

# Examining Sexual Violence in the Military Within the Context of Eritrean Asylum Claims Presented in Norway

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## Abstract

Discussion of rape by soldiers as a form of persecution has largely been directed towards the context of war or actual conflict. Nevertheless, there is a need for attention to be directed towards the phenomenon of rape within the military in the post-conflict period. This article discusses asylum claims presented in Norway by Eritrean female soldiers claiming risk of persecution in the form of sexual violence, rape, or torture within the military. First, presentation is made of the history of Eritrean women's participation in the war of independence and the ensuing political and legislative gains won at the end of the war against Ethiopia. Review of Eritrea's report and responses to the Committee on the Elimination of Discrimination Against Women (CEDAW) reveal a state of backlash against women in the post-conflict period. Second, examination of how rape within the military and desertion may fall under the criteria of the definition of a refugee according to the 1951 Convention on the Status of Refugees is pursued. Comparison is drawn to instances of rape of women soldiers in the US and Israel, as well as sexual violence by United Nations Mission in Ethiopia and Eritrea (UNMEE) peacekeepers, revealing common challenges affecting prevention and protection strategies. Third, a comparative review is conducted of evidentiary standards in order to highlight the importance of maintaining a flexible approach responsive to the special circumstances of sexual violence. The Norwegian practice indicated a tendency to provide protection for compassionate grounds or humanitarian protection, rather than asylum. This resulted in non-recognition of the legitimacy of claims based on gender related persecution as requiring legal protection under the 1951 Convention on the Status of Refugees.

## 1. Introduction

David Mitchell states:

Rape is prohibited in every major domestic legal system, is universally included as a component of every other *jus cogens* norm, and has long been a violation of customary international law. And yet, while rape is often treated as *jus cogens*, its prohibition is rarely enforced and the proliferation of violence against women continues to thrive with remarkable impunity.<sup>1</sup>

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<sup>1</sup> David S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine' 15 *Duke J. Comp. & Int'l L.* 219 (Spring-Summer 2005).

Rape is a form of sexual violence; it is characterized by the means of attack or ground for targeting of which the consequence is violation of the human dignity of the victim.<sup>2</sup>

The focus on the use of mass rape within situations of ethnic cleansing, ethnic conflict, inter- and intra-state war has sought to expose systematic and strategic characteristics of targeted violence against women. Examples include cases from Bosnia, Rwanda, the former Yugoslavia, Congo, Sudan, Sierra Leone and the use of comfort women by the Japanese military and child ‘wives’ of LRA commanders in Uganda.<sup>3</sup> These cases have

<sup>2</sup> The ICC Statute and Elements of Crimes are the first international instruments to codify the elements of rape and sexual violence. The Rome Statute of the International Criminal Court, 2187 UNTS 90, opened for signature 17 July 1998 (entered into force 1 July 2002) (hereinafter Rome Statute). The ICC Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, Preparatory Comm’n for the International Criminal Court, addendum part II, UN Doc. PCNICC/2000/1/Add.2 (2000) (hereinafter ICC Elements of Crimes) Article 7 (1)(g)-1 Rape as a crime against humanity, 7 (1)(g)-6 Sexual Violence as a Crime against Humanity, Article 8 (2)(b)(xxii)-1 Rape as a war crime, and Article 8 (2)(b)(xxii)-6 Sexual Violence as a War Crime. The core common elements of rape are:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ of or the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The core common element of sexual violence is:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such persons or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity of giving genuine consent.

The Rome Statute and Elements of Crimes also include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence within the categories of genocide, crimes against humanity and war crimes.

<sup>3</sup> See, *The Shame of War: Sexual Violence against Women and Girls in Conflict* (UN OCHA/IRIN 2007). On Japanese comfort women, see, Sue R. Lee, Comment: ‘Comforting the Comfort Women: Who Can Make Japan Pay?’ *U. Penn. J. Int’l. Econ. L.* 509 (Summer, 2003); Anne Barker ‘Justice Delayed’ *8 MSU-DCL J. Int’l. L.* 453 (Summer 1999); Brooke Say, Comment ‘Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility’ *23 Penn St. Int’l L. Rev.* 931 (Spring 2005). On Congo, see, Naomi Cahn, ‘Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence’, *1 Stan. J. Civ. Rts. & Civ. Liberties* 217 (Apr. 2005). On Bosnia and Sudan, see, Stephanie N. Sackellaers, ‘From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict’ *Wis. Women’s L. J.* 137 (Spring 2005). On Sierra Leone, see, Shana Eaton, ‘Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime’ *Geo. J. Int’l. L.* 873 (Summer 2004). On Uganda, see, Abigail Leibig, Note and Comment: ‘Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks offer Sufficient Protection?’ *3 NW. U. J. Int’l Hum. Rts.* 6 (Spring, 2005). See, generally, Kelly Askin, ‘A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 TO 2003’ *11 Hum. Rts. Brief* 16 (Spring 2004). See also, Valerie Oosterveld, ‘Sexual Slavery and the International Criminal Court: Advancing International Law’ *25 Mich. J. Int’l. L.* 605 (Spring 2004). See also, Kelly Askin, ‘Prosecuting Wartime Rape and other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles’

resulted in the recognition of rape and sexual violence as constituting part of enslavement, inhumane acts, torture, war crimes, crimes against humanity, and genocide by international and national tribunals.<sup>4</sup> One essential element in these attacks is the targeting of the women as the ‘other’, often symbolizing the rival ethnic group and/or religious community, in conjunction with gender, to be oppressed via rape. Rape and sexual violence have been recognized as a form of persecution by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Kvočka*, as well as within the Rome Statute Establishing the International Criminal Court.<sup>5</sup> The ICC Elements of Crimes includes gender based persecution within the definition of genocide, crimes against humanity, and war crimes.<sup>6</sup> Further, given that rape is a violation of customary international

21 *Berkeley J. Int'l L.* 288 (2003). See also, A. Yasmine Rassam, ‘International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach’ 23 *Penn St. Int'l L. Rev.* 809 (Spring 2005).

<sup>4</sup> See, *Prosecutor v. Musema*, ICTR, Case No. 96-13-A, Judgment 221,226 (27 Jan. 2000). See also, *Prosecutor v. Furundzija*, ICTY, IT-95-17/ 1-T, Judgment 185 (10 Dec. 1998) holding rape as torture according to Article 3 of the ICTY Statute. See also, *Prosecutor v. Akayesu*, ICTR, 96-4-T, Judgment, 706-07, 731-34 (2 Sept. 1998) holding that sexual violence is linked to torture and genocide. Rape is a violation of dignity and can be a form of torture when used to intimidate, degrade, humiliate, discriminate, punish, control or destroy the victim. See, Kelly Askin, ‘Gender Crimes Jurisprudence in the ICTR - Positive Developments’, 3 *J. Int'l. Crim. Just.* 1007, 1009-12 (2005). See also, *Prosecutor v. Delalic (et al) Celebici* (1998), ICTY, Judgment, IT-96-21-T (16 Nov. 1998) holding rape to constitute torture according to Arts. 2 and 3 of the ICTY statute. See also, *Prosecutor v. Kunarac*, ICTY, Judgment, IT-96-23-T & IT-96-23/I-T (22 Feb. 2001 and 12 June 2002) holding rape as a violation of Article 3, outrage upon personal dignity, and customary international law. These cases have held that when a person is raped with the intent to inflict severe pain or suffering on the victim for a prohibited purpose - such as for punishment, intimidation, coercion, discrimination, humiliation or to secure information - it may constitute torture. See also, *Mejia v. Peru*, Case 10.970, Report No. 5/96, Inter American Commission on Human Rights (1 Mar. 1996), holding rape to constitute torture and a violation of privacy according to the American Convention on Human Rights, Arts. 5.2 and 11. See also, *X & Y v. the Netherlands*, European Court of Human Rights, Judgment (26 Mar. 1985), Series A, no. 91, holding that rape abridges the right to privacy and holding the State responsible for failing to provide a remedy to the victim. See also, *Aydin v. Turkey*, European Court of Human Rights (25 Sept. 1997), Reports of Judgments and Decisions 1997, VI. See also, Kelly Askin, ‘The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors’ in Helen Durham & Tracey Gurd (eds.), *Listening to the Silences: Women and War*, 125-153 (Martinus Nijhoff 2005). Both the ICTR and ICTY Statutes state that rape can be a crime against humanity or a form of torture. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 UNSCOR 49<sup>th</sup> Sess. 3453<sup>rd</sup> mtg., 3, UN Doc. S/RES/955 (1994) 3 g, and Statute of the International Criminal Tribunal for Yugoslavia, S.C. Res. 827, UN SCOR, 48<sup>th</sup> Sess., Annex, 3217<sup>th</sup> mtg., 6, UN Doc. S/RES/827 (1993), 32 ILM 1192.

<sup>5</sup> See, *Prosecutor v. Kvočka*, ICTY, Judgment, IT-98-30-T (2 Nov. 2001), establishing that rape can be a form of persecution. See, Valerie Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution’ 17 *Duke J. Comp. & Int'l.* 49 (Fall 2006), noting the recognition of persecution in the form of sexual violence as a foreseeable consequence due to the link between gender and political, racial/ethnic, or religious identity by the ICTR Trial Chamber in the *Nahimana* case, Case No. ICTR-99-52-T (3 Dec. 2003) and the ICTY in the *Krstic* judgment, *Prosecutor v. Krstic*, ICTY, Judgment, IT-98-33-T, Trial Chamber I (2 Aug. 2001).

<sup>6</sup> ICC Elements of Crimes Art. 7 (1)(h). The Rome Statute defines persecution as the intentional and severe deprivation of fundamental rights contrary to international law. The persecutor targets the person on account of group or collective identity related to political, racial, national, ethnic, cultural, religious, gender or other ground impermissible under international law.

law, recognition of victims is not limited to civilians, but can include military personnel.<sup>7</sup>

The failure by the state of origin to adequately prevent or punish those who commit rape of women within the military can result in resignation, desertion, and even migration of victims abroad.<sup>8</sup> Catherine Mackinnon described rape as ‘an instrument of forced exile, rape to make you leave your home and never want to go back’.<sup>9</sup> As of 2005, the Norwegian Directorate of Immigration (*Utlendingsdirektoratet*, hereinafter UDI or Immigration Directorate) and the Norwegian Board of Immigration Appeals (*Utlendingsnemnda*, hereinafter UNE or Immigration Appeals Board) had determined a series of cases involving asylum claims from the Eritrean military citing fear of rape, and/or other forms of inhuman treatment or torture, as grounds for desertion or draft evasion.<sup>10</sup> Although the Eritrean government presents its inclusion of women in the military as demonstrating egalitarian principles, the asylum cases paint a different picture. This is one in which the social constructs of the role of women remain traditional and permit sexual violence. This case study addresses the assessment of protection drawing from the fields of refugee law, human rights law and international criminal law which are concurrently applicable. It advocates a harmonized approach to fulfil the humanitarian purpose of the 1951 Convention on the Status of Refugees in keeping with the aspiration to ensure implementation of a gendered protection perspective.

## 2. Country background context

Eritrea pursued a thirty year war of independence against Ethiopia which ended in 1991. A referendum was held and independence was approved in 1993. Nevertheless, a border war erupted between the two countries which lasted from 1998 to 2000. The UN established a peacekeeping operation, which remains in place, in order to monitor the Temporary Security Zone at the border. The government is described as ‘transitional’, composed of

<sup>7</sup> *Prosecutor v. Kupreskić et al*, ICTY Case No. IT-95-16, Trial Chamber II Judgment (14 Jan. 2000) 568, noting that military personnel can be victims of violations of international customary law.

<sup>8</sup> The problem of access to justice is not only national, but it affects supranational litigation as well. For example, when the Judges of the Special Court for Sierra Leone refused to allow the prosecution of Civil Defence Forces for sexual violence committed against their own ethnic group, criticisms were raised that the rejection of the case was based on a view that women were ‘rendering support’ to the combatants and that linkage to a war crime would be difficult given that they were on the same side.

<sup>9</sup> Cited by Lori A. Nessel “Willful Blindness” to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention against Torture’ 89 *Min. L. Rev.* 71(2004). She notes the failure of UN demobilization program in Liberia to address women because it is believed that they have nothing to demobilize, citing Caroline Preston, ‘Rehabilitation Programs Reportedly Failing War Affected Females’ UN Wire, 5 Apr. 2004 available at: <<http://www.unwire.org/UNWire/20040405>>. In addition, she cites Aberico Gentili, *De Jure Belli Libri Tres* 258-59 (John C. Rolfe Trans 1995) (1612) stating that it was unlawful to rape a woman in wartime even if was she is a combatant.

<sup>10</sup> Norwegian asylum cases at the administrative levels are unpublished. Twelve cases involving Eritrean women asylum seekers were selected (six from UDI and six from UNE) and twelve cases involving Eritrean men were selected (seven from UDI and five from UNE) as representative of the case load.

a National Assembly, including the sole legal party, the People's Front for Democracy and Justice (PFDJ), as the legislature. This body elected Issayas Afewerki as president and there have not been any presidential or parliamentary elections thus far. A Constitutional Commission drafted a Constitution which was ratified by the national referendum, but the president has not implemented it. Human Rights Watch characterizes the state as 'highly repressive', in which freedom of opinion is restricted and journalists and editors are arrested and detained without due process.<sup>11</sup> All non-governmental publications have been shut down and foreign correspondents expelled, resulting in limited information as to country conditions.

