

The trend in the USA in recent years has also emphasised the need to target a cross-section of the HIV community in all drug trial research. It is unlikely that such a cross-section of participants is possible while the criteria for inclusion remain restrictive and drug companies continue to offer trials on the basis of such protocols.

AFAO's current position on trials is to argue:

for increased access to trials for women, to address the dearth of gender-specific data by actively moving towards the collection of women-specific data in all trials; and

that 'child bearing capacity' should not be a valid criterion for participation in any trial.³

This is essential to AFAO's view that the demography of drug trial profiles should reflect the demographic of epidemic and that the National Health and Medical Research Council should develop a policy to ensure that this occurs.⁴

The net effect of restrictive inclusion criteria is that women are often ineligible for participation in HIV drug trials. While there have been developments in increasing compassionate access to drugs in the trial stage, compassionate access is not a substitution for inclusion in drug trials.⁵ Compassionate access may enable HIV-positive women to access drugs being trialled, but will not result in inclusion in trial data and therefore does not ensure an assessment of the impact of new drugs for women.

While the appeal to the Full Court of the Federal Court is pending, it remains to be seen whether this case will proceed to test the waters on whether the protocol in Ms Dibble's case contravenes the *Sex Discrimination Act*. The case raises issues of public importance. It is imperative for HIV drug testing to investigate the impact of new drugs on women and to ensure that HIV-positive women have equal capacity, alongside HIV-positive men, to access new treatments at the experimental stage.

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INTERNATIONAL LAW

Women and war

KARYN ANDERSON and HELEN DURHAM discuss sexual assault and rape of women in wartime.

The history of war betrays the regularity with which rape and sexual assault are used as physical and psychological weapons. During times of armed conflict, women's bodies are violated for numerous reasons: as prizes and spoils of war; in the destruction of the enemy's 'property' and pride; under

orders and without orders; as revenge; and sometimes mere opportunism.¹ Waging war is about gaining territory. The raping of women is a very effective and cheap way to dispose of citizens by spreading fear and humiliation and making people flee from their homes and land. Time and again women's bodies are used as a battle-field — in East Timor, Afghanistan, Cambodia, Vietnam, Burma, China, Rwanda, Bangladesh, during World Wars I and II and during the more recent conflict in the former Yugoslavia.

Even after the conflicts are over, women's experiences of war are often not recognised or acknowledged. Drive through any small country town in Australia and you will see tall rows of poplar trees and stone monuments to fallen soldiers, their names chiselled with family pride. These memorials can be found throughout most countries in the world in some form or another. A woman does not get a medal if she is raped, or a stone monument for dying of dysentery. Women's experiences of war do not translate into thrilling fire-side stories, action packed movies or exciting novels. More than mundane, many of the events which happen to women during war are silencing, particularly rape.

This 'silencing process' is evident in the lack of prosecutions of rape as a war crime, despite the numerous instruments of international legislation and documentation deeming rape and sexual assault to be unacceptable behaviour.² In the Nuremberg trials no defendant was charged with 'rape' despite the presentation of sexual assault as evidence of crimes against humanity.³ During the Tokyo trials a limited number of officers were prosecuted for sexual assault under Articles of the Charter dealing with 'inhumane treatment', not as an offence of itself. While there are scattered examples of domestic war crimes trials trying soldiers for sexual assault offences,⁴ there is no clear, practical international legal precedent that rape is an internationally recognised war crime. The current *ad hoc* tribunals for Rwanda and the former Yugoslavia are the first opportunity in many years to clarify international humanitarian law in relation to the illegality of rape and sexual assault. If rape is not clearly defined as a war crime by these tribunals, especially in the case of the former Yugoslavia following significant media attention on the atrocities of the 'rape camps', how will women in East Timor and other nations convince authorities that what they have suffered is a war crime and not an 'inevitable consequence' of armed conflict that may go unpunished?

Yet despite the possibilities of clarifying the law, there are technical difficulties in the drafting of the Statute for the International Tribunal Established to Prosecute Persons Responsible for Serious Violations of International Humanitarian Law in territory of the former Yugoslavia since 1991 (the Yugoslavia Tribunal). There is no mention of rape under Article 3 which defines 'war crimes'. Nor are rape or sexual assault listed under Article 2 dealing with 'grave breaches' of the Geneva Conventions. The list of crimes under Article 2 is not exhaustive and there is much debate about whether rape should be deemed a 'grave breach' or whether non-grave breaches such as Article 27 of the Geneva Convention could be included.⁵ However, this is an issue of interpretation that will be left to the discretion of the Tribunal's judges and there is no international legal precedent that rape should be deemed a 'grave breach' rather than a mere breach of the Convention.

