

A GENDERED PERSPECTIVE TO THE INTERNATIONAL USE OF FORCE

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1. Introduction

This paper and the previous one by Judith Gardam focus upon areas that have been particularly subject to international legal regulation and therefore are of significance to international lawyers. The first examines the interplay between the right to self-determination and the prohibition against the use of force in Article 2(4) of the United Nations Charter and the role of women in nationalist movements, while the second analyses the consequences for women of the reintroduction of the concept of a "just war" through the extension of Protocol I¹ to wars of national liberation and the defence of military necessity.

Since the traditional subjects and objects of international law are the abstract entities of States there appears to be an objective neutrality in the rules of international law in terms of gender. There has been a great deal of writing exposing the western orientation and bias of these rules² and the consequent demands for their change from Third World international lawyers, but much less realisation of their bias from a gendered perspective. However, as was recognised at Nuremberg, actions carried out in the name of States are in fact committed by people and their impact is upon people, not artificial constructs. The reality of who is making those decisions and the effect of those decisions upon individuals within States may well take on a different perspective when examined from a gendered viewpoint.³ The prohibition against the use of force in international relations is integral to the post-1945 international legal order and

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1 Protocol Additional to the Geneva Conventions of 12 August and Relating to the protection of Victims of International Armed Conflicts (Protocol 1), Geneva 8 June 1977, 1977 UNYB 95; 16 ILM 1391 (1977).

2 See eg Cassese A, *International Law in a Divided World* (1986).

3 The significance of feminism to study and research in international relations is examined in the Special Issue of *Millennium* developed from a Symposium on Women and International Relations, London School of Economics June 1988, (1988) 17 *Millennium* No 3. It is hoped that the papers in this volume will cause a similar awareness of its significance in international law.

is often suggested to be a norm of *jus cogens*.⁴ If it can be shown that gender is, or could be, a relevant concern when considering its application, then the myth of the gender neutrality of rules of international law must be open to question.

The prohibition of the use of force does not stand alone in the United Nations Charter but is linked with other provisions, notably Chapters 6 and 7. Further, Article 1 links the major purpose of the United Nations, the world order goal of the maintenance of international peace and security and the corollary prohibition of the unilateral use of force by States, with other objectives of the international legal system, notably the self-determination of peoples and the promotion of human rights.⁵ Human rights is the subject of other papers in this Yearbook taking a feminist perspective,⁶ so this paper will make a brief examination of self-determination, the role of women in nationalist movements and their invisibility in determining the legality or otherwise of any international use of force.

2. Women In Nationalist Movements

1. *Women and Colonialism*

There is a fundamental contradiction between the notion of self-determination as meaning the right of "all people" to "freely determine their political status and freely pursue their economic, social and cultural status"⁷ and the continued domination and marginalisation by one sector of the population in a nation state of another sector. Colonisation has been universally condemned by the international community as being about domination, oppression, exploitation, aggression and power and therefore *per se* as constituting a threat to the maintenance of international peace and security. Therefore since 1945 nationalist movements formed to act against such oppression have gradually been accorded legitimacy in international law; wars of national liberation have been labelled international armed conflict subject to the restraints and protections of the laws of war and it has been argued that the use of force in support of a

4 Eg [1966] 2 YBILC 247-8. In the *Nicaragua* case both Nicaragua and the United States asserted the prohibition against the use of force to be *jus cogens*. The majority of the Court did not rule upon this point. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, ICJ Rep 1986 p14, at 100-1 (Judgment of 27 June).

5 The prime motivation for State protection of individuals guaranteed by treaty has been the furtherance of international order through the preservation of international peace and security rather than a direct intention to improve conditions for individuals; see Bull H, *The Anarchical Society: A Study of Order in World Politics* (1977) p77.

6 Byrnes, "A Feminist Analysis of International Human Rights Law"; Wright, "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions".

7 International Covenant on Civil and Political Rights, 19 Dec 1966, Article 1; International Covenant on Economic, Social and Cultural Rights, Article 1.

nationalist movement constitutes an exception to Article 2(4). There may be a duty on third States to assist those fighting a war of national liberation and there is certainly a duty not to assist in opposing such peoples.⁸ The unambiguous international support for the objectives of such nationalist movements makes the position of women within them inherently problematic. As members of the movement they are entitled to that same international support, but when their own objectives are articulated they may be seen as undermining the unity of the nationalist movement.

The role of women under colonialism is in many ways symbolic of the domination of the colonised within a colonial society. Local women were seen by the colonial power as providing a pool of cheap labour in industries, agriculture, plantations and in domestic service while local men were often recruited to work away from their families, for example, in foreign mines. Colonised women were also regarded as sex objects, especially where there was a shortage of women from home.⁹ Missionaries and colonial women saw them as pupils to imbue with the essentials of Western civilisation. For local men the position of their women was symbolic of and mirrored their own domination: colonialism means allowing the colonial power to abuse the colonised women, resistance to colonialism is reasserting the colonised males' own power over their women.¹⁰

For both men and women who participated in nationalist movements the goal was freedom from foreign domination, but for many women there were other objectives which militated against their concerns being accorded full weight within nationalist agendas. On the one hand are the relatively simple issues of demands for women's equality and emancipation but on the other are those more complex matters requiring examination of the very structures and values of society, and the reasons for male domination within it. Since nationalist movements have the objectives of restructuring the hierarchies of power and control and reallocation of wealth within society, it was inevitable that feminist issues in this wider sense would cause tension across gendered lines within them.