## **2.1 Eritrean women's participation in the war of independence**

The development of policies regarding the emancipation of women in Eritrea is described as rooted in the nation's liberation movement. Women constituted 30 per cent of the national liberation army during the liberation movement in the Eritrean Peoples Liberation Front. A mythic image of the woman as a soldier emerged. One account from 1988 provides the following description:

There is almost a neuter quality to female Eritrean guerrillas. After years of living in the field exactly like men, they have come to resemble them physically. Their hair is short, their hands and feet callused, their legs sinewy. Though men and women sleep side by side in the cramped front-line quarters, sex is said to be rare and pregnancies unusual.<sup>12</sup>

This imagery was utilized to seek transformation of the participation of women from the battlefield to the political, social and economic realms upon independence. The Eritrean Constitution (23 May 1997) contains egalitarian language which promotes recognition of the contribution of women to the emergence of the nation as an independent entity and envisions equal participation.<sup>13</sup> The Preamble sets forth:

Noting the fact that the Eritrean women's heroic participation in the struggle for independence, human rights and solidarity, based on equality and mutual respect,

<sup>11</sup> Africa Advocacy Director for Human Rights Watch, 'Testimony to U.S. House of Representatives 5 May 2005: Ethiopia and Eritrea: Promoting Stability, Democracy and Human Rights' (Human Rights Watch 2005).

<sup>12</sup> Cited in Linda Grant De Pauw, *Battle Cries and Lullabies: Women in War from Prehistory to the Present* (University of Oklahoma 1998), 292.

<sup>13</sup> Eritrea's Combined Initial, Second and Third Periodic Reports to the Committee on the Elimination of Discrimination Against Women, UN doc. CEDAW/C/ERI/1-3, 3 Feb. 2004. The Constitution also contains guarantees on equality and protection from discrimination: Article 7(2) – On Democratic Principles - prohibits any form of discrimination against women and reads: 'Any act that violates the human rights of women or limits or otherwise thwarts their role and participation is prohibited'. Article 14 on Equality under the Law: 'All persons are equal under the law. The National Assembly shall enact laws that can assist in eliminating inequalities existing in the Eritrean Society'.

generated by such struggle will serve as an unshakable foundation for our commitment to create a society in which women and men shall interact on the basis of mutual respect, solidarity and equality.

Eritrea's report to CEDAW also cites the National Charter, characterized as the ideological guideline and principal document of the People's Front for Democracy and Justice (PFDJ):

A society that does not respect the rights and equality of women can not be a truly liberated society. During the years of struggle, big changes occurred for Eritrean women. Seen as weak and passive creatures, of less value than man, the Eritrean woman transformed herself into a formidable fighter when her erstwhile-suppressed strength was allowed to express itself. Our revolution would not have succeeded without their participation ... The role of women in society and in the family should be given greater recognition. Eritrea cannot modernize without the full participation of women ... Eritrea must be a country where both genders live in equality, harmony and prosperity.

A news report described an international celebration of the achievements of the Eritrean women:

After independence from Ethiopia in 1993, women were rewarded with legal rights unheard of across most of sub-Saharan Africa, including rights of property ownership, divorce and custody of children. Thirty percent of the seats in parliament were reserved for women. International Women's Day was made an official holiday. Eritrea became a showcase and women's studies classes in Europe and the United States added its example to the curriculum.<sup>14</sup>

Nevertheless, Eritrea has yet to sign and ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>15</sup> This is of special concern because it contains expansive provisions which address the State's duties to protect and prevent women from being subjected to private and public sexual

<sup>14</sup> Emily Wax, 'Eritrea's Female Veterans Seek Peacetime Role' MSNBC, 4 Apr. 2004, available at: <<http://www.msnbc.msn.com>>. Indeed, in Feb. 2006 the Committee on the Elimination of Discrimination Against Women commended Eritrea for the reservation of 30% of seats in regional assemblies for women, recognition of the right of women to use land without discrimination, and adoption of equal citizenship rights for women. Committee on the Elimination of All Forms of Discrimination against Women, Concluding Comments to Eritrea's Combined Initial, Second and Third Periodic Reports to the Committee on the Elimination of All Forms of Discrimination Against Women, UN doc. CEDAW/C/ERI/CO/3, 3 Feb. 2006, available at: <<http://www.un.org/womenwatch/daw/cedaw/34sess.htm>>.

<sup>15</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, 13 Sept. 2000; reprinted in 1 *Arz. Hum. Rts. L.J.* 40, entered into force 25 Nov. 2005, with 15 ratifications, 15 deposits, and 38 signatures out of a total of 53 countries.

violence, as well as to punish those who violate their rights.<sup>16</sup> Specifically, it calls for adoption and enforcement of legislative and other measures to prohibit the exploitation or degradation of women, including sexual violence. The failure to sign this instrument is an indicator that the issue of women's rights remains contentious in the post-conflict period.

## **2.2 Post-conflict backlash and response by CEDAW**

The gains won during the war appear to have stagnated or diminished in the post-conflict period. In part, there are claims of a backlash against women, in which men seek to restore the traditional division of labour and gender roles, and this has been identified as an even harder struggle than the war.<sup>17</sup> This provoked comment from CEDAW Committee member Ms Tavares Da Silva, who noted that reversion to traditional gender roles was a common phenomenon in the stable periods following revolutionary phases.<sup>18</sup> Conflicts often arise concerning access to education, the right to work, child care responsibilities, etc. Yet, perhaps the area of greatest concern pertains to the right of security of the person. Incidences of rape in Eritrea have escalated in the recent period, and this suggests that the backlash manifests itself in the form of physical and sexual violence. Upon identification of issues and questions with regard to Eritrea's report to the CEDAW, the Pre-Session Working Group noted that the report of the Special Rapporteur on Violence against Women, Integration of the Human Rights of Women and the Gender Perspective Violence Against Women indicated that violence against women is 'pervasive' in Eritrea, yet Eritrea's report provided little information on this.<sup>19</sup>

<sup>16</sup> See, Article 3 (3) States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women, (4) States Parties shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence. Article 4 (2)(a) States Parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public (c) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims. Article 5 (d) States Parties shall take all necessary legislative or other measures to eliminate such practices (which negatively affect the human rights of women and which are contrary to recognised international standards), including protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

<sup>17</sup> De Pauw, n. 12 above, 293.

<sup>18</sup> UN Committee on the Elimination of Discrimination Against Women, 'Women's Anti-Discrimination Committee Takes Up Report of Eritrea: Told Gender Equality Efforts Hindered by Stereotypes, Poverty, War', 24 Jan. 2006, available at <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/KHII-6LD2VR?OpenDocument>>.

<sup>19</sup> See, Report of the Special Rapporteur on Violence against Women, Integration of the Human Rights of Women and the Gender Perspective Violence Against Women (para. 224 E/CN.4/2003/75/Add.1, 27 Feb. 2003). See also, Committee on the Elimination of Discrimination Against Women, Pre-Session Working Group, List of Issues and Questions with Regard to the Consideration of Reports, UN Doc. CEDAW/C/ERI/Q/1-3, 29 July 2005.

In its response, the State alleged that it lacked the ability to produce detailed data on this topic. Nevertheless, the US Department of State Country Report on Human Rights Practices in Eritrea (2006) confirms a state of pervasiveness of violence against women, including: spousal abuse, female genital mutilation, prostitution, unequal access to education, employment, and control of economic resources. In particular, it states that ‘there were reports that some women drafted into the national service were subjected to sexual harassment and abuse’.<sup>20</sup>

CEDAW Committee Expert Mary Shani Dairiam asked directly about the incidence of violence against women in the service.<sup>21</sup> The reply ignored the query on violence in the military, and this received no follow up by the Committee. The government only referred generally to the right of women experiencing sexual harassment to complain to the National Union, and the provision of training for victims of rape, as rape of women of all ages ‘had been widely used’ during the war. Hence, there was no discussion about rape within the military *per se*. The discussion addressed rape as a general issue within the society as a whole, and failed to address how to approach institutionalized violence against women. CEDAW’s concluding comments urged the State to enact legislation on all forms of sexual abuse, to ensure redress and protection for victims of violence and prosecution and punishment for perpetrators.<sup>22</sup> It also called for training of the judiciary, law enforcement personnel, and health service providers to respond to violence against women. The State’s refusal to reply to the specific query on the issue of sexual violence within the military suggests that the State is unable or unwilling to document the extent to which it responds to violations. If one were to apply this to the asylum determination process, the failure of the State to provide substantive evidence of its fulfilment of duties to protect its women conscripts from exposure to sexual abuse indicates grounds for finding in favour of protection claims.

### 3. Rape within the military as grounds for asylum

The 1951 Convention on the Status of Refugees, Article 1, defines a refugee as ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country . . .’. As noted by the Special Rapporteur on Violence against

<sup>20</sup> US Department of State, ‘Country Report on Human Rights Practices in Eritrea (2006)’, Bureau of Democracy, Human Rights and Labour, 6 Mar. 2007.

<sup>21</sup> Above n.18.

<sup>22</sup> UN Committee on the Elimination of Discrimination Against Women, Concluding Comments: Eritrea, UN doc. CEDAW/C/ERI/CO/3, 3 Feb. 2006, available at: <<http://www.un.org/womenwatch/daw/cedaw/34sess.htm>>.

Women, its Causes and Consequences, Radhika Coomaraswamy, rape can constitute grounds for asylum:

The Office of the High Commissioner (UNHCR) encourages countries to consider that rape or other forms of sexual violence, when committed as measures of oppression against a person's race, religion, nationality, membership of a particular social group or political opinion, and particularly when such actions are condoned by the authorities concerned, should be grounds for asylum. Rape and sexual violence may be considered grounds for persecution within the definition of the term 'refugee' in the statute of the Office (para. 6 A (ii) and the 1951 Convention (art. 1 A (2)) if the acts are perpetrated or 'knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection'.<sup>23</sup>

The following sections will examine each part of the refugee definition in relation to rape and the penalty for desertion from the military.

### 3.1 Rape and sexual violence as persecution

In 2002, UNHCR issued guidelines on Gender-Related Persecution.<sup>24</sup> The guidelines set forth that rape is an act which inflicts severe pain and suffering (mental and physical); and which is used as a form of persecution by State and non-State actors.<sup>25</sup> In terms of defining rape as an act of serious harm amounting to persecution, one is to consider the violation of one's autonomy and dignity, privacy, security and integrity of the person.<sup>26</sup> In addition, rape can constitute cruel, inhuman or degrading treatment, as well as torture.<sup>27</sup> Essentially, control of one's body is at the core of one's

<sup>23</sup> UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status' (Geneva, 1992), para. 65, cited by Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, 'Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)', UN doc. E/CN.4/2001/73, 23 Jan. 2001, para. 171.

<sup>24</sup> UNHCR, 'Guidelines on Gender-Related Persecution within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees': HCR/GIP/02/017, May 2002.

<sup>25</sup> *Ibid.*, para. 9.

<sup>26</sup> Askin confirms that sexual attacks directed against persons on the basis of their gender or sex would constitute discriminatory persecution. Kelly Askin, *The Jurisprudence of International War Crimes Tribunals*, n. 4 above, 143. The ICTY held in the *Kvočka* and *Krstić* judgments that rape and sexual violence is persecution when committed with a persecutory intent against a protected group. The *Kvočka* Trial Chamber found that intentionally directing attacks exclusively against non-Serbs constitutes discrimination within the meaning of persecution. *Prosecutor v. Kvočka et al*, ICTY Case No. IT-98-30/1, Trial Chamber Judgment (2 Nov. 2001). See also, *Prosecutor v. Krstić*, ICTY Case No. IT-98-33, Trial Chamber Judgment (2 Aug. 2001).

<sup>27</sup> See, Article 7 of the International Covenant on Civil and Political Rights: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 Mar. 1976. See also, the Convention Against Torture, Article 1: 'Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a

sense of dignity and autonomy. Furthermore, one must consider the physical and psychological consequences of rape, including post-traumatic stress, unwanted pregnancy and abortion, exposure to sexually transmitted diseases or fear of rejection by one's family or community.

Eritrea's report to CEDAW states that rape is penalized under the law, and this includes rape via *intimidation* (prevalent within the context of rape in the military) not only violence: 'Whoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation or after having rendered her unconscious or incapable of resistance is punishable by law.'<sup>28</sup> Nevertheless, it is noted that not all rapes are reported, because the victim or her family fear social alienation. An important detail is that unlike many other countries, in which there is no information as

confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 UN GAOR Supp. (No. 51), 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987. See, *Prosecutor v. Kunarac*, ICTY Case Nos. IT-96-23-T & IT-96-23/I-T, Trial Chamber I and Appeals Judgments (22 Feb. 2001 and 12 June 2002) holding rape as a violation of Article 3, an outrage upon personal dignity and customary international law. The ICTY highlighted gender discrimination as the purpose of the rape in the *Celebici* case, thereby elevating it to an act of torture: 'The violence suffered by Ms Cecez in the form of rape, was inflicted upon her by Delic because she is a woman ... and this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.' *Prosecutor v. Delalic et al (Celebici)* Case No. IT-96-21, Trial Chamber II Judgment (16 Nov. 1998).

