Options

Vol. 33 June 2003 Rs. 50/-

Special Issue on the International Criminal Court

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Edited by
Ramani Muttettuwegama, Nehama Jayewardene, Prathibashi Seneviratne

Both cover paintings are by **Anoma Wijewardene**. Born in Sri Lanka, Anoma completed her BA and MA at Central St Martin's College of Art, London. Her work has sold to Yves St Laurent, Pierre Cardin, Ralph Lauren and Calvin Klein, and been exhibited at the Victoria & Albert Museum, the Photographers Gallery, and the House of Commons and Contemporary Applied Art in London. She also lectured for many years in the UK and now conducts art classes in Colombo. She has held exhibitions in Kuala Lumpur, Singapore, New Delhi and Colombo. Anoma's paintings are among collections in the UK, USA, Canada, Malaysia, Singapore, France, Germany, Belgium, India, Sri Lanka, Japan, UAE and Australia. *(Anoma can be contacted at: Tel 699624, Email:anomazon@eureka.lk)*

The front cover painting titled **Event Horizon II**, depicts the connection between the Spetember 11th attacks and the destruction of the Bhamiyan Buddha statues. Anoma says that, as a proponent of healing between faiths and cultures, she was deeply affected by the Bhamiyan incident, as by the 9/11 tragedy. Event Horizon is a technical term that refers to a particular boundary in a black hole beyond which there is no return for anything, including light; a 'Point of No Return'.

The painting on the back cover, showing a child leading his mother out of darkness and entrapment, is titled **Into the Light**, although the artist's 'inner' title is 'Dawn for Terror's Child'. The painting reflects Anoma's belief that children are our hope and future and the custodians of the planet and mankind.

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Comment

The ceasefire between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) has held for over fifteen months at the time that *Options* goes to publication. The process has now moved to probably its most difficult phase to date in that the LTTE has currently suspended its participation in the talks. However, all efforts are being made to ensure that the talks recommence without much delay.

During this period, *Options* has noted with concern the lack of space for women's voices in this process. Although women of Sri Lanka have borne the brunt of the war, we see almost no discussion regarding their concerns. This issue is dedicated to the various forms in which women's rights are violated during the course of conflict or when identity politics are at stake.

We explore the International Criminal Court, the first permanent tribunal set up by the international community to try individuals accused of war crimes, crimes against humanity, genocide and, in the future, aggression. The first article provides the history of the Court and the justification for the establishment of a permanent tribunal. Next, is a short summary of the Court. Of particular interest to our readers are the types of gender specific crimes included, as well as gender being recognised as a basis for persecution under crimes against humanity in Part 2; the insistence on including women in the judiciary in Part 4; the establishment of the unit to represent victims and witnesses and the Court's powers to make orders for reparations in Part 6; and the setting up of a Victims' Trust Fund under Part 7. The article by Nehama Jayewardene discusses the various aspects of the Court that may, one day, result in its conversion into a tribunal where women victims and witnesses may finally get a fair hearing. Her analysis includes details of the rules of procedures and evidence that would be applicable to sexual offences. Then, we provide you with profiles of the seven women who are to serve as judges on the ICC. The final article in this section, written by Usha Ramanathan, details the international effort by the USA to minimise the impact of the Court by entering into bilateral agreements with countries regarding extraditions.

In the next section, we have articles on issues that may be within the jurisdiction of the ICC and are of relevance to women. The article adapted from the book by Priyadharshini Dias details the international standards relating to disappearances and argues for a need to adopt a definition of disappearance in Sri Lanka. The article by Sheila Varadan describes the advances in international jurisprudence in relation to rape and argues for reform of the rules of evidence applicable in Sri Lanka. Saama Rajakaruna shifts our focus out of Sri Lanka by providing an overview of the defence of "honour" in cases where women are killed by male members of their family. The question of whether the ICC will one day recognise these murders as a crime against humanity remains to be seen.

The final section of this issue of *Options* contains reviews of two creative works on related themes. Neloufer de Mel discusses the depiction of the suicide bomber in the film 'Kalu Sudu Mal'. Neluka Silva reviews the two plays in 'Thin Veils' by Sumathy, which deal with the reality of women's lives in the context of war in Sri Lanka.

Ramani Muttettuwegama
Editor

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OVERVIEW

It has been 50 years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide. In resolution 260 of 9th December 1948, the General Assembly, "Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required", adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as "a crime under international law", and article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction..." In the same resolution, the General Assembly also invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide..."

Following the Commission's conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised draft statute in 1953. The General Assembly, however, decided to postpone consideration of the draft statute pending the adoption of a definition of aggression.

Since that time, the question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. Then, in 1993, the conflict in the former Yugoslavia erupted, and war crimes, crimes against humanity and genocide – in the guise of "ethnic cleansing" – once again commanded international attention. In an effort to bring an end to this widespread human suffering, the UN Security Council established the ad hoc International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future.

Shortly thereafter, the International Law Commission successfully completed its work on the draft statute for an international criminal court, and in 1994 submitted the draft statute to the General Assembly. To consider major substantive issues arising from that draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995. After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text.

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At its fifty-second session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15th June to 17th July 1998, "to finalize and adopt a convention on the establishment of an international criminal court".

"In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you...to do yours in our struggle to ensure that no ruler, no State, no junta and no army can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the covers of justice; that they, too, have rights, and that those who violate those rights will be punished."

- Kofi Annan, United Nations Secretary-General

Peace and Justice

One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world. In this connection, few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today's world. The establishment of a permanent international criminal court (ICC) is seen as a decisive step forward. The international community met in Rome, Italy, from 15th June to 17th July 1998 to finalize a draft statute which, when ratified, will establish such a court.

Why do we need an International Criminal Court?

- **to achieve justice for all**

"For nearly half a century – almost as long as the United Nations has been in existence – the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought...that the horrors of the Second World War – the camps, the cruelty, the exterminations, the Holocaust – could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time – this decade even – has shown us that man's capacity for evil knows no limits. 'Genocide' is now a word of our time, too, a heinous reality that calls for a historic response."

- Kofi Annan, United Nations Secretary-General

An international criminal court has been called the missing link in the international legal system. The International Court of Justice at The Hague handles only cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable. In Cambodia in the 1970s, an estimated 2 million people were killed by the Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children. Massacres of civilians continue in Algeria and the Great Lakes region of Africa.

- **to end impunity**

"A person stands a better chance of being tried and judged for killing one human being than for killing 100,000."

- José Ayala Lasso, former United Nations High Commissioner for Human Rights

The Judgment of the Nuremberg Tribunal stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" – establishing the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law. According to the Draft Code of Crimes against the Peace and Security of Mankind, completed in 1996 by the International Law Commission at the request of the General Assembly, this principle applies equally and without exception to any individual throughout the governmental hierarchy or military chain of command. And the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations in 1948 recognizes that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals.

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- **to help end conflicts**

> "There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."
>
> - Benjamin B. Ferencz, former Nuremberg prosecutor

In situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end. Two ad hoc international criminal tribunals, one for the former Yugoslavia and another for Rwanda, were created in this decade with the hope of hastening the end of the violence and preventing its recurrence.

- **to remedy the deficiencies of ad hoc tribunals**

The establishment of an ad hoc tribunal immediately raises the question of "selective justice". Why has there been no war crimes tribunal for the "killing fields" in Cambodia? A permanent court could operate in a more consistent way.

Reference has been made to "tribunal fatigue". The delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.

Ad hoc tribunals are subject to limits of time or place. In the last year, thousands of refugees from the ethnic conflict in Rwanda have been murdered, but the mandate of that Tribunal is limited to events that occurred in 1994. Crimes committed since that time are not covered.

- **to take over when national criminal justice institutions are unwilling or unable to act**

> "Crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command."
>
> - Report of the International Law Commission, 1996

Nations agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia. Or national institutions may have collapsed, as in the case of Rwanda.

- **to deter future war criminals**

> "From now on, all potential warlords must know that, depending on how a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law...Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defence that the suspects were not aware of the law will not be permissible."
>
> - Hans Corell, United Nations
> Under-Secretary-General for Legal Affairs

Most perpetrators of war crimes and crimes against humanity throughout history have gone unpunished. In spite of the military tribunals following the Second World War and the two recent ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, the same holds true for the twentieth century. That being said, it is reasonable to conclude that most perpetrators of such atrocities have believed that their crimes would go unpunished. Effective deterrence is a primary objective of those working to establish the international criminal court. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment – to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits – it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers.

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A Summary of the Rome Statute

The ICC Statute, agreed upon in Rome, Italy, on July 17th 1998, comprises of 13 sections and 128 articles. The following is a brief outline of the parts and subject matter of the Rome Statute.

PART 1: Establishment of the Court
Part 1 is comprised of articles 1 to 4. It concerns the establishment of the Court and its relationship with the United Nations.

The Court is to be established by treaty and based in The Hague, the Netherlands. The relationship of the Court to the UN will be determined by an agreement under negotiation at the Preparatory Commission.

PART 2: Jurisdiction, Admissibility and Applicable Law
Part 2 is comprised of articles 5 to 21. It concerns crimes within the Court's jurisdiction, the role of the Security Council, the admissibility of cases, and the law applicable to cases coming before the Court.

The Court initially will have jurisdiction over war crimes, genocide and crimes against humanity. Additionally, the Court will exercise jurisdiction over the crime of aggression once agreement can be reached on a definition of this crime.

There is specific inclusion of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other grave forms of sexual violence as war crimes in international and non international armed conflict as well as crimes against humanity. Additionally, persecution is a crime against humanity and it specifically recognises gender as a basis for persecution.

It also establishes the principle of complementarity, by virtue of which the Court will only exercise its jurisdiction when States that would normally have national jurisdiction are either unable or unwilling to exercise it.

The powers of the Security Council have been limited to the ability to refer a situation, acting under Chapter VII of the UN Charter, to the Prosecutor. The Security Council has the power to defer an investigation into a particular situation referred to the Prosecutor, but only for a period of 12 months at a time.

Part 3: General Principles of Criminal Law
Part 3 is comprised of articles 22 to 33. It concerns principles of criminal law drawn from different legal systems with the objective of providing all guarantees of due process.

This section includes the principle of non-retroactivity, where the Court will not have jurisdiction over acts committed prior to the Statute's entry into force.

It recognises the principle of individual criminal responsibility, which makes it possible to prosecute individuals for serious violations of international law.

This part also addresses the responsibility of leaders for actions of subordinates, the age of responsibility, the statute of limitations, and an individual's responsibility for both an act and

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an omission. Article 26 of the Statute states that the court will not have jurisdiction over any person who was below the age of eighteen at the time of the alleged commission of the crime.

PART 4: Composition and Administration of the Court

Part 4 is comprised of articles 34 to 52. It details the structure of the Court and the qualification and independence of judges.

The Court will be comprised of the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor, and the Registry.

Eighteen judges will be elected by the Assembly of States Parties for nine year terms. They must have strong personal and professional qualifications in international and criminal law.

The composition of the Court will reflect an adequate balance of the different legal systems of the world, geographic locations and gender equality.

PART 5: Investigation and Prosecution

Part 5 is comprised of articles 53 to 61. It addresses the investigation of alleged crimes and the process by which the prosecutor can initiate and carry out investigations. It also defines the rights of individuals suspected of a crime.

PART 6: The Trial

Part 6 is comprised of articles 62 to 76. It deals with trial proceedings, the question of a trial in the absence of the accused or following an admission of guilt, and the rights and protection of the accused.

The Statute states that "everyone shall be presumed innocent until proven guilty in accordance with law."

This part also provides for the establishment of a Victims and Witnesses unit and the ability of the Court to determine the extent of damages and to order a guilty person to make reparation.

PART 7: Penalties

Part 7 is comprised of articles 77 to 80. It covers applicable penalties for persons convicted of a crime, which include: life imprisonment, imprisonment for a designated number of years, and fines, among other sentences. The death penalty is not a sentence of the Court.

This part of the Statute also establishes a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of victims.

PART 8: Appeal and Review

Part 8 is comprised of articles 81 to 85. It addresses appeals against judgement or sentence, appeal proceedings, the revision of a conviction or sentence, and the compensation to a suspect, accused, or convicted person.

A convicted person, or the Prosecutor, may bring an appeal before the Court on the basis that the fairness of the proceedings was affected. The Statute states that anyone wrongfully arrested, detained, or convicted is entitled to compensation from the Court.

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PART 9: International Cooperation and Judicial Justice
Part 9 is comprised of articles 86 to 102. It addresses international cooperation and judicial assistance between States and the Court.

It involves the surrender of persons to the Court, the Court's ability to make provisional arrests, and State responsibility to cover costs associated with requests from the Court.