The only place that rape is specifically mentioned in the Statute is under Article 5(g) as a 'crime against humanity'. The evidence necessary to prove a crime against humanity is

extremely high. One must first prove that the act was committed because of the victim's connection to an ethnic group and, further, that it was carried out in a systematic and organised manner. Furthermore, in both the Nuremberg and Tokyo trials, the Charters of the Tribunals required that crimes against humanity be 'committed in execution of or in connection with' another crime within the jurisdiction of the Tribunals. It is fortunate that a recent appellate decision of the Yugoslavia Tribunal followed Control Council Law No. 10 and disposed of this nexus requirement. Nonetheless, crimes against humanity are the most difficult to prove, and it is in this context that rape and sexual assault will be dealt with by the Tribunal.

There is little doubt that rape could be prosecuted under other sections of the Statute, such as those provisions dealing with grave breaches including torture and inhumane treatment as mentioned in Article 2. A number of legal theorists have also argued that rape should be dealt with under Article 5 defining the international crime of genocide and the Genocide Convention.⁶ It is argued that rape could constitute genocide where the assaults were committed with the specific intention 'to destroy, in whole or in part' a national, religious or ethnic group.⁷

Law, both domestic and international, is society's attempt to define what is right and what is wrong. While sexual assault is obviously inhumane treatment, its intent and general nature is different to other acts under the same category, such as breaking someone's arm or beating a person with sticks. Actually proscribing that the raping of someone during a time of war, just as during a time of peace, is an illegal act is symbolically powerful. Furthermore, rape and sexual assault must be defined as war crimes because they are a violation of a woman's fundamental and basic right to bodily integrity, not merely as a 'crime against humanity' or as constituting genocide in its use, at a strategic level, to destroy a nation or people. There is a great need for international law to recognise rape as a crime in its own right, as its own category, and without any contextual legal requirements.

Since 1991 Australia has accepted over 14,000 refugees from the territory of the former Yugoslavia.⁸ Many individuals from the region now living in Australia, irrespective of their ethnicity, age and gender, have been victims of or witnesses to breaches of international humanitarian law. Most have family and friends still in the region. The capacity for these new Australians to have access to international justice, if they wish to pursue this avenue, is essential. As stated by Ms Wendy Lobwein, Program Development Coordinator at the Victorian Foundation for the Survivors of Torture:

For many survivors of torture, once they begin to recover from the distressing symptoms of post traumatic stress disorder, anxiety and depression, they begin to seek ways to use their experiences to bring awareness of human rights abuses to the attention of others and to work against apathy, disbelief and complacency. They also seek justice. Access to justice is not just a social issue, but a critical factor in the healing processes for the individuals who have experienced the reality and horror of unbridled violence.⁹

It is accepted by a number of psychologists and academics that unsettled and unforgotten grievances do not disappear. While to the rest of the world, amnesties and peace plans are seen as a final solution, to the victims and their families the trauma of their experiences does not end with the conflict. This is particularly so in relation to the crime of rape. Even

long after the physical body has healed, the violation of human dignity and the social and family implications of having been a victim of sexual assault leave their mark.

It was in the context of this need to allow survivors with the courage and strength to speak out, that the Australian Committee of Investigation Into War Crimes (ACIWC) was created. ACIWC's mandate also followed a request from women at Tresnjevka, a Centre in Zagreb to assist women and children who were victims of war. When asked what the women from the former Yugoslavia wanted from women in Australia, members of Tresnjevka responded that they wanted acknowledgment that what they had suffered was illegal and also wanted to ensure some kind of accountability of the perpetrators for crimes such as rape.

ACIWC currently assists the Yugoslavia Tribunal through the identification of potential witnesses to violations of international humanitarian law from the Australian refugee population. While it has a focus on the crime of rape and sexual assault, it takes statements from people of both genders, all ages and from the three major ethnic groups about any breaches of humanitarian law. The Committee works closely with the Prosecutor's Office of the Yugoslavia Tribunal and has already located over 30 witnesses, some of whom may be giving evidence before the Tribunal this year. The ACIWC is the only organisation of this kind in Australia that facilitates the passage of individual testimonies to The Hague, thus ensuring the experiences of survivors are acknowledged. The collection of such evidence is vital to the successful prosecution of war crimes and the development of international law. The process is also essential to assist in the resettlement process of refugees from the territory of the former Yugoslavia.

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References

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