<sup>28</sup> The recognition of rape or sexual violence via intimidation or coercion is present at the international level. The ICTR Trial Chamber judgment in *Akayesu* offered the first definition of rape in international law: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 Sept. 1998), 598. Sexual violence was defined as 'any act of a sexual nature which is committed on a person in circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact'. It noted that coercion need not be physical force, but rather may be expressed via threats, intimidation, duress or extortion which 'prey on fear or desperation'. It is interesting to note that the ICTR remarks that coercion may be inherent in armed conflicts or when the military or militias are present. Indeed, for a female soldier her environment is the military which may be characterized by the framework of coercive norms linked to command and control systems. The ICTY in the *Furundzija* case, No. IT-95-17/1, Trial Chamber Judgment (10 Dec. 1998) offers another definition of rape: 'sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; by coercion or force against the victim or a third person'. With respect to sexual violence, the ICTY in the *Kunarac* case set up a three part definition: I) sexual activity is accompanied by force or threat to the victim or third party, ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or iii) the sexual activity occurs without the consent of the victim. *Prosecutor v. Kunarac*, ICTY Case Nos. IT-96-23 and IT-96-23/I-A, Trial Chamber Judgment (22 Feb. 2001). ICTY in *Furundzija* Case No. IT-95-17/1 (10 Dec. 1998), 186, defines sexual assault as embracing 'all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity'. Further, the ICC Elements of Crimes 7(1)(g)-6 and 7(1)(g)-1 on sexual violence and rape as crimes against humanity cites coercion, psychological oppression, abuse of power, a coercive environment, and that the person is incapable of consent.

to the incidence of rape, Eritrea actually has official statistics from the Attorney General which indicate a 46 per cent increase in rape cases:

Year	1998	1999	2000	2001	2002
<b>Reported Rape cases</b>	21	49	49	63	72**

\*\* The fourth quarter report not included, the figure will tend to increase.

It has been stated that the prevalence of sexual violence in post-conflict situations may be viewed as a phenomenon which seeks to return women to domestic roles previously held.<sup>29</sup> Sexual violence is reflective of structural and social inequalities in power and serves as a means by which to maintain such imbalance.<sup>30</sup> Attitudes regarding non-recognition of rape as a crime, the duty of submission of women when receiving a marriage proposal from a man, forced circumcision, and limited access to education seek to counteract the advances women made during their participation in the liberation struggle. An arena in which it appears that Eritrean women have a high risk of being subjected to sexual violence on account of its inherent coercive context is that of the Army.

### 3.2 Compulsory military service and sexual violence in Eritrea

The increase in the incidence of rape within the general society may suggest that a similar increase may be present within the military. Specifically, there remains a need to consider the circumstances in which rape occurs internally within a military system. All Eritrean citizens above the age of 18 have a duty to serve in the national service and forced recruitment of adults and minors is so widespread that the country has been described as 'completely militarised'.<sup>31</sup> All high school students are sent to finish their final year within a school in the military training camp in Sawa.<sup>32</sup> None of them have entered the University of Asmara, which now only has upper level students who enrolled prior to the enactment of the draft.<sup>33</sup> Officially, it is estimated that, at present, women comprise 3.09 per cent in the ground-force; 3.30 per cent in the navy; 8.92 per cent in the air

<sup>29</sup> Marie Vlachova & Lea Bion, *Women in an Insecure World* (Geneva Centre for the Democratic Control of Armed Forces 2005), 119.

<sup>30</sup> Jacqueline R. Castel, 'Rape, Sexual Assault and the Meaning of Persecution' 4 *IJRL* 39, 48 (1992), citing Bert Van Herk, *Why Men Rape* (Meppel: Boom 1985), 140.

<sup>31</sup> The National Service Act No.82/95 (1995). See, Bill Weinberg, 'Conscientious Objection in Eritrea', *The Broken Rifle*, Dec. 2005, available at: <<http://www.w4report.com/node/1363>>.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

force; 10.36 per cent administration/support staff within the Ministry and over 400 women officers operational in the Military.<sup>34</sup> Women soldiers are subject to a social system within the society at large which is characterized by a hierarchical order founded on the principles of command and control. To the extent that democratic principles are not respected in the external society, they are less likely to be respected in the internal military system. Amnesty International issued a report which set forth:

There have been allegations from former conscripts of a pattern of sexual violence against female conscripts. Female conscripts are reported to have been subjected to sexual abuse, including rape. Amnesty International has received reports that some of the new female recruits were selected by commanders for sex under duress, through being threatened with heavy military duties or being sent to the battle-front during the war or to a remote and harsh posting, or being denied home leave. In some cases, this may be termed rape or possible sexual slavery because, although it may not have consisted of physical violence, it was coercive within a command and discipline system where women had little or no opportunity to resist. There was no mechanism for complaining to the military or civilian authorities, and when complaints were made no action was known to have been taken to stop and prevent this practice, which appears to have been widely known. In some cases, the women became pregnant and were sent home to their families. They were then subject to extreme social dishonour in the community as unmarried mothers.<sup>35</sup>

The Eritrean female asylum seekers in Norway attested to the rape of other women besides themselves, signalling the possibility of a systematic practice. They claimed abuses including detention (short and long term), beatings, forced abortions (and attempted abortions), forced heavy labour, forced ingestion of drugs, death threats, degrading treatment, continuous sexual violence and rape, as well as possible forced pregnancy and sexual enslavement.<sup>36</sup> They also alleged that some women suffered sexual abuse by military leaders beyond the one they served directly. Refusal to submit

<sup>34</sup> It is important that the labour proclamation of Eritrea No.118/2001, which guarantees non-discrimination for treatment in employment of women, does not apply to the military. Article 65 of the proclamation - *on general protection measures*- reads:-

1. Women may not be discriminated against as regards opportunity or treatment in employment and remuneration, on the basis of their sex.

<sup>35</sup> Amnesty International, 'You Have No Right to Ask - Government resists scrutiny on human rights', 19 May 2004.

<sup>36</sup> With respect to forced pregnancy, Kelly Askin states:

If a woman was raped with the intent to discriminate against her, to persecute her, to torture her or to commit any other grave violation of international law, and she became pregnant as a result of the rape, the pregnancy could probably be prosecuted successfully as forced pregnancy. The victimizer merely needs to intend to engage in the conduct, the sexual activity, not intend the pregnancy. Further, one of the natural and foreseeable consequences of sex is pregnancy. Pregnancy is clearly a foreseeable result of sex and hence rape.

Kelly Askin, 'The Jurisprudence of International War Crimes Tribunals: Securing Justice for Some Survivors', n. 4 above, 141.

to sexual abuse was punished by detention, torture, humiliation and ill-treatment: including underground detention, binding of hands and feet and placement in stress positions, suspension from trees, limitation of food rations, exposure to extreme heat and insects, shaving of the head, etc. Furthermore, similar to the ICTY *Kunarac* case, they described being forced to perform domestic duties, including washing clothes, cooking, and preparing coffee, in addition to continuous sexual violation, thereby signalling a possible case of enslavement.<sup>37</sup> Given the exclusive nature of the sexual slavery (pseudo-familial form), it may be more properly characterized as forced marriage.<sup>38</sup> Some applicants feared forced marriage to third persons as a result of the rapes (in order to obscure the stigma of rape), forced marriage to the very commanders who abused them, or the inability to marry at all due to the trauma and stigma of being a victim of sexual violence. Applicants alleged that other women selected suicide as a mode of escape from the sexual violence.

### 3.3 The measure of sexual violence as continuous persecution

The Eritrean women asylum seekers voiced concern for the loss of control of their own well being and autonomy after experiencing sexual

<sup>37</sup> See, *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T (22 Feb. 2001), noting that in spite of the fact that the women were not locked in the house, they were held captive as they were surrounded by soldiers and could not escape. The subjugation of the women by forcing them to perform domestic work in addition to enduring sexual violence was considered indicative of treatment as if they were property of the captors, thereby constituting enslavement. Control over the women's sexuality was achieved via their deprivation of liberty. The Appeals Chamber discussed the concept of power or ownership based on elimination of the free will of the victim via 'threat or use of force or other forms of coercion, the fear of violence, deception or false promises, abuse of power, the victim's position of vulnerability, detention or captivity, psychological oppression, and socio-economic conditions'. The abusers exerted ownership over their victims by humiliating them, forcing them to perform domestic labour, and forcing them to serve the same people that abused them. According to Oosterveld, the ICTY recognized the fundamental right to sexual self-determination addressing sexual enslavement (although only referring to enslavement as such) as a crime against humanity in *Kunarac*, *Kovac*, and *Vukovic*, ICTY Case. Nos. IT-96-23-T, IT-96-23/1-7, P/20, ICTY Appeals Chamber (12 June 2002). Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', n. 3 above, 651. It has been argued that the prohibition of sexual slavery is considered to reflect customary law, indeed may be considered *jus cogens* if one considers the ICC Rules of Procedure and Evidence Rule 70 which notes that one cannot raise consent as a defence to slavery, as it is *jus cogens*. See, Rina Lehr-Lehnart, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' 16 *BIU J. Pub. L.* 317 (2002). See, Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956, 266 UNTS 3, entered into force Apr. 1957. Sexual slavery is defined in the Rome Statute and Elements of Crimes as being both a crime against humanity 7 (1)(g)-2 and a war crime 8 (2)(b)(xxii)-2. The core common elements are:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or battering such a person or persons, or by imposing on them a similar deprivation of liberty.

The perpetrator caused such person to engage in one or more acts of a sexual nature.

<sup>38</sup> Kelly Askin, 'The Jurisprudence of International War Crimes Tribunals', n. 4 above, 149.

<sup>39</sup> Case UDI 005 (unpublished case on file with the author).

violence. One applicant stated that she felt that the battalion leader destroyed many things for her and that it would be difficult for her to have a normal relationship with a man after having endured these experiences. Another case evoking such images actually did result in asylum. The claimant was of Christian faith with health problems (hearing difficulties, head, neck and back pains) who claimed that she was punished while serving in the military for reading the Bible.<sup>39</sup> She claimed to have had cold water thrown on her and to have been forced to roll around the ground for an hour over a period of three days. She also claimed that her superior told her that if she slept with him, he would not punish her for causing problems on account of her faith. When she refused, he held a gun to her head and raped her. She stated that she was a virgin and that he destroyed her life, thereby linking her bleak future prospects to the past rape. The provision of asylum stands in contrast to the other cases which were given a lower level of protection.<sup>40</sup> The Norwegian Immigration Directorate's analysis in the other cases was bifurcated, as discussion of past persecution in the form of sexual violence was considered separately from its consequences which extended into the present. There is a need to adopt an evaluation framework which would identify a protection continuum addressing past, present and future aspects of subjugation to sexual persecution.

One may consider the example of the Inter American Court of Human Rights' recognition of a violation of one's 'life plan' as regards a victim of rape and torture. The case of *Loayza Tamayo* involved a female university professor who was detained, raped, and tortured by state agents. Her life was radically changed after the abuse: she gave up her studies, moved abroad, suffered deep depression and chronic post-traumatic stress disorder. Her ability to fulfil her ambitions was devastated and her options in life were severely limited. From a transcendental perspective, her personal aspirations were destroyed and in this manner her very sense of self was permanently altered.<sup>41</sup> The Court determined that these actions had long term effects in that they inhibited the fulfilment of the woman's potential and goals (personal and professional), which could be considered an important manifestation of freedom. The Court held the State responsible for

<sup>40</sup> The other eleven cases involving Eritrean female asylum seekers received humanitarian protection on compassionate grounds.