Where international treaties of extradition are concerned, when a State Party receives a request from the Court for the surrender of a person and it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime, then if there is a treaty of extradition that exists between the requested State and the requesting State, the requested State can determine whether to surrender the person to the Court or to extradite the person to the requesting State.

PART 10: Enforcement
Part 10 is comprised of articles 103 to 111. It includes the recognition of judgements, the role of States in enforcement of sentences, the transfer of the person upon completion of a sentence, and parole and commutation of sentences.

PART 11: Assembly of States Parties
Part 11 is comprised of article 112. It establishes an Assembly of States Parties, formed by one representative of each State Party, to oversee the various organs of the Court, its budget, and reports and activities of the Bureau of the Assembly. Representatives will have one vote and decisions will be reached either by consensus or some form of a majority vote.

The Assembly of States Parties will also have the power to adopt or amend the draft texts of the Rules of Procedure and Evidence and Elements of Crimes.

PART 12: Financing of the Court
Part 12 is comprised of articles 113 to 118. It states that funding for the Court shall be provided by three sources: (a) assessed contributions from States Parties; (b) funds provided by the United Nations; and (c) voluntary contributions from governments, international organisations, individuals, corporations and other entities.

PART 13: Final Clauses
Part 13 is comprised of articles 119 to 128. It addresses the settlement of disputes, reservations and amendments of the Statute, and ratification.

It states that no reservations may be made upon ratification of the treaty. However, seven years after the treaty has entered into force, any State Party may propose amendments to the Statute at a Review Conference.

The final clauses called for the Statute to be open for signature from July 17th 1998 to December 31st 2000 by all States that attended the Rome Conference. The Statue allows for a State Party to withdraw from the Statute by notifying the Secretary-General of the UN, in writing.

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ENGENDERMENT IS NOT ENDANGERMENT

Nehama Jayewardene

> *"As a rule of prudence, however, it has been emphasized that courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and the person accused of abduction or rape has not been falsely implicated"*[1]

The above statement is a sharp awakening to Sri Lanka's archaic laws and rules of evidence and procedure relating to sexual offences. While realising the need for a thorough revamp of these laws, it is necessary to bring in progressive legislation that a majority of the international community embraces. The reasoning behind this is that progressive legislation is drafted and agreed upon in light of the latest developments in law as a means of addressing universal crimes, morality and a sense of criminal justice at the relevant time.

> The adoption of the Rome Statute with the support of 120 States astonished many observers. It was the result of a lengthy and complex negotiation process. It capped various attempts at institution building over several decades, which did not appear to hold the promise of breakthrough. The adoption of the Statute was a spectacular rebuttal of the scepticism expressed by illustrious publicists of international law and practitioners alike[2].

This article initially aims at presenting the standards observed in the Rome Statute of the International Criminal Court[3] and its Rules of Procedure and Evidence and Elements of Crime with regard to gender as near ideal especially in times of armed conflict, worthy of study and being absorbed into domestic legislation in individual countries.

> The implementation of ICC standards into national legislation will benefit the state by strengthening its national criminal justice system, bring national law into conformity with international obligations and up to date with important developments in international law.[4]

States that have already fully implemented the Geneva Conventions will already have some of the ICC legislation with regard to most war crimes in their domestic legislation. However there is a good chance that these countries may need these laws amended in order to comprehensively implement these provisions. Few states have adequately implemented these Conventions into national law and very few have the full range of crimes against humanity on their statute books. The ratification of the Rome Statute is the ideal opportunity to correct this and establish detailed national law on these crimes.

Universal Jurisdiction

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.....

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> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for such crimes[5].

In the past, due to issues like respecting a country's sovereignty and non-interference, courts of one state would only exercise jurisdiction over crimes committed by persons in their own territory (territorial jurisdiction). More recently international law has recognized that there are some crimes that are so heinous that it permits and in some cases requires states to exercise jurisdiction over persons suspected of certain grave crimes under international law, no matter where the crimes occurred. But it wasn't till the past two decades, beginning with the establishment of the International Criminal Tribunals for Former Yugoslavia and Rwanda that states finally began to fulfil their responsibilities under international law to enact legislation permitting their courts to exercise universal jurisdiction over grave crimes under international law and to exercise that jurisdiction.

> An overwhelming majority of states at the Diplomatic Conference in Rome in June and July 1998 favoured giving the International Criminal Court the same universal jurisdiction over genocide, crimes against humanity and war crimes, which they themselves have. However as a last minute compromise in an attempt to persuade certain states not to oppose the court the Rome Statute omits such jurisdiction when the Prosecutor acts based on information from sources other than the Security Council[6].

The international community have a duty and responsibility to ensure that the gap in international protection is filled. National legislation of State Parties to the Rome Statute will need to include provisions, which permit the surrender of accused persons to the court and requiring their authorities to cooperate with the court. This legislation will need to be an effective complement to the International Criminal Court. Not only should they comprehensively define the crimes but universal jurisdiction should be provided over crimes under international law which could include genocide, crimes against humanity, war crimes, extra judicial executions, torture and enforced disappearances.

> Such steps by reinforcing an integrated system of investigation and prosecution of crimes under international law – will help reduce and eventually eliminate safe havens for those responsible for the worst war crimes in the world.[7]

The Court can exercise its jurisdiction[8] over crimes that have been referred to the Prosecutor by a State Party[9], by the Security Council acting under Chapter VII of the Charter of the United Nations or the Prosecutor initiated an investigation in respect of such a crime[10].

This Universal Jurisdiction however should not be viewed as a threat to a state's sovereignty.

> The Rome Statute balances the primary duty of states to prosecute these crimes with the need for an alternative judicial mechanism to ensure that those who commit serious international crimes face justice. It does this by making the jurisdiction of the ICC complementary to national jurisdictions. This means that the ICC can exercise its jurisdiction only after it is established that there is no state with jurisdiction that is able or willing to pursue a bona fide investigation or prosecution. This principle is known as the *complementarity* principle[11].

This principle of complementarity is often viewed as an incentive for national courts to implement ICC standards into domestic legislation. This is because under the complementarity principle, state parties that have the proper legal basis for prosecuting ICC crimes will be able to exercise their national jurisdiction over their nationals rather than having to surrender them to the ICC. Implementation of the Rome Statute into domestic law provides an excellent opportunity for state parties to review and amend their national laws to ensure that they are able to exercise their jurisdiction over these crimes.[12]

Definitions of Crimes of Sexual and Gender Violence

The most significant provisions of the Rome Statute with regard to women's rights are in the section that deals with the definition of crimes.[13] This is the result of the recognition of the fact that war related brutality such as rape, sexual slavery, forced pregnancy, and other forms of gender violence during times of armed conflict are often sanctioned, tolerated, or ordered by state actors. It is also an admission that little steps have been taken in the past to outlaw these atrocities or make the perpetrators accountable for their crimes.

> Although the international community has made some strides in outlawing and punishing atrocities committed during armed conflict through the development of international humanitarian law, gender based violence has

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been consistently marginalized or dismissed as a natural consequence of war.[14]

Articles 7 and 8 of the Rome Statute define the offences of Crimes against Humanity and War Crimes respectively. These provisions contain a wide range of gender specific crimes, among them, the offences of Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy and Enforced Sterilization.[15] Additionally, Persecution is included as a Crime against Humanity and this specifically includes gender as a basis for persecution[16]. Trafficking is included as a crime against humanity among the crime of enslavement.[17]

The definition of the crime of rape is worthy of particular attention as it is the result of negotiation and takes into account definitions used by the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda. The Elements of Crime determines that the following acts constitute the crime of rape as a war crime and a crime against humanity. *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, or of the anal or genital opening of the victim with any object or any other part of the body.*
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.[18]

The crime of Genocide also has been defined in the Rome Statute. The Elements of Crime specifically extends bodily or mental harm constituting genocide to include and not be restricted to acts of torture, rape, sexual violence or inhuman or degrading treatment.

The Rome Statute also specifically states that the application and interpretation of law must be without adverse distinction on the basis of enumerated grounds including gender.[19]

> The term Gender : The term Gender has been defined referring to both sexes male and female within the context of society.

Rules of Evidence and Procedure

> In every legal system of the world, the investigation and prosecution of sexual and gender violence has been undermined by discriminatory and patriarchal procedural and evidentiary rules...The Rome Statute is revolutionary because it codifies a mandate for the court to adopt specific investigative, procedural and evidentiary mechanisms that are essential for gender justice.[20]

Part 5 of the Rome Statute which concerns investigation and prosecution, requires the Prosecutor to take appropriate measures to ensure the effective investigation and prosecution of crimes and to respect the interests and personal circumstances of victims and witnesses including age, gender, health and also to take into account the nature of the crimes particularly when they involve sexual violence and gender violence.[21]

There are specific rules of evidence and procedure that have to be adhered to with regard to sexual violence.

- The issue of consent :

  Rule 70 of the Rules of Evidence and Procedure state that consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent. Additionally consent cannot be inferred by reason of any word or conduct of a victim where the victim is incapable of giving genuine consent, it cannot be inferred by reason of the silence or lack of resistance nor can the credibility, character or predisposition to sexual availability of a victim be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

- Prior or subsequent sexual conduct :

  Rule 71 of the Rules of Evidence and Procedure rules out the admissibility of evidence of the prior or subsequent sexual conduct of a victim or witness.

- Corroboration :

  Chapter 4 of the said Rules of Procedure and Evidence deals with provisions relating to various stages of the proceedings. Rule 63 is quite clear in stating that corroboration is not required in order to prove any crime within the jurisdiction of the court, particularly crimes of sexual and gender violence.

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The participation of Victims at appropriate stages in the proceedings

Rules 89-93 of the Rules of Procedure and Evidence clearly set out provisions regarding the participation of victims in the proceedings. For the purposes of the ICC, a victim has been defined as a natural person who was harmed as a result of the crime within the jurisdiction of the court[22]. Victims or their legal representatives may attend and participate in the proceedings to present their views and concerns. The victim who lacks necessary means to pay a legal representative may apply to the Registry for assistance including appropriate financial assistance. In order to safeguard the rights of the accused, the Prosecutor shall be allowed to reply any oral or written observation by the legal representative of the victim.

The Victims and Witness Unit (VWU)

The Victims and Witness Unit will be set up in the Registry of the Court. The Unit is bound to provide in consultation with the office of the Prosecutor protective measures and security arrangements, counselling and other appropriate assistance for witnesses and victims. These protective measures are in place to safeguard the "safety, physical well-being, dignity and privacy of victims and witnesses". They could include confidentiality, anonymity, alternate means of giving evidence including audio or video testimony, in-camera proceedings and relocation. The reparations that are offered to victims and witnesses include compensation, restitution and rehabilitation. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. The other responsibilities of the Victims and Witness Unit include assistance in obtaining medical, psychological and other appropriate assistance, making trainings available on trauma, sexual violence, security and confidentiality for court and parties, and ensuring that the staff is trained on witness security, integrity and dignity, including gender and cultural sensitivity.

WOMEN ON THE COURT

The statute emphasises the necessity of fair representation of male and female judges. The same provision applies to the selection of staff in the Office of the Prosecutor and all other organs of the court.[23] On the 11th of March 2003, 18 judges were elected to the International Criminal Court. Of them 7 are women. The statute requires that in the selection of Judges, prosecutors and other staff, the need for legal expertise on violence against women or children be taken into account. All of these women judges have expertise on violence against women.

All these provisions, which relate to Gender specific mechanisms in the International Criminal Court are the result of the continued presence and voice of women throughout the preparatory process of the International Criminal Court. These women formed the Women's Caucus for Gender Justice in 1997, in response to the need for the inclusion of gender issues in the ICC preparatory process. In response to the absence of gender issues in earlier negotiations they were successful in lobbying governments to consider a developed draft text, which represented these concerns.

