare officers had to learn first hand what woman's groups have been saying about the dynamics of domestic violence, that immediate protection is of paramount importance so that the abuser realises that he cannot continue to be abusive and that the state is watching over his behaviour. Secondly, an abuser will not reform if he continues to think that hitting his wife is his right and will go unpunished. Welfare officers have begun to see the urgency of protection first, followed by counselling if both parties are willing to come together.

## **Developing a multi-agency approach**

The implementation of the DVA necessitated the coming together of different agencies to coordinate their services for victims of domestic violence. In 1996, almost immediately a working committee chaired by the Welfare Department was set up to bring together the police, hospitals, courts, and NGOs.

WAO was invited to join this committee in 1997 after we started releasing to the press our concerns over bureaucratic and attitudinal obstacles that women faced when trying to access protection. Although the committee met only once 1-2 times per year, it did create an opportunity to talk to agencies that would otherwise have not come together to address domestic violence.

It was also noted that in the state of Penang there was more coordination between agencies; for example, in Penang, a state in North Malaysia, the police, welfare, court and hospital meet regularly to coordinate the implementation of the DVA. It is no coincidence that women faced fewer obstacles in Penang as the agencies were making an effort to remove such obstacles.

## **KEY LESSONS**

### **Substance of the Law**

The availability of the law itself has allowed women's groups to improve the protection for women, and gain an entry point to call for law reform.

Specific definition of domestic violence: The failure to define domestic violence as a separate crime in the Penal Code with appropriate procedures in the Criminal Procedure Code is seriously impairing the implementation of the DVA as domestic violence is treated like any other crime within the Penal Code. The definitions and corresponding procedures within the Penal Code do not address the specific dynamics of intimate partner violence and the urgency of immediate investigation and prosecution of the perpetrator.

Psychological/Emotional Violence: The Penal Code does not have any sections that define psychological violence or acts, which are not physical abuse, but results in the desired effect of instilling fear and control of the victim, for instance, harassment and stalking.

Purpose and Content of the IPO: The procedures or protocols developed do not spell out in detail how the court should issue these orders. The order itself is brief in its explanation. It merely states that an order has been taken out against the perpetrator for protection of the complainant and that "*he should not commit domestic violence.*"

The IPO does not explain the conditions of violating the order and what the perpetrator should not do. The IPO does not spell out the various acts of domestic violence. No one explains to the perpetrator what he must not do; the court does not summon his appearance.

### **Structures of Implementation**

Any piece of legislation must be accompanied with structures of implementation that will make the law accessible and relevant to the victim, which the law seeks to protect. The enforcement agencies from welfare, police and the courts must adopt a swift and determined response to prevent, stop and punish violent behaviour.

However, the lengthy and bureaucratic procedures in obtaining an IPO, inconsistencies in procedures, lack of standardisation, lack of training for both police and court officials and lack of resources (there was no specific budget allocation) all demonstrate that there is a lack of political will if not real understanding on the issue of domestic violence.

To WAO's knowledge, there has been no specific training for police on domestic violence or the workings of the DVA. For instance, police are not aware that an IPO is valid throughout the country. There are no clear instructions on how to handle the violation of an IPO and any violation is seen as a fresh police report of another crime and not as escalating violence, which is specific to the nature of domestic violence.

The pervasive attitude that domestic violence is a private matter still exists and it is incumbent on the state to put into place structures that circumvent these deeply entrenched attitudes. Of urgent priority is training officials within the criminal justice system – police training and increase in police personnel handling domestic violence investigation and prosecution.

### **Cultural Influences**

The culture of the law still remains the root cause of obstacles that women face when accessing the system for protection and support. The designation of welfare officers who were relegated to the task of counselling and assessing the applications for IPOs with a view to saving the marriage indicates that the implementers of the Act did not regard women as autonomous individuals who are capable of making the decision of leaving an abusive relationship. Although this practice of counselling first followed by protection is decreasing among welfare officers, it is significant to note that in 2000 out of the 3468 reports of domestic violence to the police, welfare facilitated 478 IPOs.<sup>11</sup>

Women still complain to WAO about the attitude of police officers who remain largely unsympathetic to victims of domestic violence and do not see it as a priority in the cases they are investigating. Furthermore, there is still a belief that beating a wife is a male privilege that should not be challenged by state authority.

### **CONCLUSION**

The implementation of the Act is hampered by the substance of the law, structures of implementation and a culture that condones domestic violence. WAO remains committed to the process of strengthening the Act and to ensure that victim-survivor of domestic violence receive the legal protection and support services they need and deserve.

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<sup>11</sup> Department of Welfare, Ministry of National Unity & Social Development, July 2001.

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