<sup>41</sup> The Joint Concurring Opinion of Judges A.A. Cancado Trindade and A. Abreu-Burelli set forth: 'The project of life encompasses fully the ideal of the American Declaration of 1948 of proclaiming the spiritual development as the supreme end and the highest expression of human existence. The damage to the project of life threatens, ultimately, the very meaning which each human person attributes to her existence. When this occurs, damage is caused to what is most intimate in the human being: this is a damage endowed with an autonomy of its own, which affects the spiritual meaning of life.' Concurring Opinion, *Loayza Tamayo* Reparations, I/A Court H. R. Series C No. 42 (1998), para. 16.

failing to prevent the violations, and in that manner highlighted a breach of the social contract of which the natural consequence is the 'self-imposed' exile of the victim:

In the case under study, while the outcome was neither certain nor inevitable, it was a plausible situation - not merely possible - within the likelihood given the subject's natural and foreseeable development, a development that was disrupted and upset by events that violated her human rights. Those events radically alter the course in which life was on, introduce new and hostile circumstances, and upset the kind of plans and projects that a person makes based on the everyday circumstances in which one's life unfolds and on one's own aptitudes to carry out those plans with a likelihood of success ... Thus, a person's life is altered by factors that, although extraneous to him, are unfairly and arbitrarily thrust upon him, in violation of laws in effect and in a breach of trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and satisfy his legitimate interests ... It is obvious that the violations committed against the victim in the instant Case prevented her from achieving her goals for personal and professional growth, goals that would have been feasible under normal circumstances. Those violations caused irreparable damage to her life, forcing her to interrupt her studies and to take up life in a foreign country far from the context in which her life had been evolving, in a state of solitude, poverty, and severe physical and psychological distress.<sup>42</sup>

Similarly, the International Criminal Tribunal for Rwanda (ICTR) noted in the *Akayesu* case that 'Rape destroys the spirit and the will to live, causing pain beyond the act of rape itself'.<sup>43</sup> Indeed, this brings to mind the oft-cited remark by persecutors that they chose to rape their victims rather than kill them, knowing that the former act rendered consequences more devastating than death. Consequences of rape may negate the possibility of returning to one's home with any sense of dignity or security: fear of rejection, mistreatment, social stigma, or ostracization by one's family or community, the inability to find a husband or have children, severe health problems and diseases, psychological disorders, including persistent fear and anxiety affecting intimacy, depression, nightmares, feelings of loss of control of one's life, and ongoing threat to life or safety due to potential reprisal by the persecutor due to escape, revelation of her experience, or fear that she will be a potential witness against him in a future prosecution. This underscores the notion that a protection assessment of sexual violence requires fluidity in order to fully examine the

<sup>42</sup> *Loayza Tamayo*, Reparations, I/A Court H. R. Series C No. 42 (1998), paras. 147-153.

<sup>43</sup> *Prosecutor v. Akayesu*, ICTR 96-4-T, Judgment 732 (2 Sept. 1998). The Tribunal also held that 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts', 597. See also, Elisabeth Odio-Benito, 'Sexual Violence as a War Crime' in Pablo Antonio Fernandez-Sanchez, *The New Challenges of Humanitarian Law in Armed Conflicts*, 163-173 at 166 (Martinus Nijhoff 2005), noting 'In the case of women, besides the assault itself, she will suffer guilt, punishment and marginalisation, as if she were responsible for the crime.'

scope of related serious harm that often extends beyond distinct time periods or geographic locations.<sup>44</sup>

Several of the Eritrean women asylum seekers indicated aspirations for continued education, the possibility of marriage and children out of free choice, as well as participation in the labour market in order to provide for older parents and younger siblings. These concerns appeared to work against them, as the immigration authorities seemed to discredit their protection needs given their identification of socio-economic goals linked towards provision of support to loved ones. In addition, the Eritrean women's concern for their family is indicative of an 'ethic of care' characteristic of their gender, which unfortunately appeared to also be interpreted by the Immigration Authorities to be factors weakening the veracity of a persecution claim.<sup>45</sup>

### 3.4 Adequate and effective protection by the State

Asylum is a surrogate protection granted in response to the State of origin's inability or unwillingness to provide protection to persons facing persecution. Cases involving sexual violence within the military often contain testimonies which characterize the failure of the State to provide protection as a second violation of equal impact. For the refugee status determination, evaluation of the State's implementation of a prevention and response framework is the central aspect of the protection analysis.

#### 3.4.1 Enforcement of the Penal Code

The Eritrean Penal Code does contain a provision addressing use of violence or degrading treatment by a superior against an inferior, and one may argue that it may apply in the situation of sexual violence:

1. Whosoever threatens a person subject to his orders or of lower rank, strikes him, uses cruelty or violence towards him, or treats him in a degrading manner, is punishable with simple imprisonment not exceeding six months.
2. Where the offender has made use of a weapon or other dangerous instrument, he is punishable with simple imprisonment not exceeding five years.<sup>46</sup>

<sup>44</sup> In cases citing past rape, this may support an argument that she has compelling reasons arising under past persecution to refuse to avail herself of the country of nationality under Article 1 C 5 of the 1951 Convention on the Status of Refugees in spite of a change of circumstances in the country of origin. Hannah Pearce, 'An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture' 14 *IJRL* 534 (2002). See also, Evelyn Mary Aswad, Note: 'Torture by Means of Rape' 84 *Geo. L. J.* 1913 (May 1996). Cf. David Milner, 'Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Convention' 16 *IJRL* 91 (2004).

<sup>45</sup> On the ethic of care, see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

<sup>46</sup> Article 305 of the Penal Code.

Similarly, it sets sanctions against threats, attack, or striking of a member of the armed forces in the execution of his duties.<sup>47</sup> The problem is obviously linked to enforcement possibilities. As abuses committed within the military are processed internally, and the assailants have high stature, the victims feel there is no avenue for remedy. Bisrat Habte Micael provided the following testimony: 'In May 1999, the unit commander tried to rape me. I screamed and others came to help me and prevented it from happening. I demanded that he be punished, but it was his responsibility to pass on my complaint to his superiors. He did not get punished.'<sup>48</sup> Other reports cite thousands of cases of women resorting to draft evasion or exile as a result of their fear of the consequences of military service and lack of response by the State:

Only a handful of young girls were able to file a lawsuit against their army commanders. But, despite many victims coming forth with mounting evidences and witnesses, even actually naming the culprits, most of the cases do not pass beyond the perpetrators themselves. What is even more frustrating is the cumbersome legal procedures the victims have to go through. Usually, the very rapists themselves are the perpetrators of the crime, the judges and the prosecutors. The criminals have occupied the position of the protector and the guard ... The same indifference shown to them by their army commanders is shared by the central PFDJ government officials. The president himself, when asked, sarcastically scorning the situation replied with this outrageous comment to the public: 'I have sent 1000 girls but they came back 2000', implying that they came back with unplanned pregnancies and babies, deliberately overlooking the magnitude of the atrocities that women in the military services suffer by his army commanders ... one official (stated) that PFDJ was too busy with 'other obligations', as if there were something more pressing than the torture and rape of women and girls.<sup>49</sup>

The asylum applicants stated that there did not appear to be any opportunity for recourse as higher authorities directly refused or ignored their pleas for response. One applicant noted: 'They didn't help the women ... They use force against women to pursue sexual attacks. It didn't help if women screamed. No one dared to help because they were scared.'

<sup>47</sup> Article 333, simple imprisonment of one month to three years, unless serious bodily harm or death is a consequence.

<sup>48</sup> Bill Weinberg, 'Conscientious objection in Eritrea', *The Broken Rifle*, Dec. 2004, interview from 28 May 2004.

<sup>49</sup> 'Rape and torture and cover-up of innocent girls in Sawa', *Asmarino News*, 4 Jan. 2004, available at: <<http://news.asmarino.com>>. See also, Eritrean Anti-Militarism Initiative, confirming sexual mistreatment and harassment of women by military officials, available at <<http://www.forefrontleaders.org>>.

The alleged attitudes of the state authorities indicate facilitation of sexual violence through a combination of omission to respond to violations to verbal encouragement reminiscent of the ICTR *Akayesu* case. The Tribunal linked the fact that rapes occurred near a state building and the *bourgmestre* encouraged sexual violence, thereby easing a finding of official torture.<sup>50</sup> Similarly, the ICTR found violation of Article 3 (g) of the ICTR in the *Gacumbtsi* case, involving speeches and orders given by a *bourgmestre* who instigated rape and sexual violence.<sup>51</sup> As noted by the ICTY in the *Celebici* case:

Rape perpetrated by a state agent will almost always rise to the level of torture because it is difficult to envisage circumstances in which rape, by or at the instigation of a public official or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.<sup>52</sup>

If one recalls the aforementioned description of the female soldier during liberation as opposed to the present characterization of the female soldier, one is struck by contrary images: the former powerful and barren, the latter naive and fecund. Somehow, despite the political gains as pertaining to participation in the assembly and access to property rights, women soldiers face clear challenges in maintaining basic rights to security and equal protection. In fact, the allegations of rape signal a reversal of the role of the female soldier, one in which she serves the male soldiers and the nation through her sexuality and fertility. The descriptions by the female soldiers who sought asylum in Norway of their conditions under service are of subjugation by their commanders in the form of detention, servile status, forced domestic labour, and sexual abuse. In effect they relate a situation in which they are treated as if they are the property of their commanders, who claim ownership rights of sexual access, thereby pointing to a possible charge of sexual slavery.<sup>53</sup> The asylum applicants indicate that there is no possibility of legal redress within their country. The lack of response by the State signals acquiescence in discrimination, coercion, and intimidation of women within the military, and the notion of national service is equated

<sup>50</sup> *Prosecutor v. Akayasu*, ICTR Case No. ICTR 96-4-T, Judgment (2 Sept. 1998).

<sup>51</sup> *Prosecutor v. Gacumbtsi*, ICTR Case No. ICTR-2001-64-J (17 June 2004). See also, *Media Trial*, ICTR-99-52-T (3 Dec. 2003) in which it was held that incitement to genocide made sexual violence possible (although it has been noted that there was also vicious gender-based propaganda).

<sup>52</sup> *Prosecutor v. Delalic et al (Celebici)* Case No. IT-96-21, Trial Chamber II Judgment (Nov. 16 1998) addressing superior responsibility for failing to prevent rapes. See also, *Prosecutor v. Kumarac, Kovac and Vukovic*, ICTY Case No. IT-96-23 and 23/1, Trial Chamber Judgment (22 Feb. 2001) holding that rape is torture when inflicted with the consent or acquiescence of a public official or other person acting in an official capacity.

<sup>53</sup> See, *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T (22 Feb. 2001).

with intense suffering thereby impelling desertion. Women in the military may be doubly marginalized by their exposure to violence and lack of remedies. Desertion may well be evidence of the applicant's lack of faith in the State's ability or will to provide protection against sexual violence within the military or to punish abusers.

### *3.4.2 Draft evasion and desertion*

Some of the Eritrean asylum cases involved draft evaders who fled before entering the military. They provide accounts which voice objection both to the forcible nature of conscription as well as to the particular forms of abuse they may suffer on account of their gender. One applicant was asked about what she feared about serving in the military and she stated:

I have heard that it is gruesome. Women are raped and become pregnant. Women are abused by the male leaders. It is not about serving the country, but rather serving the military leaders. I was against serving in the military because one is recruited by force.<sup>54</sup>

UDI granted humanitarian protection rather than asylum, noting that she did not risk persecution on account of the protection grounds in the Convention, but did risk loss of life or inhuman treatment. Another female draft evader noted: 'Sawa in particular, is a horrible place for women. Women serve to pleasure the old men. Young girls have unwanted babies or are forced to marry men who are much older than them.'<sup>55</sup> She also received humanitarian protection.

The penalty for desertion or evasion of military service is punishable by imprisonment not exceeding five years, in times of emergency or war the penalty runs from five years to life, or in the gravest cases to the death penalty.<sup>56</sup> Hence, women draft evaders and deserters fear not only the possibility of rape upon return, but additional excessive punishment as a result of their choice to flee. The US State Department confirms reports that security forces 'severely mistreated and beat army deserters and draft evaders', including disciplinary actions that included prolonged sun exposure in temperatures of up to 120 degrees Fahrenheit or the binding of hands, elbows, and feet for extended periods.<sup>57</sup> It cites credible reports that both women and men rounded up for military service have died following torture

<sup>54</sup> UDI case no. 009 (unpublished case on file with the author). This concerned a woman who evaded her call-up in 1996.

<sup>55</sup> UDI case no. 008 (unpublished case on file with the author).

<sup>56</sup> Penal Code of the Empire of Ethiopia (1957) which remains in effect in Eritrea, Article 300. Article 325 addresses cowardice and punishes those who refuse to take up arms or use them, hide, run away, abandon one's post. It also penalizes incitement of comrades or subordinates to such behaviour with three year rigorous imprisonment or in the gravest cases death.

<sup>57</sup> US State Department Country Report on Human Rights in Eritrea (2006).

and severe beatings. It sets forth that ‘the Government continued to authorize the use of deadly force against anyone resisting or attempting to flee during military searches for deserters and draft evaders, and deaths reportedly occurred during the year’.<sup>58</sup> The conditions in the detention centres for those held for draft evasion are described as harsh and life threatening. Some are located underground, lacking light and ventilation, and are subject to overcrowding, resulting in severe mental and physical stress.<sup>59</sup> Amnesty International also confirms torture, arbitrary imprisonment, and possible execution of deserters on order of their military commander.<sup>60</sup>

In comparison, UNHCR has provided guidance to immigration authorities in cases involving draft evaders and deserters from countries formerly under the Soviet Union who feared being subjected to ‘*dedovshchina*’.<sup>61</sup> It stated that ill-treatment and torture, including violent hazing and bullying, would violate the individual’s right to freedom from torture, inhuman or degrading treatment or punishment and threaten his right to life, liberty and security of person. Such treatment would amount to serious harm constituting persecution. UNHCR also opines that because the ill treatment is conducted within the armed forces by military personnel, there is a need to assess whether this practice is systemic and in practice authorized, tolerated or condoned by the military hierarchy of the State.