> The ICC presents a framework that can be utilized in the peace building process. In advocating attention to this framework, I leave to you whether and how to use it in the immediate as well as longer-term process of peace building. These gains were achieved by overcoming gender negativism, gender neutralism, misogyny and religio-political fundamentalisms. And thus we can expect resistance at every turn.[24]

[1] *Prosecutrix-Petitioner v. Addararachchige Genendra Kamal*, (30 May 2001), Supreme Court of the Democratic Socialist Republic of Sri Lanka p7
[2] Fife,R.E (2000) Nordic Journal of International Law Vol 69 No1 The International Criminal Court Whence it came, Where it goes
[3] Rome Statute of the International Criminal Court (Rome Statute) Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998
[4] Human Rights Watch (2001 Sep) Vol. 13, No.4(G) Making the International Criminal Court work. A Handbook for Implementing the Rome Statute p15
[5] *Supra* note 3, Preamble
[6] Amnesty International (1999 May) IOR 53/01/99 Universal Jurisdiction : 14 Principles on the Effective Exercise of Universal Jurisdiction p3
[7] *Supra note 6* p4
[8] *Supra note 3*, Article 13
[9] *Supra note 3*, Article 14 Referral of a situation by a State Party
[10] Article 15 - Prosecutor
[11] *Supra note 4* p 16,17
[12] Ibid
[13] *Supra note 3*
[14] Bedont B, Hall-Martinez K Ending Impunity for Gender Crimes under the International Criminal Court Brownlow Journal of World Affairs p1
[15] *Supra note 3*, Article 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g)
[16] *Supra note 3*, Article 7(1)(h)
[17] *Supra note 3*, Article 7(1)(c) and 7(2)(c)
[18] *Supra note 3*, Articles 7(1)(g)-1,8(2)(b)(xxii)-1Elements of crime pgs 12, 34
[19] *Supra note 3*, Article 21(3)
[20] *Supra note 14*
[21] *Supra note 3*, Article 54(b)
[22] Rule 85, Definition of victims of the Rules of Procedure and Evidence
[23] *Supra note 3* Article 36(8)(a)(ii)
[24] Copelan R, (2002) Unpublished Justice and Accountability for Women in the Post Conflict Situation

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Seven months after the Rome Statue entered into force, and following thirty-three rounds of elections, the eighteen judges who will preside for the International Criminal Court were decided after the final round of voting held from 3rd to 7th February 2003.

Representing the regions of Western and Eastern Europe, Africa, North America and the Caribbean, South America, Asia and Oceania, the judges for the ICC consist of eleven men and seven women. This, in conformity with the Rome Statute, which states in Article 36 that the Court will reflect an adequate balance of the world's principal legal systems and geographical locations, as well as "a fair representation of female and male judges." Each of the judges has been elected for a term of either three, six or nine years.

The inauguration ceremony for the judges was held on March 11th 2003.

Options profiles

the

First Women Justices

of the international criminal court

Elizabeth Odio Benito (Costa Rica), **Vice President of the Court**, served as a judge for the International Criminal Tribunal for the Former Yugoslavia (ICTY) from 1993 to 1998, and as Vice-President of the tribunal from 1993 to 1995. As a judge, she established jurisprudence on various aspects of international humanitarian law, most notably with regard to the recognition of sexual violence against women as a war crime. Actively involved in the United Nations, she was also Special Rapporteur for the UN Sub-Commission on Discrimination and Intolerance based on Religion or Creed (1983-1986), a member of the Sub-Commission for the Prevention of Discrimination and Minorities Protection (1980-1983), and President of the Working Group on the Optional Protocol for the International Convention Against Torture.

Before her appointment to the ICTY, she served as Dean Emeritus of the Law School of the University of Costa Rica and worked untiringly for human rights in Latin America and worldwide. She is currently a member of the National Group of Costa Rica to the Permanent Court of Arbitration. In addition, she has served as Second

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Vice-President of the Republic of Costa Rica (1998-2002), and has held positions as the country's Minister of Justice, Minister of Environment and Energy, and Attorney General. Her expertise lies in a number of fields, including international human rights law, family law and labour law, as well as social and economic development.

Elizabeth Benito has taught for a number of years at the University of Costa Rica Law School and as a visiting lecturer at universities in Spain and the Netherlands. She is the author of several articles and papers on political, legal and social issues.

Akua Kuenyehia (Ghana), **Vice President of the Court**, is currently Dean of the Faculty of Law of the University of Ghana, Acting Director of the Ghana School of Law, and a member of the Committee on the Elimination of All Forms of Discrimination Against Women.

A strong advocate of women's rights, she has written and spoken at national and international level on numerous areas of concern for women, such as family welfare, employment, health, violence against women, property rights, divorce law, poverty and economic rights, especially in relation to her home country. She has worked closely with several international NGOs on international human rights issues concerning women.

Akua Kuenyehia is a founding member of WiLDAF (Women in Law and Development in Africa), a leading regional network on women's human rights. She holds membership in a number of other professional bodies, including the International Bar Association, the International Federation of Women Lawyers (FIDA), and the African Society of International and Comparative Law.

Navanethem Pillay (South Africa) is currently President of the International Criminal Tribunal for Rwanda (ICTR), to which she was elected as a judge in 1995. She was a member of the trial chamber that delivered the historic judgement in the case of Jean-Paul Akayesu which represented the first ever conviction for genocide, and which also took into account the ways in which sexual crimes can constitute as acts of genocide. She was also one of the presiding judges at the trial and conviction of Rwanda's Prime Minister, Jean Kambanda, who pleaded guilty to genocide, crimes against humanity and a number of violations of the Geneva Conventions, the first time a head of government has been convicted by an international court.

Prior to her tenure at the ICTR, Navanethem Pillay practised as a professional lawyer in Durban, and was defence attorney for members of the African National Congress, the Unity Movement, the Black Consciousness Movement, Swapo, and for trade union activists. She was instrumental in bringing about a successful, ground-breaking application in the High Court which spelt out the rights of Robben Island political prisoners, particularly their right of access to lawyers. She was the first black woman attorney to be appointed Acting Judge of the Supreme Court of South Africa, where she presided over both civil and criminal cases.

She is currently Honorary Chairperson of *Equality Now* and a member of the Advisory Board of the *Journal of International Criminal Justice*. She has been honoured with a number of awards and citations for her achievements in the field of human rights.

Fatoumata Dembele Diarra (Mali) currently serves as an *ad litem* judge for the International Criminal Tribunal for the former Yugoslavia. She has had over twenty years of experience as a professional lawyer and judge in her

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home country, including conducting investigations into serious crimes such as drug-trafficking, murder and note-forgery, as well as infanticide, rape and other forms of violence against women and girls. She also served as National Director of the Justice Administration, and as President of the Criminal Chamber of the Bamako Appeals Court.

In 1991, following the adoption of a new Democratic Constitution by Mali, Fatoumata Diarra served as a legal adviser in the country's efforts to amend laws relating to marriage, divorce, guardianship and parenthood. In 1994, she was President of the Support Group for Legal Reform which was coordinated to criminalise genital mutilations.

She has numerous publications and research studies to her credit, primarily on women's issues and women's rights.

Maureen Harding Clark (Republic of Ireland) was elected in 2001 as an *ad litem* judge for the International Criminal Tribunal for the former Yugoslavia. Prior to her election to the tribunal, she was Ireland's leading woman criminal lawyer. She served as Lead Counsel in Ireland's first male rape trial and also its first marital rape trial. She has had twenty-six years of legal practice covering many different areas of law. Her expertise lies in criminal law, with a special interest in sexual offences and the rights of victims of sexual crimes. She has also had extensive experience in both prosecution and defence with regard to serious crimes such as rape, murder, money-laundering and fraud.

In addition, she has lectured and spoken extensively about the need to develop a criminal legal system based on the rights and needs of victims.

Sylvia Helena de Figueiredo Steiner (Brazil) has served as a Federal Judge for the Federal Court of Appeals for Sao Paulo since 1995, and prior to that, as a prosecutor in the Federal Court. She is a founding member of the Brazilian Institute of Criminal Sciences, a member of the Executive Council of the Brazilian Section of the International Legal Commission, and a member of the Sao Paulo Commission for Peace and Justice. She was a member of the Brazilian Delegation of the first Assembly of States Parties of the International Criminal Court in September 2002.

Sylvia Steiner has spent over thirty years working with numerous NGOs, and has dealt with several criminal cases dealing with violence against women and children. She is the author of several publications on criminal law, human rights, children in the justice process and on the International Criminal Court.

Anita Usacka (Latvia) has been a Judge at the Constitutional Court for the Republic of Latvia since 1996. She is also a Professor at the Department of State Law and an Associate Professor at the Department for Fundamental Legal Studies of the University of Latvia. She served as Executive Director of the Latvian Branch of UNICEF from 1994 to 1996. She has lectured and written extensively on human rights, international law, child protection, minority rights, women's rights, and legal issues relating to EU accession. She is a member of a number of professional bodies, including the International Women Judges Association.

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To Kill a Court

Usha Ramanathan

A quiescent India toes the U.S. line in the battle over the International Criminal Court.

The Bush Administration has been straining every nerve to nullify the potential of the International Criminal Court (ICC). 'Impunity agreements' are the most recent tactic it has deployed in its aggressive attempts to derail the ICC, and to keep an exceptional position for the U.S. in any system of accountability and deterrence that may develop in the international arena. These agreements – variously termed 'exemption', 'Article 98' or 'non-surrender' agreements – are bilateral treaties which provide that neither country will surrender any current or former government official or national of the other country to an international tribunal without the express consent of that country. This is not limited to the nationals of the two states, but could include anyone in the pay of either state, including for instance those involved in espionage or undercover operations. The impunity agreement amounts to an express assertion of non-cooperation with the court.

President Bush, speaking to reporters in the last week of September[1], explained the rejection of the ICC and the pursuit of impunity agreements: "I strongly reject the ICC. I'm not going to accept an ICC. I'm not going to put ourselves in a position where our soldiers and diplomats get hauled into a court over which we have got [no control] – the prosecutors whom we don't know, the judges – I mean, we're not going to allow ourselves to do that. And our friends shouldn't want us to be in that position. Therefore, we're seeking Article 98s from our friends." On December 26th, 2002, India became the fifteenth country to enter into such a bilateral agreement with the U.S.

Although the U.S. had voted against the statute in Rome in June 1998, President Bill Clinton signed it on to the multilateral treaty in December 2000: a parting gift before he set down office. The Bush Administration was relatively low-key on the ICC issue until the 60 ratifications needed to establish the court came in in April 2002. There was some effort to bully countries not to sign or ratify the ICC; but this manoeuvre, essayed through U.S. consulates around the world, did not prevent the signatures and ratifications from building up beyond the magic number that would ensure its establishment. Since then, the Bush Administration has shown enterprise and arrogant genius in its efforts to render the ICC redundant even before it is constituted. On May 6th, 2002, the U.S. launched its attack on the ICC by 'unsigning' itself from the statute. It is a procedure not known to international law. In June-July 2002, it threatened to withdraw from peacekeeping operations in East Timor and in Bosnia and Herzegovina unless U.S. peacekeepers were granted immunity from prosecution. It succeeded in extracting a resolution from the Security Council on July 12th, 2002, that would restrain the ICC from starting or proceeding with investigations or prosecutions of peacekeepers and other officials of non-state parties for a period of 12 months. On August 2nd, 2002, George Bush signed into law the American Servicemen's Protection Act (ASPA). Acquiring recognition as the 'Hague Invasion Act', it authorises the President to retrieve American nationals "using all means necessary" if they are held in the Hague for trial before the ICC. Dutch protests over this have left the American establishment unrepentant.

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The impunity agreements are a continuation of this strategy of intimidation. In the first week of August 2002, the U.S. State Department briefed foreign ambassadors on U.S. opposition to the ICC. They were warned that ASPA prohibits military assistance to countries that are party to the ICC treaty, but allows the President to waive the ban if the state were to enter into an impunity agreement, or where he finds it to be in the U.S. national interest. Since the end of August, the U.S. has been on the offensive, procuring bilateral agreements. Israel, Romania, East Timor, Tajikistan, the Marshall Islands, Afghanistan, Honduras, Uzbekistan, Mauritania, the Dominican Republic, Palau, Micronesia, the Gambia, Sri Lanka, India and Nepal have so far signed the bilateral agreement. Pressure has been mounting on other countries too to sign the treaty, and the European Union's (E.U.) weak protest, which ended in a conciliatory whimper at the end of September, is symbolic of the bulldozing capacities of the U.S. After much hemming and hawing, on September 30th, a deeply divided E.U. set down three guidelines to be followed by countries that may decide to enter into bilateral agreements with the U.S. The first guideline was that there should be no immunity for any individual who is alleged to have committed crimes against humanity, war crimes or genocide. The second was that if they were U.S. personnel, and they were not to be surrendered to the ICC, the U.S. was obliged to try them in their courts. And, the E.U. ruled out reciprocity. The U.S., of course, reportedly finds this formula inadequate as this does not provide blanket immunity to all U.S. citizens living or serving away from home.

U.S. officials had been avoiding identifying specific countries with which they were seeking immunity deals, evidently in order to avoid pressure being exerted on the governments not to negotiate them.

According to the U.S., Article 98 provides the space within the ICC statue to accommodate these impunity agreements. Legal opinion is not quite so categorical. Article 98 cautions the court against proceeding with a request for surrender that may require a requested state to act in a manner that is inconsistent with its obligations under international agreements. But this, experts point out, was a provision introduced into the statute in the final stages at the Rome Conference, and it was intended to deal with existing Status of Forces Agreements (SOFAs); SOFAs only apply where there is a 'sending state' which sends its troops to be stationed in another state under an agreement. The U.S. attempts to extrapolate this provision to mean that all agreements into which it may enter are not in conformity with the statute. It may be a misnomer to term these treaties 'Article 98 agreements'.