Given the recognition that rape or sexual violation can constitute serious harm amounting to persecution, the focus of the protection analysis is thus determining whether it may be regarded as a type of ‘institutional pathology’ and whether the State is effective in preventing and responding to such violations within the military. When rape is conducted within the framework of military service, the desire to sever links with the state of origin renders the pursuit of asylum abroad doubly understandable. In particular, where the State has been negligent in preventing or responding to rapes, or acquiesced in the pursuit of such actions by its military personnel, the need for supplementary protection by the international community is made evident.<sup>62</sup> UNHCR also states that although a State may prohibit a persecutory practice, it may actually continue to condone or tolerate the practice, or be unable to effectively stop the practice.<sup>63</sup> It deems

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> See, Amnesty International Report on Eritrea (2007).

<sup>61</sup> UNHCR Protection Policy and Legal Advice Section: Ref. ZZ 001/06/EN, 10 Aug. 2005.

<sup>62</sup> The UN Declaration on Violence against Women, Proclaimed by General Assembly Resolution 48/104 of 20 Dec. 1993, Article 4 provides that States should: Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

<sup>63</sup> UNHCR, ‘Guidelines on Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’: HCR/GIP/02/017, para. 11, May 2002.

such cases as revealing persecutory practice. In other words, there is a need for a *de facto* contextual assessment beyond a black letter review of the penal codes when making a refugee determination. This is the principle issue of concern involving female soldiers fleeing into exile as a result of rape practices within the military. Rape may well be formally illegal, but the military environment may prove lax in preventing or prosecuting abuses. Hence, the risk of persecution remains present. The fact that military officers and soldiers are government agents should render it easier to recognize their acts as composing persecution which necessitates protection.

### 3.4.3 Comparative review of the issue of rape of women soldiers in the US and Israel

If one conducts a comparative review of the issue of rape of women soldiers in the military, it is apparent that it is a problem in other armies besides Eritrea. Martha Chamallas notes: 'Unlike the prototypical image of a soldier captured by the enemy and subject to rape, however, really the greatest danger is to be subjected to assault by a fellow soldier.'<sup>64</sup> Within the United States, statistics range between 23 per cent and 40 per cent of female veterans who were receiving treatment at the US Veterans Affairs medical facility as victims of sexual assault.<sup>65</sup> Another study concluded that the rate of attempted and completed rape among women in the US military is 20 times that among other civilian government workers. This phenomenon signals possible malfunction of a domestic institution, in part reflecting deficiencies within its own culture as well as inequities derived from the society at large.

The consequences of sexual harassment and rape of women within the US military have received much attention due to the complexity of attaining a remedy for victims and the numerous incidences of women who have been ignored, subject to disbelief, harassed, humiliated, warned not to report abuse, or discharged for doing so.<sup>66</sup> Women soldiers seeking justice

<sup>64</sup> Symposium, 'Women and War: A Critical Discourse', 20 *Berkeley J. Gender. L. & Just.* 321, 338 (2005). Martha Chamallas recounts the 'Tailhook scandal', in which women were groped in a hotel, and then the next scandal, in 1997, at the Aberdeen Proving Grounds and Advanced Training Facility outside of Maryland was one in which drill sergeants were accused of raping female sergeants under their command. 'Here, it was the unique situation of dominance and control presented by the drill sergeant playing a major role. In one case a staff sergeant was convicted of six rapes. There was testimony that he ordered female recruits to report to his office without wearing underwear and ordered them to take off their clothes. The interesting aspect of this scenario from a feminist's perspective is that there was neither use of overpowering physical force, nor a threat of physical force. This was constructive force. So we have that kind of sexual abuse.'

<sup>65</sup> T.S. Nelson, 'Lessons Learned from Military Sexual Trauma Survivors' in *Connections WCASA Bi Annual Educational Journal*, Oct. 2003.

<sup>66</sup> Martha Chamallas, 'The New Gender Panic: Reflections on Sex Scandals and the Military' 83 *Minn. L. Rev.* 305 (Dec. 1998). See also, Madeline Morris, 'By Force of Arm: Rape, War and Military Culture' 45 *Duke L. J.* 651 (Feb. 1996).

were stymied by complex evidentiary standards and normative set-backs such as the lack of criminalization of non-violent coercive conduct, or consideration of sexual violence as a tort occurring during the course of military service not subject to review by a court.<sup>67</sup> The key characteristic of these cases is their reference to non-physical force which abuses the command structure for carrying out the sexual violence; this has resulted in the term 'command rape'. The lack of clear data from the Army and the convoluted evidentiary standards render prosecution of offenders difficult. The US Army issued a Command Policy in 2006 which presented the Sexual Assault Prevention and Response Program (created the year before) that creates restricted and unrestricted reporting mechanisms to sexual assault response coordinators.<sup>68</sup> Both will provide medical treatment and counselling, but only the latter will trigger an official investigative process (upon the consent of the victim). A recent article in the New York Times confirms a significant degree of scepticism towards remedies for sexual violence in the military:

There was a pervasive sense among them (female Iraq veterans) that reporting a sexual crime was seldom worthwhile. Department of Defense statistics seem to bear this out: of the 3,038 investigations of military sexual assault charges completed in

<sup>67</sup> Elizabeth A. Reidy, Comment: '*Gonzalez v. United States Air Force*: Should Courts Consider Rape to be Incident to Military Service?' 13 *Am. U. J. Gender, Soc. Pol'y & L.* 635 at 637 (2005) noting: 'Courts bar virtually every tort claim through an expanded meaning of the Feres Doctrine, which finds that almost every injury that occurs to a service member arises directly out of his or her military service. According to judicial interpretations, service-related injuries include those that occur when a military member is on active duty, subject to military discipline, or while performing a recreational activity that relates to military service.' See also, Colleen Dalton, Note/Comment 'The Sexual Assault Crisis in the United States Air Force Academy' 11 *Cardozo Women's L. J.* 177 at 179-180 (2004): 'Rape is widespread in the armed forces ... Sketchy military record-keeping makes it impossible to quantify. The Pentagon puts the percentage of women raped in single digits, yet two Department of Veterans Affairs surveys in the past decade found 21 percent and 30 percent of women reported a rape or attempted rape. The comparable civilian figure is nearly 18 percent, according to a federal survey in 2000. In 1991, witnesses told Congress that between 60,000 and 200,000 female veterans had been sexually assaulted over time by servicemen.' She cites a victim of sexual assault, Sharon Fullilove: 'During sexual assault awareness week, people told us that if you make it through all four years without being sexually assaulted, you're lucky ... They also say if you want to have an Air Force career you should not report it.' Dalton concludes that 'The military's rape shield law, set out in Military Rule of Evidence 412, has also been judicially interpreted to the point that its parameters can only be understood by looking at the rules set out by the many cases decided since its codification in 1978. As it stands now, the rape shield law is a tangled web of judicially imposed balancing tests and standards. Because the law fails to exist in a unified form with a clear purpose, it could become merely a set of flimsy procedural obstacles to the admission of evidence in court-martial proceedings.' See also, Captain Alexander N. Pickands, 'Reveille for Congress: A Challenge to Revise Rape Law in the Military' 45 *Wm. & Mary L. Rev.* 2425 (Apr. 2004); stating that the UCMJ Article 120 criminalizes only forcible rape, providing no related crimes or lesser-included offences that cover non-violent coercive conduct (e.g., threats of non-violent reprisal such as an unfavorable performance review).

<sup>68</sup> US Army, Army Command Policy, Army Regulation 600-20, Ch. 8 (Department of the Army, 7 June 2006). See also, Department of Defense Directive Nr. 6495.01 on the Sexual Assault Prevention and Response Program, 6 Oct. 2005.

2004 and 2005, only 329 - about one-tenth - resulted in the court-martial of the perpetrator. More than half were dismissed for lack of evidence or because an offender could not be identified, and another 617 were resolved through milder administrative punishments, like demotions, transfers and letters of admonishment.<sup>69</sup>

In comparison, a combination of research and litigation addressing sexual harassment of women soldiers in Israel prompted the adoption of the law on prevention of sexual harassment No. 5758- 1998, which makes sexual harassment a criminal offence and also identifies it as a cause for a civil suit against the perpetrator and his employer (this is applicable to the IDF). As in the US case, it has been reported that Israeli female conscripts have been reluctant to file complaints due to fear of retaliation, worsened conditions or dismissive attitudes.<sup>70</sup> A peculiar search for a preventive remedy was pursued by some Israeli woman who filed claims of conscientious objection based in part on their feminist beliefs. One noted:

A strongly patriarchal institution, like the army, underlines female marginality and the superiority of male-identified values ... It might be said that a mood of sexual harassment is endemic to the army. And so the demand that a woman enlist is tantamount to demanding that she cope with sexual harassment. Since the army is such a central institution in society, a culture of sexual harassment also is exported to civic society. I as a feminist, feel I must avoid military service and act to limit and reduce the influence of the army on civic society. When men spend a formative period of their lives in the military they are likely to receive positive reinforcements for the use of brute power and violence in an organization whose main values include superiority and control. I cannot join an organization which either directly or indirectly, encourages violence- of any form and kind- against women. I cannot live in such flagrant denial of my conscience.<sup>71</sup>

The Israeli Supreme Court held that women's separate right to conscientious objection should be abolished, as equal protection standards required them to be subject to the same standards as men, that is objection based on traditional religious belief not secular conscience.<sup>72</sup>

<sup>69</sup> Sara Corbett, 'The Women's War', *The New York Times*, 18 Mar. 2007.

<sup>70</sup> Tzili Mor cites IDF statistics indicating that 'in 1997, 280 women soldiers filed sexual harassment complaints, a 20 per cent increase from 1996 figures. Actual incidence of harassment is believed to be higher than reported ...'. Tzili Mor, 'Law as a Tool for a Sexual Revolution: Israel's Prevention of Sexual Harassment Law' 7 *Mich. J. Gender & L.* 291 (2001). The Supreme Court hindered the promotion of a military officer accused of raping a young IDF staff member in *DOE v. Galili* sitting as the High Court of Justice, H.C. 1284/99, 21 Mar. 1999. See, Guy I. Seidman & Eyal A. Nun, 'Women, the Military and the Court: Israel at 2001' 11 *S. Cal. Rev. L. & Women's Stud.* 91 (Fall 2001).

<sup>71</sup> Statement by Idan Halili, email from Rela Mazali 17 Nov. 2005.

<sup>72</sup> HCJ 2383/04 *Milo v. Minister of Defense* {2004} IsrSC 59 (1) 166. Noya Renalt, 'Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality' 16 *Colum. J. Gender & L.* 97 (2007). See, Defense Service Law (Consolidated Version), 5746-1986, 40 LSI 112 (1985-86) (Isr.) which offered exemptions for women on the grounds of marriage, pregnancy or motherhood, as well as religious belief and conscientious objection.

In sum, consideration of the US and Israeli cases underscore that the risk of sexual harassment, sexual violence, or rape may be higher in a military setting even for those who belong to it and that ensuring accountability for violations may be difficult. The right to remedy may be limited due to evidentiary and normative limitations and female soldiers may be exposed to reprisals for attempting to seek justice, thereby inhibiting recourse to internal mechanisms. One may draw a parallel between the sentiments presented by the Israeli CO and those presented by Eritrean female soldiers who resist their objectification by male commanders and seek liberation from forced conscription via asylum.

#### 3.4.4 *Sexual violence and UNMEE*

Ironically, one of the most notorious examples of sexual violence against women in Eritrea has been linked to the actions of the UN Mission (UNMEE) peacekeepers and staff monitoring the border dispute between the two countries. In 2005, UNMEE set up a committee to investigate these allegations.<sup>73</sup> The low point was the discovery of two Irish peacekeepers who took pornographic photos of Eritrean women. In fact the Security Council resolution extending the mandate of UNMEE until March 2006 contains a paragraph addressing this issue from the perspective of prevention and response:

13. Requests the Secretary-General to take the necessary measures to achieve actual compliance in UNMEE with the United Nations zero-tolerance policy on sexual exploitation and abuse, including the development of strategies and appropriate mechanisms to *prevent, identify and respond to all forms of misconduct, including sexual exploitation and abuse*, and the enhancement of training for personnel to prevent misconduct and ensure full compliance with the United Nations code of conduct, requests the Secretary-General to take all necessary action in accordance with the Secretary-General's Bulletin on special measures for protection from sexual exploitation and sexual abuse (ST/SGB/2003/13) and to keep the Council informed, and urges troop-contributing countries to take appropriate preventive action including the conduct of pre-deployment awareness training, *and take disciplinary action and other action to ensure full accountability in cases of such conduct involving their personnel.*<sup>74</sup> (Emphasis added.)

Training in the prevention of sexual exploitation and abuse was provided for UNMEE civilian and military staff.<sup>75</sup> Discussion of the accountability of peacekeepers in the area of sexual violence is contentious due to the fact that troops are often rotated (thereby inhibiting investigation), collection of DNA samples from peacekeepers are not required, and the UN's

<sup>73</sup> See, 'UN Investigates Alleged Sexual Abuse by Peacekeepers in Eritrea', at <<http://www.peacewomen.org/un/pkwatch/News/05/UNMEEabuse.html>>.