On November 14th, 2002, John Bolton, the U.S. Under Secretary of State for Arms Control and International Security and who is leading the U.S. effort to find bilateral signatories, was reported to have said: "In the near future, we will also be holding discussions on the issue with several countries in the Middle East and South Asia." That was the first indication that the focus was shifting out of Europe and moving southwards. U.S. officials had been avoiding identifying specific countries with which they were seeking immunity deals, evidently in order to avoid pressure being exerted on the governments not to negotiate them.

In India, the signing of this treaty was a closely held piece of information. There was no public information of the impending deal, no discussion which could have elicited public opinion. And now that the treaty has been signed, sealed and delivered, there is no means of retracting even if the agreement were to meet with public opprobrium. Treaties concluded by the executive do not have to be sanctified by parliamentary acceptance, nor may they be dislodged by parliamentary disapproval. The potential for irresponsible conduct that may tie down the whole polity has no checks when the executive is exercising its treaty-making power. In non-governmental circles, there has been an apprehension for some time now that the U.S. will push through agreements with countries where it plans to base its operations in its future militaristic ventures. The stopover by two planes on Indian territory in the first week of January this year, while on their way to the Iraq theatre where the U.S. is bent on staging war[2], tells its own story.

A spokesman for the Indian government talked warmly of the "strongest possible commitment to bring to justice those who commit war crimes, crimes against humanity, genocide" that is shared by India and the U.S., and of the accord being "emblematic of the strides that continue to be made in transforming India-United States relations". The claim lacks conviction. Even given India's opposition to the ICC, it is plain that the initiative for these impunity agreements has come solely from the U.S., and that India has signed it like any of the other

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countries that have buckled under U.S. pressure. While the U.S. goes about its mission of nullifying the ICC in relation to its officials and citizens, India shares this reciprocity with just the U.S. This, in other words, is a U.S. campaign, with India contributing to the U.S. being able to realise its aims. If, therefore, U.S. personnel commit grave crimes on Indian soil, or are found on Indian territory having participated in such crime, the Indian state would not retain the option of the use of an international tribunal to try and punish the criminal.

As for the claim of commitment to justice, despite the 1984 anti-Sikh riots, and the more recent carnage in Gujarat, the crime of genocide finds no place in Indian law. Nor have the large numbers of disappeared persons in Punjab and in Kashmir given such disappearances legislative recognition. The record of the Indian state in the matter of crimes of grave import is far from impeccable.

Having failed to prevent a multilateral ICC treaty from emerging, the U.S. is attempting multiple bilateralism in order to kill the court. This cynical disdain of the very real problem of impunity is perhaps not surprising at a time when the U.S. is expanding its militaristic horizons.

Bolton calls the impunity agreements "non-surrender agreements". The Washington Post has termed it the "non-extradition pact". In effect, by means of these agreements the U.S. is seeking to ensure that the ICC will be unable to set eyes on any accused person over whom the U.S. asserts an interest. From its original expression of concern that its peacekeepers should be protected from any threat of prosecution before an international tribunal, it has now stretched the logic to cover all officials and nationals. And there is no guarantee that they would be tried in the U.S. In entering into these reciprocal treaties with states that have ratified the ICC statute, a conflict of obligation arises; Romania and Tajikistan and East Timor are, for instance, state parties to the ICC statute and have an obligation to cooperate with the court. Cooperation includes the surrender of the accused if found on their territory, and where the court, having applied the principle of complementarity, asks for such surrender. The bilateral agreement would deny the state the right to cooperate with the court thus.

John Bolton said: "Signatories of the Statute of Rome have created an ICC to their liking, and they should live with it. The United States did not agree to be bound, and must not be held to its terms." What he is also saying is that, especially in getting states parties to the statute to sign the treaty with it, the U.S. is not merely working at providing protection to its nationals and officials, but is actively engaged in undermining the court. Having failed to prevent a multilateral ICC treaty from emerging, the U.S. is attempting multiple bilateralism in order to kill the court. This cynical disdain of the very real problem of impunity is perhaps not surprising at a time when the U.S. is expanding its militaristic horizons.

In the meantime, the number of states becoming parties to the statute has continued to rise, and with Barbados joining up on December 10th, 2002, it has reached 87.[3] Israel, which had signed but not yet ratified the statute, has now chosen the U.S. path. Bolton explained in a speech delivered to the Federalist Society on November 14th, 2002: "There seems little doubt that Israel will be the target of a complaint in the ICC concerning conditions and practices by the Israeli military in the West Bank and Gaza. Israel recently (on August 28th) decided to declare its intention not to become a party to the ICC or to be bound by the statute's obligations."

Between February 3rd and 7th, 2003, the election of 18 judges to the ICC will be held at the United Nations headquarters in New York. The profile of the court that has been established to deal with impunity will then begin to emerge. Nobody expects the court to provide a cure for all the ills that blight a violent, unequal and often irrational world. But it could be the first steps towards rending the shield of impunity that has protected mass murderers and violators in the past. The U.S. continues to demand an exclusivity which, if it cannot get it by acquiescence, it warrants it can by intimidation. India stands among the quiescent, sharing a distrust of the ICC and a touching faith in the honourable intentions of the U.S. The tug-of-war between the proponents of the ICC and the U.S. has, plainly, escalated into a battle.

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& *The Frontline*, Vol. 20, Issue 2, January 18-31, 2003

Editor's notes:

[1] 2002

[2] The US-led war against Iraq took place in March/April 2003.

[3] 90 countries have now ratified the Rome Statute, with Lithuania adding its signature on May 12th 2003.

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A NOTE ON U.S. BILATERAL EXEMPTION AGREEMENTS

The State Department of the United States of America has been pushing individual countries to conclude bilateral Agreements with the United States of America, exempting all Americans (and even some non-nationals) from accountability for genocide, crimes against humanity and war crimes. These proposed agreements, in the form requested by the US government, are illegal under the Rome Statute and are not required by U.S. law.

Several versions of these bilateral agreements have been signed. They differ on a basis of whether or not the country that is approached by the United States is a signatory or State Party to the Rome Statute. One version of the agreement is reciprocal and affirms that both parties to the agreement would not surrender a broad range of each others' 'persons' to the ICC without first gaining consent from the other. A second version is non-reciprocal and would only allow extradition to the ICC of the American citizen if the U.S.A. consented. The variation of this agreement intended for states that have neither signed nor ratified the Rome Statute includes a paragraph requiring states not to cooperate with efforts of third-party states to surrender persons to the ICC.

Sri Lanka entered into a reciprocal agreement on the 22nd of November 2002. This reciprocal agreement was signed by U.S. Ambassador Ashley Wills and Sri Lankan Foreign Minister Tyronne Fernando.

The agreement was celebrated as an advance in relations between the United States of America and Sri Lanka. The media presented it to the public as an extradition agreement. There was little specific reference to the International Criminal Court, either in the text of the agreement or in the media coverage it received.

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International Human Rights Standards Relating to Disappearances

This article has been adapted from
Disappearances in Sri Lanka and the Available Legal Remedies
by Priyadharshini Dias*

This paper briefly discusses the various aspects of disappearances. It begins with a consideration of the nature of disappearances and then discusses the various international human rights standards which are violated both in respect of the disappeared person and also the people they leave behind. It then discusses the various definitions of disappearance and concludes that these are insufficient to cover the experience of disappearance. Finally, the paper suggests an alternative definition of disappearance.

Who is a disappeared person?

The term "'disappearance'" has evoked many interpretations and intense debate. It is interesting to note the definition given by the Argentinean military authorities, "What is a disappeared? In itself the disappeared is an incognito. If he reappeared, he would have treatment X and if the 'disappearance' would convert into a certainty of his demise it would have treatment Z. But while being a disappeared, he could not have any special treatment. He is an incognito. He is a disappeared. He is a non-entity..."

This definition manifests the outstanding features of the involuntary disappearance of persons. This practice impedes the verification of reality; in fact, it is an attempt – as it is manifested in the quotation mentioned – to deny reality itself through misinformation. This is a mechanism conceived and utilised to paralyse the people through fear, because where there is no life or death, there is neither affirmation nor negation, but only the announcement of emptiness.

Rights denied to a disappeared person

Disappearance results in a clear violation of many aspects of human rights. The UN Declaration on the Protection of All Persons from Enforced 'Disappearance' holds in its preamble that "enforced disappearances undermines the deepest values of any society committed to respect of the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity."

The Declaration recognises that a disappearance is an offence to human dignity; a denial of the purposes of the Charter of the United Nations and a grave and flagrant violation of the human rights and fundamental freedoms proclaimed under the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. The Declaration reminds us that an act of enforced disappearance places the

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person outside the protection of the law thereby depriving them of the most basic safeguards.

Many of the provisions in the International Covenant on Civil and Political Rights are violated in a case of 'disappearance'. These include: the right to life, prohibition of torture, right to liberty and security, right to detained persons to be treated with humanity and respect, and right to a fair trial, right to recognition and right to equal protection of the law.

When women are the victims of disappearance they become particularly vulnerable to sexual and other forms of violence and may suffer intimidation, persecution and reprisals.

Rights denied to the families of the disappeared

Disappearances generally violate the right to a family life and a majority of rights enumerated in the International Covenant on Economic, Social and Cultural Rights. The serious economic hardships, which usually accompany a disappearance, are most often borne by women who are placed in the forefront of the struggle to resolve the disappearance of members of their family.

Further, human rights law now recognises disappearance as a form of torture that relatives of the disappeared are subject to due to the continuing state of uncertainty and anguish at the fate of their loved ones, as a result of the State's refusal to inform family members of the fate of the disappeared. They are also denied the basic right to having their complaints recorded and investigated effectively.

Definition of 'disappearance'

The Draft Convention on the Protection of all Persons from Enforced Disappearances[1] defined the term disappearances to mean as follows,

> Enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

The UN Working Group on Enforced or Involuntary Disappearances goes further and recognises that those responsible may include not only officials of different branches or levels of government, but also "organized groups or private individuals acting on their behalf, or with the direct or indirect support, consent or acquiescence of the government."[2]

The Inter-American Convention on Forced Disappearance of Persons defined the term in Article II as follows.

> ...an act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

In the Philippines "the Act Prescribing Penalties Upon Persons Causing any Forced or Involuntary 'Disappearance' and for Other Purposes"[3] defined the term enforced or involuntary 'disappearance' as follows.

> The term 'enforced or involuntary disappearance' as used in this Act shall mean the conditions when a person was arrested, detained or abducted against his/her will or otherwise deprived of his/her liberty by government officials or employees of any branch, subdivision, agency or instrumentality of the government or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect consent or acquiescence of such officials or employees, and who subsequently disappeared for at least 48 hours, followed by a refusal to disclose the fate or whereabouts of the person concerned or refusal to acknowledge the deprivation of his/her liberty which places such person outside the protection of the law. As distinguished from the general phenomenon of missing person, an involuntary 'disappearance' involves the sudden and forcible 'disappearance' of a real or alleged political person and also persons whose 'disappearance' is due to their opposition to anti-people development projects violative of their economic, social and cultural rights."

Amnesty International defines the disappeared as "people who have been taken into custody by agents

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of the State, yet whose whereabouts and fate are concealed, and whose custody is denied."[4]

The Federation of Latin American Committees of Relatives (FEDEFAM) proposes a definition that includes the recognition of the violation of human rights of relatives: "A disappearance may have occurred whenever acts of omissions are committed by government agents or individuals acting with governmental consent or complicity for purposes of intimidation and repression which violate basic human rights, with the intent to harm a person or his or her relatives, and in which public authorities conceal the fate of the victim and deny their own involvement."

A crucial factor in both definitions is the involvement of the authorities. The authorities may be directly or indirectly responsible for a disappearance: directly, if they order the secret service, the armed forces or the police themselves to make a person disappear, and indirectly, if it is not their order but they implicitly allow others to make someone disappear. In both cases the authorities deny their involvement. They always hide behind a wall of silence and do not cooperate on the provision of information or the conduct of research.[5]

ICC definition

The Rome Statute for the establishment of the International Criminal Court recognising that the enforced disappearance of persons is a crime against humanity[6] then defines it as follows:

> The arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The elements that constitute a disappearance that the Court would look for are:[7]

1. The perpetrator;
   a. Arrested, detained or abducted one or more persons; or

   b. Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2. a. Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

   b. Such refusal was preceded or accompanied by that deprivation of freedom.

3. The perpetrator was aware that
   a. Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons, or

   b. Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organisation.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by or with the authorization or support of such State or political organisation.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Suggested Definition for Sri Lanka

One of the contributory factors to the impunity surrounding the issue of disappearances in Sri Lanka is the non recognition of a specific crime of disappearances. Instead, prosecutors are compelled to prosecute those responsible for causing the

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disappearance of persons under the various other crimes recognised under the Penal Code. The Penal Code does not contain, however, a crime that takes into consideration the various aspects of disappearance, thereby making prosecution difficult. This paper proposes that Sri Lanka enacts a separate crime of disappearance, thereby sending a strong message to future perpetrators.

Having regard to the above, a definition for an offence of 'causing enforced or involuntary disappearance' is hereby suggested:

> "Enforced or Involuntary disappearance is an arrest, detention, abduction or taking away of a person against his/her will or otherwise deprivation of his or her liberty by officials of different branches or levels of government, or by organised groups or private individuals acting on their behalf, or with the support, direct or indirect, consent or acquiescence of such officials or employees, who subsequently disappeared for at least 48 hours. This would then be followed by a refusal or omission to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of their liberty which places such persons outside the protection of the law."

*Priyadharshini Dias, *Disappearances in Sri Lanka and the Available Legal Remedies*, International Criminal Court Project, Women and Media Collective, May 2003, Colombo, Sri Lanka

[1] Proclaimed by the General Assembly in its resolution 47/133 of 18th December 1992

[2] United Nations Working Group on Enforced or Involuntary Disappearances, Press Release HR/4411, New York, NY 13th May, 1999. http://www.un.org/News/Press/docs/1999/19990513.HR4411.html [Accessed 05/11/01]

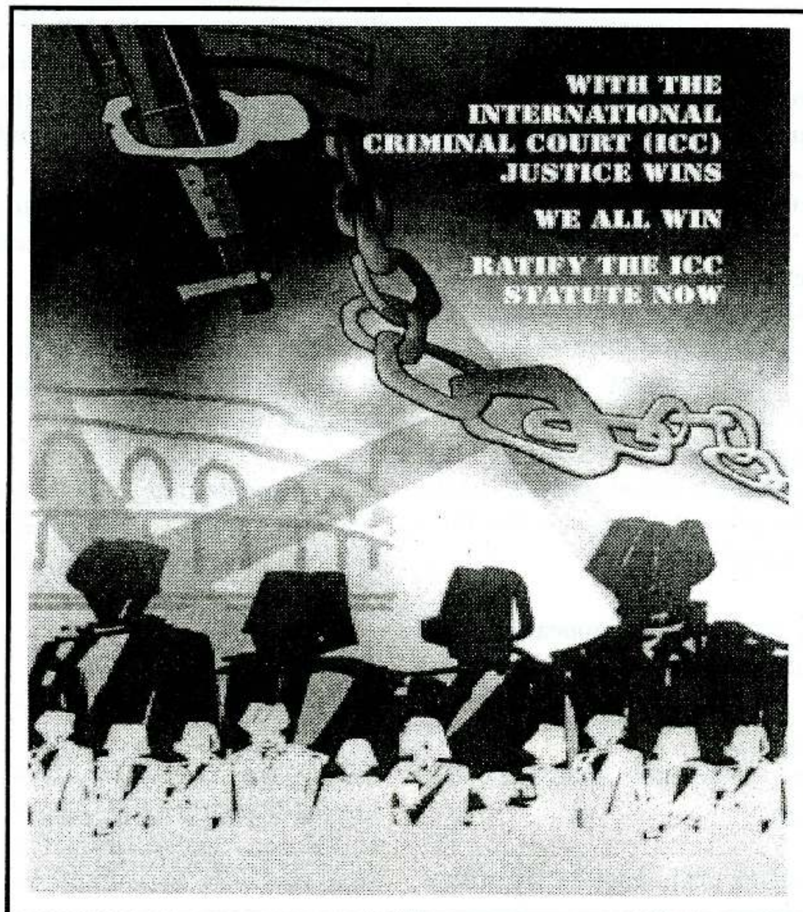
[3] House of Representatives, Republic of the Philippines, Quezon City, House Bill No. 2282 – Approved

[4] Amnesty International, 14 point program for the Prevention of "disappearances"

[5] Disappearances – http://home.planet.nl/~loz/maneng11.htm (visited on 24/2/03)

[6] It should be noted that thus, in order to complain to the ICC with regard to an enforced disappearance, first, the conditions that constitute a crime against humanity must be met. This means that the disappearance must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

[7] The Report of the Preparatory Commission for the International Criminal Court (Addendum, Part II)



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RAPE

the need for legal reform in sri lanka

Sheila Varadan

Gender violence is not a recent phenomenon in Sri Lanka. For many women, it has been part of daily life since birth. The Sri Lankan legal system has taken little, if any, notice of the disproportionate level of gender-based violence. Likewise, the international human rights community for many years, remained silent on the issue of gender violence.

The last decade, however, has seen considerable advancement in gender-sensitive justice at the international level. The Rome Conference and the subsequent drafting of the Elements of Crimes, Rules of Evidence and Rules of Procedure have marked a turning point in the advancement of gender sensitive justice.[1] The codification of gender-related sexual offences and gender sensitive rules of evidence and procedure have been indicative of an evolving international consensus to recognise gender-based violence. Such developments in international law should serve as an impetus for domestic reform. While there have been attempts to reform the substantive sexual offence provisions in 1995, the Amendments have fallen short of matching the advancements made in international law. Specifically, the 1995 Amendments did not reform the surrounding evidence and procedural laws. This article discusses the need to reform Sri Lankan rules of evidence and procedure.

Unlike other treaty-negotiating conferences, the Rome Conference relied heavily on the judgements of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). What was unique about the ad hoc tribunal judgements was their extensive surveying of international treaty law, domestic law, regional practices and regional agreements.[2] It was through this extensive canvassing of State practice and *opinio juris* that ad hoc tribunal judgements came to be seen as articulations of international customary law.[3] Any jurisprudence emanating from the ad hoc tribunals carried weight as international customary law - a source of international law.[4] This is relevant to Sri Lanka because international customary law, unlike international treaty law, does not require the enactment of specific legislation to be enforced within the domestic legal system.[5] In other words, once a principle becomes crystallised into international customary law, it is seen to be instantly incorporated into local laws. It is a valid source of law from which domestic courts can draw from in writing decisions. In this respect, the developments in international customary law offer a mechanism to implicitly reform Sri Lankan penal law.

Even with this mechanism, however, what remains unchanged are the rules of evidence. The rules of evidence have largely gone unreformed since their inception and still reflect many sexist and discriminatory attitudes. Examining international law reveals an unequivocal prohibition against the rule of corroboration[6] and the admission of the victim's past sexual conduct.[7] While such principles have not crystallised into customary law, they offer a model for reform that, if followed, would bring the Sri Lankan legal system in line with the international legal community. Reforming the rules of evidence would also inevitably facilitate a more gender-sensitive interpretation of the substantive sexual offence provisions. Only by reforming the rules of evidence can Sri Lanka feel the full benefit of the 1995 Amendments, and the effect of gender-sensitive developments in international customary law.

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The rule of corroboration has long since been the subject of controversy and debate in Sri Lanka. While the strict requirement of corroboration has been repealed, Courts still view corroboration as a rule of prudence. In a recent Supreme Court decision, it was held that "it is always safe to look for corroboration."[8] Maintaining the rule of corroboration propagates discriminatory attitudes towards women because it implies that victims of such offences are somehow less credible than victims of other criminal offences.[9] The leading Sri Lankan text, *Coomaraswamy on Evidence*, confirms this suspicion, writing that, "sexual offences are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."[10]

International criminal law has unequivocally condemned the rule of corroboration. The Trial Chamber of the ICTY in *Tadic* explicitly held that "no corroboration is required" for sexual offences. The Chamber went one step further, holding that "testimonial corroboration of a single witness's evidence...is in almost all modern continental legal systems no longer a feature."[11] The Rome Statute mirrors the ICTY position explicitly prohibiting the requirement of corroboration in the Rules of Evidence. The rule on corroboration is obsolete in most legal traditions in the world and international criminal law. Upholding this rule is sexist and has detrimental effects in the prosecution and conviction of sexual offenders. Sri Lankan criminal law should take notice of international legal developments and ban this outdated and discriminatory rule of evidence.

Section 155(d) of the Sri Lankan Evidence Ordinance Act allows a defendant to question the moral character of the victim. The rationale for admitting such evidence turns on the belief that "the character of the woman as to chastity [has] probative value in judging the likelihood of...consent."[12] Admitting evidence of the victim's prior sexual conduct is not only an infringement of the right to privacy but also contrary to the principle of relevancy as it admits evidence that does not necessarily make the existence of another fact more probable. Moreover, it is founded on the discriminatory belief that sexually active women are more likely to consent to sex than sexually inexperienced women. While obviously discriminatory, admitting evidence of the victim's past sexual conduct also impedes the investigation and prosecution of sexual offences. The prospect of having their personal lives scrutinised before the public deters many women from reporting sexual violence. According to one study, "a senior police officer estimated that only 50% of the victims of rape and sexual abuse make a complaint to the police and only about 25% of those complaints go to trial."

At the international level, evidence of prior sexual conduct is inadmissible under rule 96(iv) of the *ICTY Statute*, *ICTR Statute* and under rule 71 of the International Criminal Court Rules of Evidence. Evidence of the victim's prior sexual conduct has been restricted and deemed obsolete in almost all common law jurisdictions in the world.[13] Sri Lanka should acknowledge these developments in international law and domestic legal systems of the world as an impetus to update and reform its own evidence laws.

Gender violence is not particular to Sri Lanka. It is perpetrated in almost every country, in every region of the world. What is particular is the manner in which the Sri Lankan legal system has chosen to deal with the issue. While other countries have come together to reform their evidentiary laws and collectively create a gender-sensitive international criminal court, Sri Lanka has repeatedly failed to take notice of these developments or reform its own evidentiary rules. It is time that the Sri Lankan legal system aligns itself with the international community and repeals the outdated evidentiary rules of the past.

[1] Rhonda Copelon, "International Conference: Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" 46 McGill L.J. 232.
[2] Guénaël Mettraux, « Crimes Against Humanity in the Jurisprudence of the International Tribunals for the Former Yugoslavia and for Rwanda » Harvard L J, Winter 2002
[3] *Ibid.*
[4] *The Statute of the International Court of Justice*, reprinted in I. Brownlie, *Principles of Public International Law*, 3rd ed., (Clarendon Press: Oxford, 1979) at 3.
[5] S Varadan, *The Role of Gender Sensitive International Justice in the Domestic Legislative Framework: the Relevancy of the Seemingly Irrelevant*, (International Criminal Court Project, Women and Media Collective: Colombo, Sri Lanka, 2003).
[6] *Prosecutor* v. *Tadic*, Opinion and Judgement, No. IT-94-1-T (May 7, 1997) at para 536 [hereinafter *Tadic*].
[7] H.R. Gavin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the 2nd Decade," 70 Minn. L. Rev. 763.
[8] *Prosecutrix-Petitioner* v. *Addararachchige Genendra Kamal*, (30 May 2001), Supreme Court of the Democratic Socialist Republic of Sri Lanka at 7 [hereinafter *Addararachchi*].
[9] Mario and Shyamala Gomez, *From Rights and Shame to Remedies and Change* (Shakti: Colombo, Sri Lanka, 1999).
[10] E.R.S.R. Coomaraswamy, *The Law of Evidence (with special reference to the Law of Sri Lanka)*, Vol. 1 at 637 [hereinafter *Coomaraswamy*].
[11] *Tadic*, *supra* note 6 at para 536.
[12] *Coomaraswamy*, *supra* note 10 at 804.
[13] Gavin, *supra* note 7.

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Honour Crimes and Honourable Justice*

Saama Rajakaruna

The Reality

In March 1999, a 16-year-old mentally challenged girl, Lal Jamilla Mandokhel, was reportedly raped several times by a junior clerk of the local government department of agriculture in a hotel in Parachinar, North West Frontier Province, Pakistan. The girl's uncle filed a complaint about the incident with the police who took the accused into protective custody but handed over the girl to her tribe, the Mazuzai in the Kurram Agency. A tribal council decided that she had brought shame to her tribe and that honour could only be restored by her death. She was shot dead in front of a tribal gathering. (Amnesty 1,1999,8)

Honour crimes take place in Pakistan (originally a Baloch and Pashtun tribal custom, honour crimes are now reported not only in Balochistan, the North Western Frontier Province and Upper Sindh but in the Punjab province as well), Turkey (Eastern and South-Eastern but also Istanbul and Izmir in Western Turkey), Jordan, Syria, Egypt, Lebanon, Iran, Yemen, Morocco and other Mediterranean and Gulf countries. It also takes place in countries such as Germany, France and the United Kingdom within migrant communities.[1]

Honour crimes are usually practised by husbands, fathers, brothers, uncles or tribal councils. The killing is mainly carried out by under-aged males of the family to reduce the punishment. They are then treated as heroes. But it is not unheard of for female relatives to either carry out the murder or be an accomplice to it.