<sup>74</sup> UN Security Council Resolution 1622, adopted on 13 Sept. 2005, available at: <<http://www.un.org/Depts/dpko/missions/unmee/resolutions.html>>.

<sup>75</sup> Report of the UN Secretary-General on Ethiopia and Eritrea, UN doc. S/2005/553, 30 Aug. 2005.

own resources for investigations are limited. UNMEE's mandate includes monitoring the situation of human rights. This includes human rights training and UNMEE intends to launch a workshop on violence against women.<sup>76</sup> One may argue that such training is apparently of particular relevance to the Eritrean military. It might be beneficial to expand the sexual violence prevention strategies and mechanisms to the national army. Nevertheless, UNMEE suffered a loss of legitimacy and this may well limit its ability to credibly raise concerns about rape by Eritrea within its own military. Hence, the challenges of attaining full accountability of state and international actors in post-conflict situations in the area of sexual violence indicate that asylum adjudicators should exercise caution in relying on the presence of international monitors when considering security guarantees for women in the event of return.

### **3.5 Nexus**

One of the primary reasons for the provision of humanitarian protection or compassionate protection instead of asylum to the Eritrean women asylum seekers was that, although the Immigration Authorities recognized that the State was unable or unwilling to protect the women soldiers from inhuman treatment, it rejected the notion that either the threat of sexual violence or the State's failure to protect the applicant was linked to protection grounds within the 1951 Convention on the Status of Refugees. It appeared that the presence of mixed motives and the facts of the gender related persecution seemed to obscure the nexus to the categories of social group, political opinion, race, nationality, and religion which were also present.

#### *3.5.1 Social group*

UNHCR recognizes that 'sex can be included within a social group', noting that 'women' are defined by innate, immutable characteristics, who are subject to different treatment and standards by society.<sup>77</sup> In spite of Eritrean declarations noting commitment to equality between the sexes, it appears that enjoyment of such equality in practice is constrained

<sup>76</sup> Report of the UN Secretary-General on Ethiopia and Eritrea, UN doc. S/2007/250, 30 Apr. 2007. The task is challenging. In Mar. 2007 UNMEE Human Rights Officer, Sonny Onyegbula, gave a speech at a symposium on Eritrean, Ethiopian Empowerment for Women in honour of International Women's Day. He cited the statistic that women between the ages of 15 and 44 suffer more death and disability on account of gender based violence than the combined effects of cancer, malaria, traffic injuries and war. UNMEE News, 8 Mar. 2007.

<sup>77</sup> UNHCR, 'Guidelines on Gender-Related Persecution within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees': HCR/GIP/02/017, May 2002, para. 30, citing Summary Conclusions - Gender Related Persecution No. 5.

both in traditional social segments and within the military itself. In terms of linking women soldiers seeking asylum to a protection category, a particular social group is applicable, such as 'women', 'women conscripts', 'women draft evaders or deserters', or 'Eritrean women opposed to male domination within the Army', identifying their common immutable characteristics of gender, the requirement to participate in the military, the act of having avoided compulsory service, or opposition to inequality of power between the sexes in the military. Such characteristics are also externally identifiable by the society and form a factor in their risk of persecution. Following Daly and Kelley's human rights analysis, Eritrean women may be deemed to oppose conscription due to their wish to enjoy security of the person, the right not to associate with military commanders who will exploit them, the right not to be held in sex servitude, and the right to an effective remedy.<sup>78</sup> Hence, the desertion is evidence of an effort by the social group of Eritrean female conscripts to enjoy these fundamental rights and they should not be required to forsake them.

### 3.5.2 *Race, nationality and religion*

Several women alleged additional grounds for fear of rape, ill treatment, or torture due to their identities: race (ethnic group), nationality (some had mixed Ethiopian background), or religion (Muslim or Christian).<sup>79</sup> One woman additionally claimed that the military leaders would choose those they found beautiful to serve them. As noted by Kelly Askin, 'Gender very often overlaps with ethnicity, religion, race and other factors (such as age, attractiveness, vulnerability and virginity) in causing women and girls to be selected or targeted for sexual violence and each basis for the persecution should be highlighted.'<sup>80</sup>

The ICTY in the *Kvočka* case provides a discussion regarding the fact that a persecutor may engage in gender specific persecution which is linked to discriminatory intent, irrespective of a non-discriminatory motive.<sup>81</sup>

<sup>78</sup> Krista Daley & Ninette Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' 12 *IJRL* 167 (2000), citing the Universal Declaration of Human Rights, arts. 3, 20, 8 and 4.

<sup>79</sup> Eritrea has different ethnic groups (Tigrinya 50%, Tigre and Kunama 40%, Afar 4%, Saho (Red Sea coast dwellers) 3%, other 3%) as well as different religions (Muslim, Coptic Christian, Roman Catholic, and Protestant). A report on religious persecution against Christians in Eritrea has been published by Amnesty International. Amnesty International, 'Eritrea: Religious Persecution', 2005, AI Index: AFR 64/013/2005, available at: <<http://web.amnesty.org/library/Index/ENGAFR640132005?open&of=ENG-ERI>>.

<sup>80</sup> Kelly Askin, 'The Jurisprudence of International War Crimes Tribunals', n. 4 above, 143.

<sup>81</sup> *Prosecutor v. Kvočka*, ICTY Case No. IT-98-30(1-A), Judgment (28 Feb. 2005) cited by Valerie Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution', n. 5 above, 49. See also, *Prosecutor v. Kistić*, Case No. IT-98-33-T, Judgment 617 (2 Aug. 2001).

This was demonstrated by the fact that the only women raped were non-Serbs. The US Court of Appeals for the Ninth Circuit conducted a similar analysis in the *Shoafera* case involving an Ethiopian woman of Amharic ethnicity raped by a Tigrean member of the government. The Court recognized the fact that the persecutor targeted his victim on account of her ethnicity, regardless of the co-existence of a non-Convention related motive (he was attracted to her) for the rape.<sup>82</sup>

The Immigration Directorate dismissed the possibility of nexus to a protection category in one case by stating that the targeting was due to the applicant's 'attitude', asserting that this was not related to a Convention protection ground.<sup>83</sup> This analysis reflects the classic paradigm of privatization of sexual violence, in spite of the commission by a public actor, in order to impede recognition of such acts as composing persecution subject to the 1951 Convention. While scholars have claimed that there has been a revolution in the practice of refugee law to eliminate such errors, these cases reveal that anachronistic biases remain. Deborah Anker remarks:

Although there was relatively early Canadian precedent for treating rape as 'persecution of the most vile sort,' rape was privatized in many cases, especially before 1993; it was regarded as a manifestation of unrestrained – and unrestrainable – male sexual appetite ('exaggerated machismo ... rampaging lust-hate' in the words of one U.S. jurist in a 1987 case). In other words, the public/private distinction, which has so deeply affected international law, is reproduced in refugee law.<sup>84</sup>

The cases are reminiscent of *Lazo-Majano*, 813 F.2<sup>nd</sup> 1432 (9<sup>th</sup> Cir. 1987), in which the applicant was a domestic worker who was subjected to sexual violence as well as other forms of physical and psychological torture many times by her employer, a member of the Salvadoran military. The persecutor was shielded by his status and the impunity enjoyed by the Army. The Board of Immigration Appeals rejected that the treatment amounted to persecution, but this was overturned by the Ninth Circuit Court of Appeals which highlighted a nexus to an imputed political opinion that the applicant was opposed to male domination.

In contrast, the Norwegian Directorate of Immigration failed to link the Eritrean woman's 'attitude' to either such imputed political opinion against male repression or to a social group composed of 'women seeking to enjoy

<sup>82</sup> *Shoafera v. INS*, 2000 US App. LEXIS 31381 (9<sup>th</sup> Cir. 7 Sept. 2000). An additional issue of concern is that some of the women claimed to have children, and given that their abusers were of another religion (Christian commander raped a Muslim, or Muslim commander raped a Christian) there was no analysis of protection needs of the woman and/or child given mixed heritage. Parallel to the Bosnian cases, there may be grounds for further assessment in discriminatory treatment.

<sup>83</sup> UDI case 013 (unpublished case on file with the author).

<sup>84</sup> Deborah Anker, 'Refugee Law, Human Rights and the Gender Paradigm' 15 *Harv. Hum. Rts. J.* 127 (2002).

security of the person during military service' or other similar category legitimizing her opinion as meriting protection. Instead, the applicant is found to be at risk of losing her life or being subject to inhuman treatment, in light of worsened country human rights conditions, in particular due to the risk of reprisal for desertion from the Army. Hence, she was given humanitarian protection instead of asylum, ignoring the gender dimension of the asylum claim. The Immigration Appeals Board was more likely to accept that applicants would be subject to rape and reprisal for desertion upon return to the military, but also often shared the conclusion that there was no nexus to a protection ground in the 1951 Convention Relating to the Status of Refugees.<sup>85</sup>

#### 4. Evidentiary standard

Evidentiary standards used within refugee status determination are supposed to be flexible given the circumstances of forced migration which significantly reduce the possibility of attaining documentary evidence and foster psychological trauma that may render testimony inconsistent.<sup>86</sup> Oral testimony without documentation can be sufficient to recognize refugee status if it is plausible and credible. Further, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1 January 1992), paragraphs 196 and 203, highlight the importance of granting a refugee the benefit of the doubt:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his (or her) statements by documentary or other proof, and cases in which an applicant can provide evidence of all his (or her) statements will be the exception rather than the rule ... Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he (or she) should, unless there are good reasons to the contrary, be given the benefit of the doubt ... (I)t is hardly possible for a refugee to 'prove' every part of his (or her) case, and indeed, if this were a requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt.

<sup>85</sup> UNE case 056 (unpublished case on file with the author). See also, UNE case 051 involving a women engaged in 'preventive draft evasion' specifically based on fear of rape in the military, given protection on compassionate grounds. See also, UNE 042. It should be noted that the Norwegian Ministry of Justice issued a guideline (13 Jan. 1998) which stated that persecution on account of gender shall be included within the concept of a Convention refugee in order to grant asylum.

<sup>86</sup> See, Brian Gorlick, 'Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status', UNHCR Working Paper No. 68 (Oct. 2002).

UNHCR supports a consideration of satisfaction of standard of proof if the refugee has demonstrated a serious possibility, good reason, valid basis, real/reasonable chance, or likelihood of persecution which is less than a 50 per cent probability utilized in civil law.<sup>87</sup>

In particular, the Canadian Guidelines note the complexity of credibility determination in cases involving sexual violence:<sup>88</sup>

Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:

1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their 'shame' to themselves and not dishonour their family or community.
2. Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling ...

This is confirmed by Jacqueline R. Castel:

It is not uncommon for women who have been sexually abused to leave out facts that may be material to their claim. Even if women who have fled their countries because of rape, or other forms of sexual violence, are willing to reveal their stories, they often have trouble substantiating them. A claimant's account is generally considered in light of background information on the country in question. However, few refugee documentation centres have information on the position of women in a given country, on the incidence of sexual violence in that country, and on the consequences of returning to the country in question for a woman in the claimant's alleged position. In the absence of reliable information on these matters, the woman's story may not appear credible.<sup>89</sup>

The ICTY has also recognized that testimony provided by a witness suffering from Post Traumatic Stress Disorder can be credible and accurate even though the person's recollection has been impaired.<sup>90</sup>

The Norwegian Directorate of Immigration noted credibility problems among the testimonies of the Eritrean female asylum applicants. Similarly, the Immigration Appeals Board often cited problems of vagueness, contradiction and lack of credibility among some of the applicants.<sup>91</sup> Several

<sup>87</sup> *Ibid.*, 12.

<sup>88</sup> Canadian Immigration and Refugee Board, 'Women Refugee Claimants Fearing Gender-Related Persecution', 13 Nov. 1996, available at: <[http://www.irb-cisr.gc.ca/en/about/guidelines/women\\_e.htm#C](http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm#C)>.

<sup>89</sup> Castel, above n. 30, 55.

<sup>90</sup> *Prosecutor v. Furundzija*, ICTY Trial Chamber II, Case No. IT-95-17/1-T (10 Dec. 1998).

<sup>91</sup> See, e.g., UNE case no. 056 (unpublished case, on file with the author).

testimonies indicated stomach pains, back pains, leg aches, headaches or other grounds for consideration of possible post traumatic stress syndrome, such as sleep disorders, nightmares and anxiety, as well as paranoid feelings of persecution. Nevertheless, there were no expert evaluations by psychiatric/psychological professionals to address credibility issues regarding Rape Trauma Syndrome/Post Traumatic Stress Disorder at either level for these cases.

The Norwegian Directorate of Immigration also indicated concern for a lack of corroborating evidence to confirm the extent of sexual violence in the military. In contrast, the UK Immigration Appellate Authority's Gender Guidelines set forth: 'In many cases, evidence given by an asylum seeker will not be corroborated; absence of corroboration does not mean that the account given is not credible. It is an error of law to require corroborative evidence in an asylum case.'<sup>92</sup> The Canadian Gender Guidelines address the need for a relaxed evidentiary standard when addressing rape within the context of asylum cases, focusing more on subjective testimony than objective evidence which may be non-existent.<sup>93</sup>

In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as 'clear and convincing proof' of state inability to protect, will not always be either available or useful in cases of gender-related persecution.

For example, where a gender-related claim involves threats of or actual sexual violence at the hands of government authorities (or at the hands of non-state agents of persecution, where the state is either unwilling or unable to protect), the claimant may have difficulty in substantiating her claim with any 'statistical data' on the incidence of sexual violence in her country.

In cases where the claimant cannot rely on the more standard or typical forms of evidence as 'clear and convincing proof' of failure of state protection, *reference may need to be made to alternative forms of evidence to meet the 'clear and convincing' test. Such alternative forms of evidence might include the testimony of women in similar situations where there was a failure of state protection, or the testimony of the claimant herself regarding past personal incidents where state protection did not materialize.* (Emphasis added.)

UNHCR's Gender Guidelines confirms this view and calls for use of alternative evidence from similarly situated women or reports from NGOs, international organisations or academics to support a claim:

No documentary proof as such is required in order for the authorities to recognise a refugee claim, however, information on practices in the country of origin may

<sup>92</sup> UK Immigration Appellate Authority, 'Asylum Gender Guidelines', para. 5.43 (2000).

<sup>93</sup> See n. 88 above.

support a particular case. It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.<sup>94</sup>

In like manner, with regards to sexual violence, the ICTY and ICTR Rules of Procedure and Evidence, Rule 96, sets forth that ‘no corroboration of the victim’s testimony shall be required’.<sup>95</sup> The ICC Rules of Procedure and Evidence, Rule 63 (4), sets forth ‘... a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence’. This rule was established to prevent the stereotypical attitudes prevalent in some national jurisdictions that require corroboration of testimony by victims of sexual violence (while not requiring corroboration of victims of other crimes) based on the backward assumption that victims of sexual violence are inherently untrustworthy.<sup>96</sup> As pointed out by Carrie McDougall, ‘In a practical sense, this rule is important, for in many crimes of sexual violence there is an absence of eyewitnesses and, particularly in war-time situations where victims rarely have access to medical services or to law enforcement bodies, no means for corroborative evidence to be preserved.’<sup>97</sup>

In sum, asylum adjudicators may choose to look for corroborating evidence should there be concrete grounds for doubting the credibility of the applicant, but should the applicant be found credible, protection should not be denied on account of a lack of corroborating evidence.

The Eritrea Ethiopia Claims Commission in The Hague has produced decisions addressing both evidentiary standards and state responsibility standards as pertaining rape by the military. It issued awards in 2004 and 2005 which held both sides responsible for rape of civilian women by soldiers of the opposing nationality, i.e. Eritrean civilians by Ethiopian soldiers,

<sup>94</sup> UNHCR, ‘Guidelines on Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’: HCR/GIP/02/017, para. 37, May 2002.

<sup>95</sup> This rule was implemented by the ICTY in *Prosecutor v. Tadic* Case No. IT-94-1, Trial Chamber II (7 May 1997), noting that obtaining corroborating evidence in a time of conflict would be impossible.

<sup>96</sup> Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 355 (Transnational Pub. 2001). Each case has to be judged on its own merits.

<sup>97</sup> Carrie McDougall, ‘The Sexual Violence Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: The Silence has been Broken but There’s Still a Lot to Shout About’ in Ustina Dolgopol and Judith Gardam (eds.), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff 2006) 331-346, 340.

and Ethiopian civilians by Eritrean soldiers.<sup>98</sup> The Commission concluded that it did not have to find liability for rape as an instrument of war, as 'there was no suggestion, much less evidence, that either Eritrea or Ethiopia used rape, forced pregnancy or other sexual violence as an instrument of war. Neither side alleged strategically systematic sexual violence against civilians in the course of the armed conflict ... Each side did, however allege frequent rape of its women civilians by the other's soldiers'.<sup>99</sup> Its findings recognize rape as an international crime; indeed both Eritrea and Ethiopia recognized that rape of civilians was a violation of customary international law. The Commission's analysis focuses on state failure to impose effective measures to prevent rapes from occurring; thereby highlighting a state responsibility to protect its citizens. It is a progressive view that highlights preventive duties. As noted by the Inter-American Commission on Human Rights:

Current international law establishes that sexual abuse committed by members of security forces, whether as a result of deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity.<sup>100</sup>

As regards evidentiary standards, the Eritrea Ethiopia Commission noted that the parties expressed that rape was such a sensitive issue in their culture that victims were unlikely to come forward, and that testimony was likely to be less detailed and explicit than for non-sexual offences.<sup>101</sup> It accepted this argument, noting that there was no requirement of proof of

<sup>98</sup> See, Amnesty International reports on Ethiopia and Eritrea, available at: <<http://web.amnesty.org/report2005/eth-summary-eng>>. See also, Nancy Farwell, 'Silent Pain: Rebuilding Community among Eritrean Survivors of War Rape', (date unavailable) available at: <[www.ishr.org](http://www.ishr.org)>.

<sup>99</sup> Partial Award – Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22, The Hague, 28 Apr. 2004, para. 36. See also, paras. 37-38:

37. The Parties agree that rape of civilians by opposing or occupying forces is a violation of customary international law, as reflected in the Geneva Conventions. Under Common Article 3(1), States are obliged to ensure that women civilians are granted fundamental guarantees, including the prohibition against 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . outrages on personal dignity, in particular humiliating and degrading treatment.' Article 27 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV') provides: Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.

38. Article 76.1 of Protocol I adds: 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.'

<sup>100</sup> *Raquel Marti de Mejía v. Peru*, Case 10.970, Report No. 5/96- Inter-American Commission on Human Rights, 1 Mar. 1996.

<sup>101</sup> Partial Award, n. 99 above, para. 39.

pattern or frequency of rape, rather stating that it relied on un-rebutted *prima facie* cases in specific areas that demonstrated a great risk of opportunistic sexual violence by soldiers. The Commission identified rape as including intentional and grievous harm amounting to an international crime that need not be frequent to incur State responsibility:

To do otherwise would be to subscribe to the school of thought, now fortunately eroding, that rape is inevitable collateral damage in armed conflict. Given these heightened cultural sensitivities, in addition to the typically secretive and hence un-witnessed nature of rape, *the Commission has not required evidence of a pattern of frequent or pervasive rapes ... Rape, which by definition involves intentional and grievous harm to an individual civilian victim, is an illegal act that need not be frequent to support State responsibility.* This is not to say that the Commission, which is not a criminal tribunal, could or has assessed government liability for isolated individual rapes or on the basis of entirely hearsay accounts. What the Commission has done is look for *clear and convincing evidence* of several rapes in specific geographic areas under specific circumstances. Perhaps not surprisingly, the Commission has found such evidence, in the form of *un-rebutted prima facie cases*, in the Central Front regions where large numbers of opposing troops were in closest proximity to civilian populations (disproportionately women, children and the elderly) for the longest periods of time – namely, Senafe Town in Eritrea and Irob Wereda in Ethiopia. Knowing, as they must, that such areas pose *the greatest risk of opportunistic sexual violence by troops*, Eritrea and Ethiopia were obligated to *impose effective measures*, as required by international humanitarian law, to *prevent rape of civilian women*. The clear and convincing evidence of several incidents of rape in these areas shows that, at a minimum, they failed to do so ... <sup>102</sup> (Emphasis added.)

The Commission relies on the presentation of cumulative evidence in the form of eyewitness testimony of rapes occurring in the area by Ethiopian soldiers, and testimony by medical doctors from *Médecins Sans*

<sup>102</sup> Ibid., through para. 42. See also, para. 80:

Eritrea presented detailed and cumulative evidence of several rapes by Ethiopian soldiers of Eritrean civilian women in Senafe Town. Particularly disquieting were the credible accounts of an eyewitness to the rape of a girl by several Ethiopian soldiers, who then beat the eyewitness; a rape of a seventy-year-old blind woman, who died two weeks later and whose screams brought neighbours to her home, who allegedly saw an Ethiopian soldier running away; and multiple and consistent accounts of the rape of a named eighty year-old woman, who died shortly thereafter, whose neighbours heard screams and found her home surrounded by Ethiopian soldiers. Dr Mariana Rincon testified convincingly at the hearing, as well as by written statement, about treating several pregnant women in the month she served in the *Médecins Sans Frontières* (‘MSF’) hospital in Senafe. She said that their behaviour, in her experience, could only be explained by rape. Dr Bereket Berhane Woldeab, both in his written statements and at the hearing, gave similar testimony. The Commission found additional support for these accounts of participation by Ethiopian soldiers in the corroborated statement of a rape victim in Mai Mene, who described being raped at gunpoint by one Ethiopian soldier while another looked on and four kept guard.

*Frontières*.<sup>103</sup> The Commission also took into account general statements addressing rape by Ethiopian soldiers and juxtaposed it to the weak documentation of investigation and prosecution efforts by the Ethiopian state as regards its soldiers. Hence, the focus of the analysis is placed on the lack of State proof regarding its fulfilment of a duty to prevent rape of women.

Similarly, the partial awards for the Western and Eastern Fronts find state liability for failure to take effective measures to prevent the rape of civilian women by Ethiopian military personnel or officials in the towns of Barentu and Teseney and Eritrean military personnel in Dalul and Elidar Weredas.<sup>104</sup> Indeed, the description in the testimony of Eritrean soldiers going door to door in the Central Front, selecting Ethiopian women to be taken away for sexual purposes bears striking similarity to the testimony of Eritrean women asylum seekers describing how they were selected by their commanders (one woman claimed to have been held as a sex slave).<sup>105</sup> It is not far-fetched to propose that practices of sexual violence conducted

<sup>103</sup> Para. 81: The Commission finds this specific evidence, taken together with multiple general statements about unreported opportunistic rape by Ethiopian soldiers, sufficient to support an Eritrean *prima facie* case. Ethiopia's limited documentation that rape complaints were investigated and soldiers arrested and its emphasis on the scope of its humanitarian law compliance training were insufficient to rebut this *prima facie* case. Accordingly, the Commission finds Ethiopia liable for failure to take effective measures to prevent rape by its soldiers of Eritrean civilian women during Ethiopia's invasion and occupation of Senafe Town.

<sup>104</sup> Partial Award – Western Front, Aerial Bombardment and related claims. Eritrea's claims 1, 3, 5, 9–13, 14, 21, 25 & 26, The Hague, 19 Dec. 2005:

83. It is the task of the Commission to take this evidence into account, in particular to balance the obvious difficulties posed by third-party and interview testimony against the natural inclination of victims (and even witnesses) not to speak publicly about rape .... The Commission is satisfied that there is clear and convincing evidence of several incidents of rape of Eritrean civilian women by Ethiopian soldiers in Barentu and Teseney, which evidence has gone un-rebutted by Ethiopia. The Commission finds that Ethiopia failed to impose effective measures on its troops, as required by international humanitarian law, to prevent rape of civilian women in Barentu and Teseney.

<sup>105</sup> Partial Award – Central Front – Ethiopia's Claim 2 between the Claimant, The Federal Democratic Republic of Ethiopia: The Hague, 28 Apr. 2004:

83. Rape. Ethiopia presented detailed and cumulative evidence of several rapes by Eritrean soldiers of Ethiopian civilian women in Irob Wereda, in particular in Endalgeda Kebele. The Tigray Women's Association registered twenty-six rape victims in Irob Wereda, which was corroborated in a general manner by the declaration of a government official in Irob Wereda who estimated, on the basis of discussions with women and their families, that thirty-five women were raped by Eritrean troops. One declarant from Enguraela Kushet, Engalgeda Kebele, testified that he knew eleven women who were raped by Eritrean soldiers in the first week of the invasion in 1998; another testified to eleven rape victims from the same kushet bearing children and described the practice of Eritrean soldiers going door-to-door selecting women to take away. Several clergymen identified both rape victims and Eritrean military perpetrators by name. One priest described complaining, futilely, to Eritrean commanders about three specific Eritrean soldiers.

84. The Commission finds this specific evidence, with cumulative general declarations about unreported, opportunistic rape by Eritrean soldiers, sufficient to support an Ethiopian *prima facie* case. Eritrea effectively left this case un-rebutted. Accordingly, the Commission finds Eritrea liable for failure to take effective measures to prevent rape by its soldiers of Ethiopian civilian women during Eritrea's invasion and occupation of Irob Wereda.

during wartime may well be continued during peacetime and in fact be directed internally within the military itself. As noted by Heaven Crawley:

The use of rape in war is just one manifestation of the gendered process of war which not only legitimates violence by the State (and other parties) but exaggerates pre-existing myths about gender and sexuality, one of which is the belief that men have an uncontrollable sex-drive: 'from these fundamental assumptions grows the "keep-the-boys happy" mentality that explains at least some of what happens to women in war.' In this context, rape is used (or tolerated) as a means of troop mollification and as a 'just reward' for war-weary troops.<sup>106</sup>

If one were to apply the perspective of the Ethiopia-Eritrea Claims Commission to refugee status determination, the assessment of the risk of opportunistic sex within the military would form an integral part of the protection analysis. This requires substantive evaluation of the extent to which actual effective measures exist to prevent or respond to violations. When faced with an absence of State evidence documenting protection and prevention strategies specifically addressing the institution in question, there would be grounds for applying the benefit of the doubt standard to persons fleeing sexual abuse.