As honour killings often remain a private family affair, there are no official statistics on practice or frequency and the real number of such killings is vastly greater than those reported. Every year more than 1,000 women are killed in the name of honour in Pakistan alone. During the summer of 1997, Khaled Al-Qudra, then Attorney General in the Palestinian National Authority stated that he suspects that 70 percent of all murders in Gaza and the West Bank are honour killings. They are usually attributed to natural causes. (Ruggi, S.) In Lebanon, 36 honour crimes were reported between 1996 and 1998, 20 honour killings in Jordan in 1998, 52 similar crimes in Egypt in 1997 and in Iraq more than 4,000 women have been killed since 1991. (Washington Post Foreign Service, May 8th, 2000) The same report stated that between 1996 and 1998 in Bangladesh, about 200 women were attacked with acid by husbands or close relatives for honour related incidents, but the number of deaths is unknown.

'Justice' meted out

The concept of honour and its translation in different societies has brought about many forms of violence against women. In Sindh, Pakistan it takes the form of Karo-Kari killings. Karo literally means 'black man' and Kari means 'black woman'. They are people who have brought 'dishonour' to their families

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through various forms of behaviour. There is no other punishment for a Kari but death. They are most often ritualistically killed and hacked to pieces usually with the explicit or implicit sanction of the community. In Karo-Kari killings, a man's honour is only partly restored by killing the Kari. He must also kill the man allegedly involved. But, in reality, as it is the Kari who is first killed, the Karo hears of the killing and flees. In order to settle the issue, an agreement can be made if both the Karo and the man whose honour is defiled agree. The Karo has to pay compensation to the family of the Kari in order for his life to be spared. Not surprisingly, the compensation can be in the form of money or the transfer of a woman or both. (Amnesty1,1999,5) This practice has now even become an industry. Fake honour killings are committed in order to get compensation or conceal other crimes. Men kill other men in murders, which are not connected with honour issues and then kill a woman of their own family as alleged Kari to camouflage the initial murder as an honour killing. He may even go as far as killing a woman in his family to lend weight to his allegation.[2]

Another form of violence that is inflicted on women because of honour comes as a result of 'Satta-watta' or 'addo baddo' marriages as it is known in Pakistan, or 'Berdel' as it is referred to in Turkey. This involves a tradition of marriage which involves the exchange of siblings. If one of the couples that got married in this way decides to divorce, the other couple has to separate as well. Many advocates of honour crimes believe that the more brutal the murder is, the more honour the family will receive.[3]

It is not only women's right to life that is violated because of honour. Their right to liberty and movement is also restricted if they are endangered women. The predicament of women of the 'golden cage' is another form of violence towards women. These are the women who are being kept in jail in protective custody because their families had either vowed to kill them or tried and failed to kill them.

Many women resort to suicide due to reasons of honour. This could be voluntary or involuntary suicide. They may commit suicide because of the social implications of dishonour to one's self or to one's family. They may also be invited to commit suicide by the family and in most cases, they do commit suicide.

Honour crimes are not confined to Muslim communities only. It occurs in various parts of the world. In Brazil, men who kill their spouses after the wife's alleged adultery are able to obtain an acquittal based on the theory that the killing was justified to defend the man's 'honour'. Wife murder cases soon came to be defended as crimes of passion. But, the present Penal Code explicitly states that emotion or passion does not exclude criminal responsibility. In order to overcome this hurdle, defence lawyers devised the defence of honour as a new exculpatory strategy. In Brazil, there have been contradictory decisions of honour defence.[4] Not surprisingly, this defence is rarely used when women are the murderers. This stereotypes men as impulsive while women are not. Such defences, partial or complete, are found in the Penal Codes of Peru, Bangladesh, Argentina, Ecuador, Egypt, Guatemala, Iran, Israel, Jordan, Syria, Lebanon, Turkey, West Bank and Venezuela. The attitude that a man's right to kill when faced with adultery has not disappeared even in Texas. In October 1999, Jimmy Watkins was sentenced to only 4 months in prison for murdering his wife and wounding her long time lover in front of their 10-year-old son.

Many reasons have been put forward by the perpetrators of these honour killings. They could vary from supposed 'illicit' relationships, for marrying men of their choice, for divorcing abusive husbands or even if they are raped as they are deemed to have brought shame on their family. Other reasons include bringing food late, for answering back, for undertaking forbidden family visits etc. The economic benefits also play a major role in the decision to kill a woman.

Inaccessibility of justice

Honour crimes violate many of the human rights provisions found in international law. Although many of the countries in which honour crimes take place are parties to one or many of the international human rights instruments, they continue to violate those standards.

Even when there are domestic laws that make honour killings illegal, the practice continues. In Pakistan, the Constitution in several articles guarantees gender equality.[5] But, there are laws that directly violate these fundamental rights and thereby condone the custom

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of honour killings. The law of Pakistan does not explicitly sanction honour killings but it does so implicitly. There have been many cases where the sentence was reduced because the family of the victim dropped charges. This gives out the signal that it is a family affair and judicial redress can be negotiated.

Article 98 of the Jordanian Penal Code states that, 'he who commits a crime in a fit of fury caused by a wrongful and dangerous act on the part of the victim benefits for a reduction of penalty.' Article 341 considers murder a legitimate act of defence when, 'the act of killing another or harming another was committed as an act in defence of his life, or his honour, or somebody else's life or honour.'

In Turkey, fornication, either by women or men, is not defined as a criminal offence. But, the custom of honour killings is in direct contrast to this where the 'fornicator' is given a 'death sentence'. Furthermore, killing a blood relative is punishable by death according to Turkish law. But, when it is an honour crime, committed on witnessing an adulterous act or suspicion of an illicit liaison and is caused by heavy provocation, the sentence is reduced to an eighth of its severity.[6] The Iranian Penal Code 'recognises the right' of a father or brother to murder a girl found guilty of pre-marital sex 'by subscribing a maximum sentence of only six months in jail or a fine', adding that 'in the case of a husband murdering an adulterous wife, there is of course no sentence.' The Iraqi Penal Code was also amended to effectively condone honour killings a few years ago.[7] The Moroccan Penal Code in Article 418 states that, 'murder, injury and beating are excusable if they are committed by a husband on his wife as well as the accomplice at the moment in which he surprises then in the act of adultery.' The Syrian Penal Code in Article 548 states the above and further says, 'he who catches his wife or one of his ascendants, descendants or sister in a suspicious state with another benefits from a reduction of penalty.' The question to be asked here is if the law does not set the death penalty for adultery, then why should it encourage the male relative to deliver the death penalty for the same thing?

An example of state inaction can be seen throughout the case of Samia Imran in Lahore, Pakistan, who was killed on 6th April 1999. She was murdered in the office of the AGHS legal cell in front of lawyer Hina Jilani when she came seeking help in securing a divorce from her first cousin husband who had thrown her downstairs when she was pregnant. She was also subjected to high levels of domestic violence in her 10 years of marriage. Her mother, doctor Sultana Sarwar, accompanied by Samia's father-in-law, Yunus, entered the office with a gunman who shot Samia through the temple. Samia's parents were opposed to her decision to seek divorce and had gone to the last extreme of eliminating her. (Friday Times, 3-9 Sep, 1999) Although a First Information Report (FIR) was lodged immediately against Samia's parents, Ghulam (president of the NWFP Chamber of Commerce and Industry) and Sultana at a Lahore police station and the press covered the murder and reported it objectively, the administration adopted a policy of delay and prevarication when dealing with this case. No one was arrested for the murder of Samia and her parents were able to get bail before arrest.

There are only a few support systems for victims of honour. NGOs and other women's organisations strive to provide practical services such as counselling, mediation, help with legal issues and correspondence with the police, an emergency hotline and rehabilitation shelters for abused women. But, lack of access to such services for most women, lack of resources and specially trained staff to deal with specific issues result in many problems. Women in these societies rarely know their way about in the outside world due to their strict upbringing. They are unused to public transport; they have no money of their own; and they are vulnerable to further abuse when they are moving around alone.

State responsibility

The state has a dual responsibility – it is not only required to not commit human rights violations, but also to prevent and respond to human rights abuses, unlike in the past. Systematic failure by the state to prevent, investigate and to punish perpetrators leads to international responsibility of the state. This includes violence against women in the name of honour. Failure to take measures to prevent and end honour killings, failure to eradicate traditions which prescribe honour killings, not attempting to end the impunity of perpetrators of such killings, failure to abolish discriminatory laws and the failure of the police and the judiciary to apply the law in an unbiased manner signalling official indifference, if not approval of the system, results in state responsibility.

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Recently, the UN member states were forced to vote on a Netherlands sponsored revised draft resolution on honour crimes entitled, 'working towards the elimination of crimes against women committed in the name of honour'. It was adopted by the Third Committee on 3rd November 2000. The text declared that, 'states have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of such crimes, and to provide protection to the victims and that failure to do so constitutes a human rights violation'. The concept of state responsibility has expanded in the recent years to include violations by private actors.[8]

The Committee on the Elimination of Discrimination Against Women confirmed in the General Recommendation 19 that, 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'[9] So, although in the international human rights arena honour crimes against women are understood as a form of domestic violence or violence against women in the family or community, it comes within the responsibility of the state.

Real Justice

The Criminal Court of Jordan sentenced a 40-year-old man to life in prison with hard labour after finding him guilty of killing his wife and four children in May 1997. According to the prosecution charge sheet, the defendant plotted to kill his wife and children after ten years of marriage because he suspected that the children were not his. Paternity tests performed on the child victims proved that they were his children. It was later revealed that it was financial reasons that were the actual reason for the murder of his family. (Jordan Times, Sep. 1998)

This case sends out the message that a woman's life is worthy of real justice.

*A longer version of this article was published in *Nethra*, Vol. 5, No. 1, January-March 2002, ICES; & *Asian Women's Fund Journal*, March 2002

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[1] The Nottingham crown court in the United Kingdom in May 1999 sentenced a Pakistani woman and her grown-up son to life imprisonment for murdering the woman's daughter, Rukhshana Naz, a pregnant mother of two children. Rukhshana was perceived to have brought shame on the family by having a sexual relationship outside marriage. Her brother reportedly strangled Rukhshana, while her mother held her down. (Amnesty1,1999,4)

[2] The case of Amanullah illustrates this point. Amanullah married a woman who had earlier been fond of her cousin Nazir, a married man with eight children. As Nazir was unable to obtain consent from her family to marry her, Nazir murdered Amanullah and then killed his own innocent sister and declared the two of them as Karo and Kari. After a brief prison term, Nazir was given Amanullah's wife in compensation for the supposed infringement of his honour. (Amnesty,1999,9)

[3] A Jordanian case tells of a man who killed his sister and then decapitated her and paraded her head for all the villagers to see. The 18-year-old sister had brought 'shame' to her family because she kept running away from an abusive husband. (Sati,N)

[4] A couple were married for sixteen years and all was well until the wife got a job and started to come home late and refused to 'pay her conjugal debt'. The husband killed her and was acquitted on the legitimate defence of honour. The decision was upheld on appeal. (Turgut,P)

[5] Article 25 says, 'All citizens are equal before the law and are entitled to equal protection of the law' and Article 27 states, 'there shall be no discrimination on the basis of sex alone.' Article 8 of the Constitution states, 'Any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.'

[6] Article 462 of the Turkish Criminal Code.

[7] WLUML Newsheet Vol. XI No. 1.

[8] See Velasquez Rodriguez Case. (Inter American Court of Human Rights)

[9] See also the Human Rights Committee General Comment 20, CEDAW Article 2(c) and the Preamble of DEVAW

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Kalu Sudu Mal

The Cinematic Suicidal Body and its Politics

Neloufer de Mel

Ever since the suicide bomber was first used as a living weapon by the Liberation Tigers of Tamil Eelam (LTTE) in its separatist war against the Sri Lankan State, (with an estimated 217 suicide attacks to date), the suicide bomber has become a focus of public scrutiny. Such killings, despite their deadly recurrence throughout the 19-year war, still remain both disturbing and fascinating. The bomber is not an inanimate weapon but a human being. Yet, where is the humanity in the destruction and annihilation of innocent life the bomber causes in his/her wake? The bomber lives and carries out his or her duty amidst us. How does s/he blend with society at large? Are there ways in which we can tell the bombers apart? What are their innermost feelings as they embark on a mission of self-destruction? How do we assess their final act? Is death always the opposite of life? What validity can we give death as life-giving to future generations, a community, a nation waiting to be born? These are some of the questions that have fascinated and preoccupied us over the years. Feminist scholars have been particularly challenged by the phenomenon of the female suicide bomber. The woman suicide bomber refutes conventional notions that women are essentially pacifist and peace-loving by nature. Does she act out of a false consciousness, brainwashed by the (male) commanders of the movement? Or does she act with self-knowledge and dedication to a cause she believes is just? Is she used only instrumentally as someone who, because of her sex, is more likely to get through a military checkpoint than a male? Is her act of destruction a moment of victimhood or agency? As she explodes, is she both a victim *and* an agent of change? And what does she signify for the struggles for women's empowerment and the future of the women's movement?