The Norwegian Directorate of Immigration admitted instances of sexual violence in the military, but contrary to the Eritrean Ethiopian Claims Commission's willingness to accept the validity of a *prima facie* case in specific circumstances with a risk of opportunistic sexual violence, the immigration authorities considered the testimonies of the women and country reports addressing sexual violence in the military to be insufficient, instead referring to a need for 'widespread occurrence or other (undefined) conditions' in order to be considered as persecution. The reasoning appears more in keeping with an assessment for establishing crime against humanity, rather than persecution under the 1951 Convention on the Status of Refugees. There is no requirement that acts be widespread to be considered as persecution, although the testimonies of the applicants and country reports could be seen as constituting precisely such evidence they were not utilized as such. In other instances, the violations were characterized as 'random criminal acts' not subject to protection under the 1951 Convention. This characterization ignores the description offered by the asylum seekers (as well as the Amnesty International Report) of a practice which

See also, Partial Award - Western and Eastern Fronts - Ethiopia's Claims 1 & 3 between the Claimant, The Federal Democratic Republic of Ethiopia, The Hague, 19 Dec. 2005:

69. Applying the particularly careful balance necessary for rape allegations, the Commission is satisfied that there is clear and convincing evidence of several incidents of rape of Ethiopian women by Eritrean soldiers in Elidar and Dalul Weredas. The Commission finds that Eritrea failed to impose effective measures on its troops, as required by international humanitarian law, to prevent rape of women in Elidar and Dalul Weredas.

<sup>106</sup> Heaven Crawley, *Refugee and Gender: Law and Process* (Jordans 2001) 90.

appears planned, rather than spontaneous, flourishing in a coercive context and that may have attained a certain level of acceptability within the military. There did not appear to be reference to the principle of the benefit of the doubt, nor were experts consulted to conduct Rape Trauma assessments when conducting credibility determination. Furthermore, the requirement of corroboration runs contrary to the standards advocated both from the perspective of justice to be afforded to refugees and victims of sexual violence.

At the appeals level, the Eritrean state was deemed to be unlikely to have the ability or will to protect the applicant against rape and reprisal; hence the Immigration Appeals Board actually conducted a state accountability assessment and concluded that there was an increased risk of serious human rights violations amounting to inhuman treatment. The impunity enjoyed by military commanders reveals the acquiescence of the government towards such sexual abuse, but this was not developed in order to grant asylum.<sup>107</sup> Applicants were more often given protection for compassionate grounds or humanitarian protection, in part because the country assessment report described the risk level of serious harm, inhuman treatment or torture to be 'low but possible'- thereby indicating a high standard of proof.<sup>108</sup>

The inward direction of sexually violent impulses by military personnel towards its female members requires an effective response by the state and the international community.<sup>109</sup> The fact that the asylum seekers may be

<sup>107</sup> In comparison, the ICTR held Akayesu liable for facilitating rapes by failing to prevent or punish his subordinates, thereby signalling official tolerance for the rapes. *Prosecutor v. Akayesu*, ICTR, 96-4-T, Judgment (2 Sept. 1998). The *Furundzija* Case also held a commanding officer liable for aiding and abetting rapes and doing nothing to stop them. *Prosecutor v. Furundzija*, ICTY, Judgment, IT-95-17/ 1-T 185 (10 Dec. 1998).

<sup>108</sup> UNE Cases no. 044 (unpublished case on file with the author). UDI cases no. 008 and 011 (unpublished cases on file with the author). See also, UNE Case no. 051 (unpublished case on file with the author) involving a woman engaged in preventive draft evasion specifically based on fear of rape in the military. See also, UNE cases nos. 041, 009, 056 and 054 (unpublished cases on file with the author). The Norwegian Board of Immigration Appeals referred to the possibility of return to one's unit, but there was no discussion as to why this is actually insufficient from the perspective of international law. Where a person has undergone rape by a state actor, the remedy required goes beyond return to one's unit; in fact such action would actually be contrary to ordinary remedial standards given the special circumstances.

<sup>109</sup> There is a striking similarity between the non-response by the international community to the situation described by Eritrean female combatants subject to exploitation and that of the Japanese sex slaves. Note the observation by the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, 'Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)', UN doc. E/CN.4/2001/73, 23 Jan. 2001:

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.

offered protection on compassionate grounds as a secondary form of protection which reveals a tiered approach by the Norwegian Immigration authorities in interpreting the 1951 Convention on the Status of Refugees.

## 5. Comparison to asylum cases presented by male Eritrean deserters

In contrast, five claims from male applicants who deserted after imprisonment and were subject to the same type of non-sexual torture endured by the women did result in asylum, thereby upholding the male paradigm of the perception of a refugee.<sup>110</sup> A sixth case involving a male deserter who was repeatedly imprisoned but did not allege torture was also successful.<sup>111</sup> Another successful case in which asylum was granted to a male deserter ironically mirrored the identification of interests in fulfilling life aspirations which was cause for doubting the actual need for asylum among female applicants:<sup>112</sup>

There are many reasons why I went into exile. First and foremost, I believe that people should be free to express themselves orally and in written form without fear. One should be allowed to study or work freely. While the rest of the world fights to attain all human rights in place, the authorities in my country do not have any respect for human rights at all. It is dangerous to live in such country. In addition, one is forced to contribute to extend the life of this inhuman system of governance. It was difficult for me to continue to live in such a country where my life was subject to war, misery and disease. My aspiration is to attain education and become someone instead of waste my time and my energy. That is why I was forced to leave my country. If I go back I will be killed ... as a deserter I will be given the death penalty... I have run away from this gruesome system and if I go back I will be killed.

The concern for subjection of an individual to a 'civil death' was addressed by The European Court of Human Rights in *Ulke v. Turkey* (2006) concerning a conscientious objector who had gone into hiding and was subject to continuous prosecution and threat of imprisonment for his refusal to comply with military service. As a result, he was unable to marry or register his child. These measures were characterized as being

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. Sometimes women and girls are forced into 'marriage'; a soldier will 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 and may also be torture or other cruel, inhuman and degrading treatment.

<sup>110</sup> UDI cases 017, 015, 014 (unpublished cases on file with the author).

<sup>111</sup> UDI case 016 (unpublished case on file with the author).

<sup>112</sup> UDI case 007 (unpublished case on file with the author).

disproportionate and illegitimate as they repressed the applicant's intellectual personality, subjecting him to feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will. The Court held the State liable for its degrading treatment of Ulke, according to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'European Convention on Human Rights').

One of the most unusual cases involved a male Eritrean deserter who voiced his opposition to the abuse of women in the military and was punished.<sup>113</sup> He explained that women had fought side by side with men for independence and later were given the duty of military service. Nevertheless, he claimed that they suffered injustice as the military leaders raped them. He believed that the purpose of having women in the army was to defend the country, and the rapes had nothing to do with this end. He questioned why this happened. As a result, he alleged that he was arrested and subjected to torture.<sup>114</sup> He was given asylum, and it is particularly ironic given the fact that the women subjected to rape in the military and at risk of punishment on account of desertion were generally not given the same level of protection.

On the other hand, there were also cases in which men alleging past torture or inhuman treatment were given humanitarian protection or protection on compassionate grounds by UNE given the violation of fundamental human rights and the weak state of law in Eritrea. It concluded that there was a risk of inhuman treatment for desertion.<sup>115</sup> UNE took note of the case of *Said. v. Netherlands*, European Court of Human Rights (2005), holding that the Netherlands would be in violation of Article 3 of the European Convention of Human Rights if it returned an Eritrean deserter who had voiced his opposition to the State's treatment of its soldiers during the war and who underwent detention and punishment for this. Further, there was citation of a UNHCR position paper which indicated a risk of inhuman or degrading treatment for deserters. Hence, these inputs appeared to influence the policy on *non-refoulement* but did not serve to lift the analysis of claims to the level of asylum.

There is variability in how claims involving allegations of past torture or inhuman treatment within the military are treated within other jurisdictions as well. For example, consider the US case involving an Eritrean

<sup>113</sup> UDI case 003 (unpublished case on file with the author).

<sup>114</sup> Further, he contended that his regiment received orders that deserters should be executed. Specifically he alleged that all officers from the rank of colonel and over were given permission to execute those who ran away or travelled without permission.

<sup>115</sup> See also, UNE Cases 049 and 053 (unpublished cases on file with the author) involving male deserters who claimed to have been active defending their rights in the military, who were given protection on compassionate grounds.

deserter who was tortured for having questioned the legitimacy of the war, *Nuru v Gonzales, US Attorney General*, 404 F.3<sup>rd</sup> 1207 (21 April 2005). The Court granted protection under the CAT, noting that torture is never proportional punishment, and that past torture indicates a likelihood of future torture. Here is a classic political opinion case in which the applicant fits the male stereotype of the refugee, but the protection remains at the level of *non-refoulement*.

In contrast, one may consider the UK case from the Asylum and Immigration Tribunal, *MA (Draft evaders-Illegal Departure-Risk) Eritrea v. Secretary of State for the Home Department*, involving an Eritrean man of draft age who exited Eritrea illegally and was found to have a real risk of being subject to torture on account of being perceived as a deserter (thereby imputing a political opinion to him) and who therefore was viewed as meriting asylum under the 1951 Convention on the Status of Refugees as well as protection according to Article 3 of the ECHR.<sup>116</sup> Similarly, the Swiss Asylum Appeal Commission ARK in re *L.H., Eritrea, decision from 20 December 2005, GICRA 2006.Nr. 3, pp. 29–41* set forth that Eritrean deserters are imputed a political opinion by the State and subject to unreasonably severe sanctions amounting to torture and inhuman treatment. The Commission cites the *Said* case but uses it to support a finding of asylum according to the 1951 Convention definition of a refugee, thus ‘layering’ the conventions in order to provide the highest protection.

## 6. Conclusion

It is hard to avoid the impression that what is called war is what men make against each other, and what they do to women is called everyday life. So wars are fratricidally fought, and then are fraternally over, while everyday life never ends.<sup>117</sup>

The prevalence of sexual violence within the context of the military requires attention beyond situations of war or conflict. Women conscripts in Eritrea are at risk of persecution in the form of rape or sexual violence simply because they are women, as well as due to their race, nationality, political opinion, or religion. Given the severe nature of the violations, it is suggested that access to protection in the form of asylum, as opposed to humanitarian protection or protection on compassionate grounds is merited. At essence is what Rosalind Dixon calls ‘the imperative of

<sup>116</sup> *MA (Draft Evaders - Illegal Departures - Risk) Eritrea v. Secretary of State for the Home Department*. CG [2007] UKAIT 00059. United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 26 June 2007, online, UNHCR Refworld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46822c3f2>, accessed 8 July 2007.

<sup>117</sup> Catherine MacKinnon, ‘Women’s September 11<sup>th</sup>: Rethinking the International Law of Conflict’ 47 *Harv. Int’l. L. J.* 1 (Winter 2006).

recognition for victims of crimes of sexual violence'.<sup>118</sup> In part, provision of asylum could form part of a direct protection strategy where state protection is unavailable and undocumented. The Eritrean case study highlights the importance of reassessing how refugee status determination functions with respect to cases involving sexual violence. This requires restructuring of the protection evaluation format. The focus of the protection analysis should be an assessment of whether the state of origin has fulfilled prevention and protection duties regarding sexual violence within its military. This would enable an evaluation of the risk of 'opportunistic sex' within the military, thereby avoiding privatization of the violence. Omission of substantive documentation by the state of origin should create a presumption in favour of the asylum application. The analysis of the inability of victims to file effective complaints against those who abuse them (or of the risk they run for such action) should be recognized as a central (not peripheral) issue. Recognition of corroborative testimonies offered by other asylum seekers and general human rights country reports can support recognition of a claim as *prima facie*. The complexity of the cases due to the presence of mixed motives of persecution calls for a more nuanced interpretation of the protection categories. Further, lapses in detail or memory due to RTS/PTSD require the application of flexible evidentiary standards and consultation with experts. Finally, acceptance of the credible testimonies of victims of sexual violence lies at the heart of ensuring a gendered interpretation of the 1951 Convention on the Status of Refugees.

In 2006, the Norwegian Immigration Directorate suspended return of Eritrean asylum seekers in light of the deterioration of the situation of human rights. The Directorate indicated a shift towards a grant of asylum, although the Appeals Board continues to primarily grant humanitarian protection. In 2007, the Norwegian Government proposed a new Aliens Law which calls for recognition of sexual violence and acts of a gender specific nature as persecution, and announced that new gender guidelines will be created.<sup>119</sup>

<sup>118</sup> Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' in Gerry Simpson (ed.) *War Crimes Law* Vol. I (Ashgate 2004) 268.

<sup>119</sup> *Om lov om utlendingers adgang til riket og deres opphold her (utlendingsloven) Ot. prp. Nr. 75 (2006-2007)*. The draft law contains verbatim translations of the EU Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.