In recent years, film makers have turned their attention to portraying the phenomenon of the suicide bomber. Santosh Sivan's film *The Terrorist* (1998) comes to mind. In the persona of the bomber is a mix of idealism, conflict, passion, resourcefulness and ruthlessness that provides a compelling script for drama. Weave in a story of sexual intimacy between a male and female suicide bomber and we have the added ingredients of jealousy, a sudden shift in dedication to life not death, and an inevitable conflict between the individual vs the totalitarianism of the militant group. These ingredients animate the story of the Sri Lankan director Mohamud Mohan Niyaz's latest film *Kalu Sudu Mal* (or 'Colourless Flowers', an English translation that fails to capture the vivid duality available in the Sinhala term). It is the first Sinhala film to deal with the theme of Tamil suicide bombers and, moreover, attempt to establish an empathy with them. As such, Niyaz needs to be commended for his courage, for the journey has not been easy. The controversial nature of the theme kept potential funders as well as renowned actors and actresses away from the project. Finally, five years after the script was first written in 1994, the National Film Corporation agreed to finance the film, and a couple of 'brave' actors came forward to enact the roles. The final cinematic realisation of Niyaz's script (filmed in 1999 and released in 2002) and his determination to tackle the controversial plot in the face of Sinhala nationalism and commercial cowardice needs to be acclaimed. Whether the film succeeds or fails as a powerful cinematic experience, it has at least purposefully added to the archive of Sinhala cinema exploring a deadly war that has irrevocably changed the very fabric of Sri Lankan society.

Two suicide bombers, Dilip (Kamal Addararachchi) and Nirmala played by Dilhani Ekanayake, travel from rebel controlled territory to Colombo. That they are suicide bombers immediately locates them as belonging to the LTTE, although the LTTE is never specifically mentioned in the film. The bombers, whose real names are Rajkumar and Rohini, only refer to a 'sanvidanaya' or organisation to which they belong. But the early scenes in the film which show them at a militant's training camp, as well as the ceremonial benediction, before they embark on their mission, of the cyanide capsule bestowed by a commander who looks like the LTTE leader Prabhakaran makes the link with the LTTE more than implicit. In Colombo, they meet with Gauri (Veena Jayakody), the organisation's Tamil

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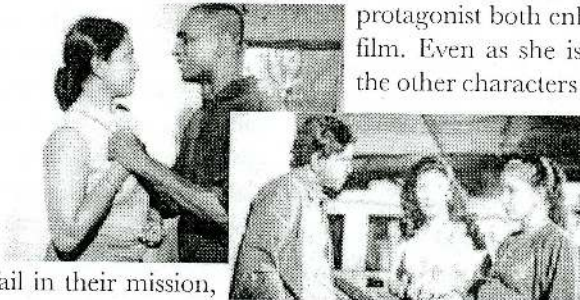
woman controller. Their mission is to kill a target code-named 'Double X' who will visit Sri Lanka. We later find out that Double X is involved with the Israeli security forces which helped the Sri Lankan government against the LTTE. The scene of the killing is the hill country around Kandy, with its lush backdrop and verdant landscape. As they plan their mission, the militants hone in on an electronics repair shop owned by Chathura (Linton Semage). The repair shop is situated in an ideal location from which to set-up a decoy for their target. Nirmala sets about seducing Chathura so that as his lover, she can have easy access to his shop.

The conflict in the narrative arises when the suicide bombers themselves become lovers. Although they resist intimacy at first, adhering to the principles of discipline and chastity ordered by their organisation, sexual desire on the part of two young people living in an already isolated and intimate environment as they share the last days of their life together, is hard to resist. Nirmala becomes pregnant and with her pregnancy she and Dilip experience a turning point in their lives. They begin to desire life, family life and legacy. Individual aspirations stir within them that go against the collective goals of their group. They face the wrath of its totalitarian regime. Fearful of Gauri's retaliation if they fail in their mission, they plan to kill their target, but escape with their lives. They enlist the help of an ex-LTTE cadre, Mala (Yasodha Wimaladharma) who lives in Colombo. How they set about fulfilling their task of killing Double X and escaping, how Gauri and the organisation on the one hand, and the Sri Lankan police on the other close in on Dilip and Nirmala make for much of the suspense and action of the film. That the militants succeed in escaping at first is only an illusion. They have been watched by their organisation all the time, and are finally ambushed onto a deserted sea shore. Dilip is shot to death. Nirmala bites on her cyanide capsule in the face of tragic personal loss and defeat.



Nirmala is portrayed in the film extremely skilfully by Dilhani Ekanayake. A woman of few words (we remember her silent but insistent presence in Asoka Handagama's film *Me Magai Sandai* ('This is My Moon'/2001), she holds the audience with her evocative stage/film presence. As Dilip goes about his business in an utterly patriarchal, selfish and brutish manner, barking orders at Nirmala and playing the ruthless militant, she stands in quiet contrast, showing us that humanity can live side by side with militancy. In fact, throughout the episode in which a neighbouring child's dog strays into their compound, she proves that instead of killing the dog to cover their tracks as Dilip does, if they returned the pet to the child, they would have attracted less attention. Nirmala has the time to be kind to children and strangers, even as she goes about preparing for her deadly mission. Even as she seduces Chathura we feel that there is compassion in her for his poverty-stricken, difficult life. Her feminised portrayal of the militant subverts the stereotypical notion of the 'terrorist' as masculinised and ruthless and makes for a more complex rendering of the female militant. Gender roles are subverted when she shows her metal as a better markswoman, less excitable and more mature and purposeful than Dilip. That her femininity and humanity are not made a false mask for her militancy is important as it prevents her character from degenerating into a 'chilling' schizophrenic Jekyll and Hyde persona. In her feminisation and humanity that *complements* her militancy, Mohamud Mohan Niyaz and Dilhani Ekanayake achieve a difficult balance that deliberately blurs the distinctions between life and death, compassion and ruthlessness to hew a sensitive and complex portrayal of a female suicide bomber.

However, this same emphasis on Nirmala as a complex protagonist both enhances and detracts from the film. Even as she is drawn on interesting lines, the other characters in the film are unconvincing, merely there as a foil to Nirmala or to provide her with a love interest. The portrayal of Dilip is particularly unconvincing. We have no real clues to his character, and are utterly surprised when he suddenly turns soft on paternity and becomes a considerate lover. Nirmala's pregnancy alone is not sufficient to convince us of how and why Dilip changes from self-contained, dogmatic, intolerant and sexist male to a man capable of jealousy, love and tenderness. If his internal crisis is produced by the stress of impending self-annihilation, we are not given a chance to witness that development, that deeply intimate moment in his character. Gauri too remains a one-dimensional foil to Nirmala. Played icily, in a tightly controlled portrayal by Veena Jayakody, Gauri remains the stereotypical wicked middle-class woman (with a male lackey named Vaas at her command) who threatens the well-being of the lovers. Chathura, again, is a static character with the sole function of providing Nirmala a platform on which to enact her dualities while moving the plot along. Despite these weaknesses, the film does succeed however in telling the story at a relatively fast pace, and keeping the suspense while the action unfolds.

A visual medium such as film invites a certain objectification of the body, and the body of the suicide bomber is of special significance. This body is a deadly weapon. It is the site of its own destruction. Its pieces are all that is left when the tragedy is over. From being a person's innermost, individual, private terrain, it becomes the focus of the public gaze. The body of the female bomber in particular, becomes an attractive site

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for cinematic exploration. Its sensuousness, how it is gendered, dressed and represented is an important part of *Kalu Sudu Mal*. As Nirmala sews her suicide bomber's jacket, as she looks at her body for the last time, as she rehearses wearing her corset of death, we realise the cruciality of her body to her persona, her political goals and finally, to her struggle for life.

Propaganda about the militant is always at pains to represent him or her as respectable, clean cut, neat and well-groomed. This is an externalisation of the respectable, bourgeois body which has its strategic uses, tapping into a middle-class morality which assesses such a body as well behaved and conforming rather than anarchical. Dilip We are yet to see a truly brave film on this topic of our ethnic war which grasps the nettle of how Sinhala-Tamil *difference* can be the site of healing and a common humanity. and Nirmala, once they come to Colombo, settle into a middle-class life style. They dress in western clothes. They wear shorts and T shirts, and Nirmala teasingly sports transparent lingerie, a satin housecoat and slit skirts. The dress code of a conservative Tamil woman disappears except for the flowers in her hair when in public. The western dress paves way for an arousal of sexual desire. There is a fine line between female provocation and male responsibility, particularly in the scene where Nirmala in transparent lingerie excites Dilip. As Dilip has not been particularly endearing to us up to this point, we are encouraged to judge his reaction as comic. However, the patriarchal male in him soon asserts itself. Caught off balance by his own arousal he immediately imposes the dress code of a sari for Nirmala. Through scenes like this Niyaz highlights for us how patriarchy asserts itself.

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The focus on the body and the sub-plot of Chathura's seduction pave the way for the sexual scenes in the film. These are clumsily done, reflecting the inhibitions of the actors and actresses in a society which is, by and large, still repressive about sex and sexuality. Why such scenes are included in the film in the first place, whether they really enhance the story and explain new aspects of the characters while adding to our visual pleasure is a matter of contention. *Kalu Sudu Mal* could have done without any of these scenes, for we only shared in the embarrassment of the actors rather than the passion and intense emotion they were attempting to enact.

Repressed sexuality, however, is vital to the film's reversal of plot. In a society that has denied the militants an opportunity to have sex, this can be the one experience on their wish list to be fulfilled before they become extinct. Moreover, their physical proximity is already imbued with deep intimacy as they spend the last days of their life together. Their anxieties and fears about death which lie beneath their bravado often come to the surface. They are made vulnerable in the eyes of each other. Sexual intimacy becomes an extension, then, of this already intense experience of awaiting death. In *Kalu Sudu Mal*, it is this sexual intimacy and consequent pregnancy that turn the tide around in favour of affirming life over death. That life is portrayed in terms of stirrings in the womb is a hackneyed cliché employed yet again in this film (as Santosh Sivan does in *The Terrorist*). (Does this mean that women who are not mothers and who have not experienced pregnancy are incapable of imagining the beauty and wonder of life, or be politically motivated towards its preservation?!). But the body carries its own terms of intimacy which is shown to be a powerful force. Dilip changes into a caring human being. Nirmala, responding to this change, decides to fulfil her destiny as the mother of his child. She sees the child as a means by which Dilip can re-connect with his humanity. When he is shot in the dying moments of the film, the sound of a baby's cry makes sure we get the point.

This humanity in the militant is constructed in the film by aid of another important discourse. The depiction of the suicide bombers in the film holds them in a vacuum, deracinated from their social, cultural and political contexts of being Tamil, possessing a specific history that has driven them to revolution. We are given nothing in the film of their families, their homes, their past lives. At one level this is dictated by the plot of the suicide bombers itself as the killers are required to cover their tracks and integrate with Sinhala society in the south. Yet, that they hold no trace of a Tamil accent (even if they are trilingual), speak Sinhala fluently, find no difficulty in adapting to Colombo, adopt a middle-class westernised lifestyle with ease and have no reminiscences of their past, consists of an erasure that is deeply problematic. One wonders too whether the multidimensionality of Nirmala's character is possible only because of the presence of Gauri who, in embodying the stern totalitarianism of the militant organisation, is there to remind us of what the Tamil militant is finally about. My contention is that in the Sinhala cinema to date, the de-politicisation of militants from their Tamil roots, the silencing of a history of discontent and difference, are prerequisites if the Tamil militant's humanity is to blossom. In their clothes, speech, mannerisms, they are made one with the Sinhala audience. Their divergent histories and cultural differences are erased in the service of establishing empathy with them. We are yet to see a truly brave film on this topic of our ethnic war which grasps the nettle of how Sinhala-Tamil *difference* can be the site of healing and a common humanity.

Cinesith 2, ed. Robert Crusz, Asian Film Centre, Colombo, 2002

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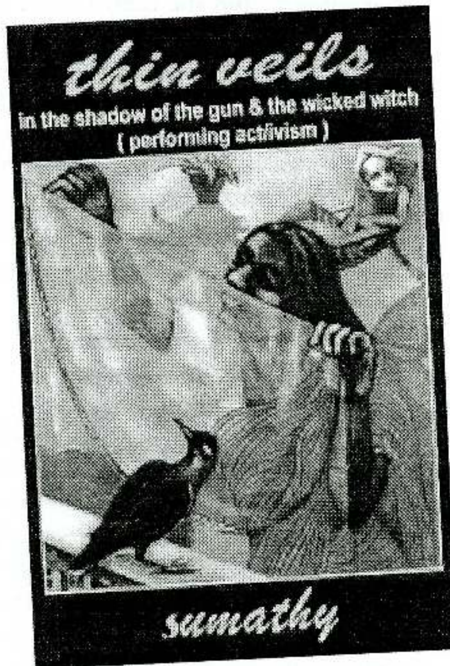
PERFORMING WOMAN



thin veils
in the shadow of the gun
and the wicked witch
(performing act/ivism)

by sumathy

Neluka Silva

Sri Lankan theatre in English has indeed undergone a transformation in the last decade or so enabling possibilities for socio-political critique. It has been revitalised by new and innovative writing, and stage productions. This has been matched by sophisticated staging techniques. *Thin Veils - In the Shadow of the Gun and the Wicked Witch* by Sumathy not only marks a significant contribution to the oeuvre of original writing in English but is pioneering in thematic content. These two plays perform woman - and all the diverse stereotypes, images assigned and identified with her, and in her enactment of this concern. While some of the plays performed in recent years are characterised by an over-emphasis on effects, and here I refer to smoke machines, large screens advertising the names of cast and crew, and sophisticated lighting which sometimes do not enhance but detract from the content, Sumathy's work takes us back to the origins of drama. She relies not on devices, but on the fundamentals of theatre, on body and voice, on movement and tension, with an economy that reminds us that this is what theatre is about, of establishing a dialectic relationship between actor and audience, so that we leave the theatre moved, heightened by an experience which blurs the distinctions of reality and fiction, and converge to create the impossible, the 'non-real'.

In her introduction to the plays, Sumathy asserts 'In all of my work, theatre, the body of the woman haunts my practice, like a spectre; it is memory, myth and history'. She then follows this comment with 'women are a difficult category to work with, to perform within where I grew up'. These comments foreground the enactment of woman in the two works. They are a clamorous demand

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for the recognition of their oppression and their humanity. The traditional, romanticised image of woman is thrown into crisis and interrogated, revealing it as a strategy of patriarchy and the state.

To begin with *In the Shadow of the Gun*, this one-woman piece brings to play a range of issues pertaining to conflict and the position woman inhabits in it. It is designed to, as Sumathy notes 'recover some of the voices of the women figures from the war torn north of Sri Lanka'. She compellingly depicts the realities of war and the ways that women wrestle with these exigencies. Through the dramatic representation of six different characters, the play explores and interrogates a gamut of emotions and situations and Sumathy's skill is displayed in traversing the boundaries of conflict and her remit is to interweave social issues such as economic exploitation and dowry as structures of gender oppression.

In the opening scene, the figure of woman poses a series of questions that demand attention to and recognition of her plight: 'Can you hear her scrape the bottom of the pot for the last grain of rice? Can you hear the guns poised against the silence of the night?' Scraping the bottom of the pot underscores the internalisation of sacrifice of physical, emotional and psychological needs 'for the sake of the family'. Juxtaposed against the scene of armed conflict, it reflects how conflict negatively impinges on woman, exacerbating her already adverse situation.

Through the character of Savitri, who is the pivotal point for giving expression to the other women and their narratives, Sumathy's preoccupation then is to follow a trajectory of 'woman's negotiation with nationalism and with the structures of hierarchy, situated in the conditions of war, militancy, the military everyday strategies of survival, hope and hopelessness'. When women are conflated with concepts such as Nation/Motherland/Mother Tongue, their bodies and bodily inscriptions are appropriated by and centralised in nationalist discourses. Sumathy's characters enact the effects of these theoretical positions when she says 'I carry the seeds of this nation here' and 'When I see the spirit of the oppressed moving you all toward national glory, martyrdom and death…'

These concepts are vividly dramatised and forcefully conveyed to the audience through depth of character. The structure of one-person theatre demands much from both actor and playwright. It entails variation of character, scene, pace, in order to sustain audience interest. This is achieved not only by scene changes marked by dance, music or movement, but also by the succession of emotional states – from frustration, anger and bitterness to joy – as the pressures of womanhood are enacted by Savitri and the others. These situations are punctuated by moments of intense drama, and the incorporation of devices such as 'slivers of light' ensures that the tension is sustained. The allusions to Brecht's *Mother Courage* in *The Shadow of the Gun* are no accident. The character of the Prostitute in the latter has an analogous role to the Prostitute in Brecht's play. The most striking comparison between *The Shadow of the Gun* and *Mother Courage* occurs in the endeavour to capture the turmoil of war on the civilian.

The second play *The Wicked Witch* resonates with the first in the thematic discourse of depicting woman. However, Sumathy notes that her focus here is not of the Tamil woman. Instead, the characters, identified not through name but as A, B, C, D, E, come together to create a surreal atmosphere in which dominant notions of female behaviour are laid bare and then subverted. The plot loosely charts the journey of the witch from the jungle to the city. Other female figures enact a choric role, providing a commentary through this venture, invoking the familiar, modern, mundane and popular: 'Open up for the queen of the forest to enter! She'll bring the cool air into your air-conditioned offices.'

Sumathy's skill as a playwright is demonstrated in her refreshingly original rendition of the stock device of the journey from jungle/village to city. The innovation emerges from positioning a woman at the forefront, who critically appraises the pedestrian conventions such as checking of ID cards, selling of bread and haggling with a three wheeler driver. Seen through Sumathy's lens it underlines the endemic exploitation within these practices. As the witch tries to escape from the city in the final scene, a symbolic evocation of reality 'the forest of refugees, bugging the hell out of you' is powerfully made evident. The female figures

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present a persuasive case against modern society through the deliberate visibility of its maladies and the regressive attitudes towards dealing with them.

Religion also comes under assault as the three-wheeler driver appeals to religion to find release from his desperate economic state. The fusion of religious metaphors of the Garden of Eden, and Hindu, Buddhist allusions along with the presence of the cobra is a stark reminder of the overarching presence of religion in defining our psychological make-up. Religious symbols also perform an ideological function in establishing a nexus between religious discourses and concepts of 'patriotism', 'nation' and 'sacrifice', all of which are critiqued for their oppressive underpinnings.

In terms of dramatic technique, Sumathy captures the audience with her ability to enlist devices with skill. One of the most forceful aspects of the play is the menace that is created through the dramatic devices, such as the sound effects and lighting. Some elements from the genre of absurd theatre are brought into play, designed to reflect the futility of war in the daily lives of the common person and the structures of power that enmesh and stifle them. The atemporal and ahistorical setting, and deliberate avoidance of place and character names, on one level, divests the scene of specificity, but then references to the Hilton and 'sili sili bags' and Shah Ruk Khan interspersed in the narratives of the characters create the sense of immediacy reminding the audience of the trappings of contemporary reality.

These concerns are relayed through a range of characters who epitomise the voice of the oppressed. Though unnamed and not clearly defined individuals, they vocalise the plight of the human condition. An economic use of stage technique, that is, the sparse sets and costumes are a visual rendition of the dehumanising effects of war and the seamy side of modern life and their debilitating effects on the psychological, physical and social fabric of a war-torn society. Effects such as slide projections, are used sparingly, not simply for effect but as an integral part of the play, subtly woven into the narrative to underscore how technology defines our lives. As a playwright Sumathy is cautious not to impose these directions, and repeatedly follows these notes with 'if necessary', signalling her consciousness of a director's limitations, and the lack of resources which may otherwise preclude directors from embarking upon the production of this work.

Thin Veils marks a significant juncture in the English theatre in Sri Lanka through its exposition of the brutality of war and recuperation of the position of women. The heterogeneity of theme, form and emotion in the two works, coupled with the socio-political overtones, has enabled a positive representation of women. One can argue that the act of writing itself is crucial to articulating the complexities of female subjectivity. From a nationalist perspective, women's writing is crucial in broadening the traditional, patriarchal discourses that are transmuted and fixed as the national narrative. The unitary, linear, 'rational', hierarchical language of the masculine, and not coincidentally, also the language of the state, is vigorously confronted and thrown into crisis. Sumathy has opened a space for articulating the identity for women by appropriating, reinventing and discarding the archetypal male, and by extension, nationalist experience, replacing it with a multiplicity of possibilities interweaving class, race, ethnic, sexual differentials. She provides an insight into the ways in which one-dimensional representations of the nation fail to account for the empowering possibilities that arise when individuals grapple for meaning and identity between their personal and political worlds.

Cultural productions such as theatre participates in the formulation of ideology and as Timothy Brennan has recognised, nations 'depend for their existence on an apparatus of cultural fictions in which imaginative literature plays a decisive role' (Brennan, 1990: 52, 49). While nationalist discourses may emphasise the virtues of female piety, purity, submissiveness and domesticity, the social reality is often very different, and while the Nation employs the condition of denial to prevail against the challenges and trauma of revolutionary change, Sumathy has forcefully illustrated that theatre need not be complicit in reinforcing such myths, but can provide a critical illumination and potentially empowering site for change. It is undoubtedly a work of great courage and commitment and I look forward to seeing it produced.

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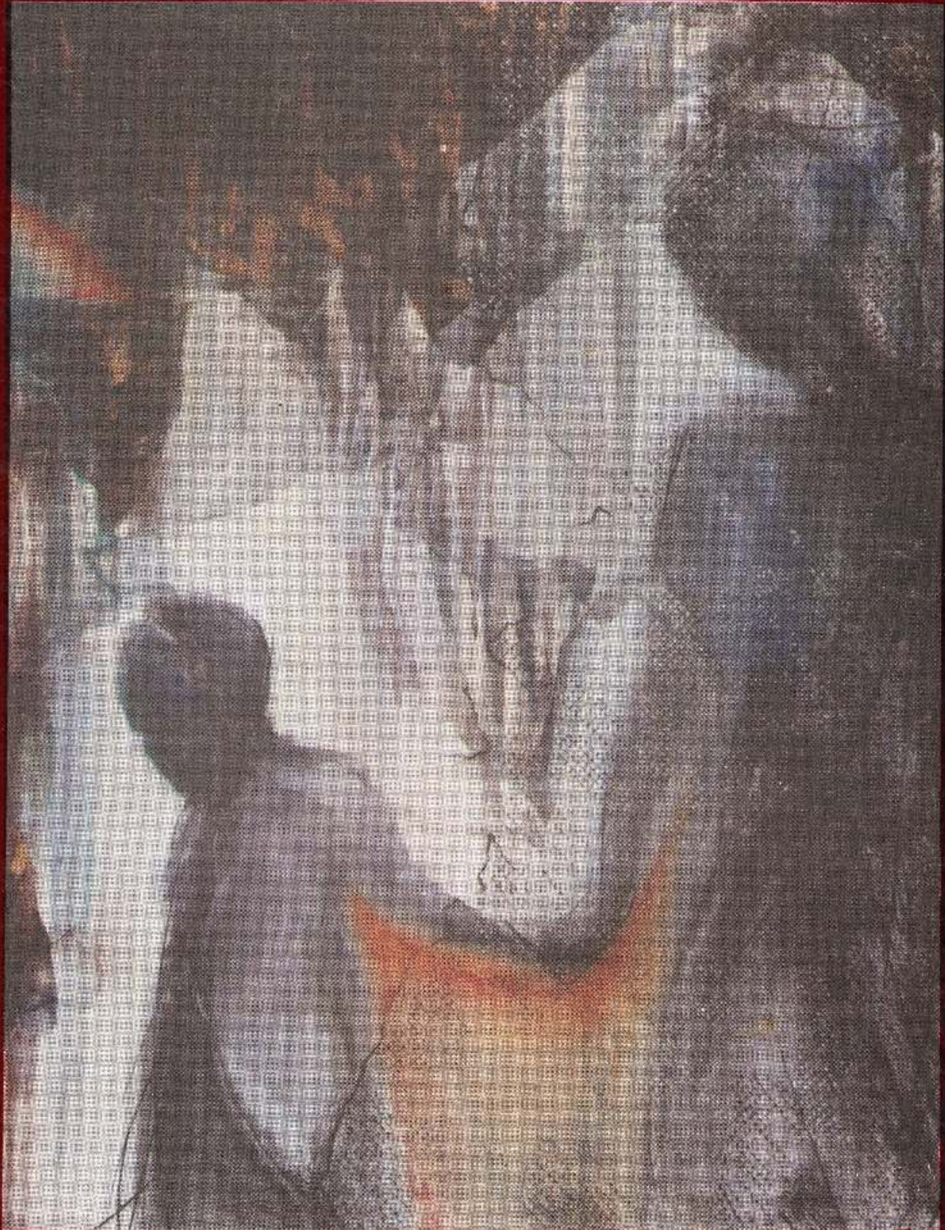

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