Sri Lankan feminist, Kumari Jayawardena, describes how for many nationalists the objective of overthrowing colonial rule required both the creation of a national identity around which people could rally and the institution of

⁸ See General Assembly Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, 1970, GA Res. 2625 (XXV), 24 October 1970.

"In their actions against and resistance to such forcible action which deprives peoples ... of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter of the United Nations."

⁹ For a discussion of issues of sexuality and foreign military bases see Enloe C, *Bananas, Beaches and Bases, Making Feminist Sense of International Politics* (1989) pp 65-92.

¹⁰ "Becoming a nationalist requires a man to resist the foreigner's use and abuse of his women." *Ibid.*, at p44.

internal reforms so as to present themselves as Western, "civilised" and therefore worthy of self-rule.¹¹ These dual strategies caught women in a double disadvantage with pressures from both the colonisers (men and women, administrators, educators and missionaries) and from colonised men that local women be modelled upon Western women. Ladylike behaviour was regarded as a "mainstay of imperialist behaviour" with "feminine respectability" teaching both the colonised and colonising that "foreign conquest was right and necessary".¹² Thus to many colonised males "women needed to be adequately Westernized and educated in order to enhance the modern and "civilised" image of their country".¹³ The model provided by Western civilisation incorporated, of course, all the restrictions imposed upon Western women. These included their containment within the private sphere and their place in the nuclear patriarchal family, as mirrored in the patriarchal assumptions of colonialism.

However there might be still further inhibitions imposed upon women by the need to fight colonialism; the need to rally around a national identity required that local women, even while they were being groomed on a Western model, should also take it upon themselves to be "the guardians of national culture, indigenous religious and family traditions."¹⁴ These were in many instances, of course, repressive for women. Halliday points out that while there has been a belief that the spread of nationalism and nationalist ideas is beneficial to women there is another side in that "nationalist movements subordinate women in a particular definition of their role and place in society, enforce conformity to values that are often male-defined ..." ¹⁵ Women could find themselves dominated by foreign rule, economic exploitation and aggression as well as by local entrenched patriarchies, religious structures and traditional local rulers.

2. *Nationalist Movements And Feminism*

These conflicting perspectives highlight a significant problem for feminists both in what have become the Third World States and for Western feminists. Feminism is often thought of as a Western phenomenon, rooted in Western political theory and reality. Thus feminists in non Western countries and, before independence, in the nationalist movements, were open to attack for accepting the thinking of decadent Western capitalism, for embracing the neo-colonialism of a foreign culture and for being diverted from their own culture, ideology and religion. The explicit or implicit addition was that they were also being diverted

11 "... Western secular thought is a crucial factor in fashioning a consciousness and devising structures that would make possible an escape from the domination of Western political power." Jayawardena K, *Feminism and Nationalism in the Third World* (1986) p60.

12 Enloe C, note 9 above at p48.

13 Jayawardena K, note 11 above at p8.

14 Ibid, at p14.

15 Halliday, "Hidden from International Relations: Women and the International Arena", (1988) 17 *Millennium* No 3 419.

from the revolutionary struggle against the colonial power by accepting the values of Western feminists. In other contexts the emancipation of women has been regarded as a communist tactic to be resisted by resort to traditional values.¹⁶ These assumptions have placed feminists in Third World countries in impossible dilemmas. Feminist and women's movements have been active in many such countries since at least the late 19th and early 20th centuries¹⁷ but too often women's concerns have been pushed off the nationalist agenda. Women in nationalist movements have had to choose between pressing their own concerns, which often run counter to those of the men and consequently of being accused of having wrong priorities, or of seeing those concerns lost under the weight of the overall struggle against colonial rule.¹⁸

Enloe gives the example of women within the Vietnamese nationalist movement against French colonial rule. Although women were in the forefront of this struggle in the 1930's, over time they were dissuaded from raising women's concerns which might cause anxieties among the men and tensions between men and women, and thus undermine the overriding goals of nationalism.¹⁹ Jayawardena too shows that in Vietnam, as in China, feminism was not solely allied with a bourgeois middle class movement, as in some other countries, but was rather part of a revolutionary struggle for the radical

16 An example of this has been in the position of women in Afghanistan since 1979. See eg "An Afghan Exile, Her School and Hopes for Future" *New York Times*, 12 June 1988 sec 1, p14:

"Westerners who have studied Afghan society, as well as many Afghan men, say education for women has been damaged by its association with the Communist coup and the subsequent Kabul regimes. ... The Government that took power after the coup in April 1978 immediately associated itself with feminism ... Women's groups became propoganda tools for the Kabul regime ..."

17 Jayawardena gives accounts of feminist movements in Turkey, Egypt, Iran, Afghanistan, India, Sri Lanka, Indonesia, the Philippines, China, Vietnam, Korea and Japan. Cf, Chafetz J and Dworkin A, *Female Revolt, Women's Movements in World and Historical Perspective* (1986), especially chapter 4 which describes, *inter alia* "first wave" women's movements in China, Japan, India, Indonesia, Persia/Iran, Egypt, Caribbean Islands, Mexico, Argentina, Brazil, Chile, Peru and Uruguay.

18 This is not an experience unique to Third World women cf, Robin Morgan's account of attitudes towards women in the revolutionary movements in the United States in the 1960's. Morgan R, *Going Too Far: The Personal Chronicle of a Feminist* (1977).

19 Enloe describes the progressive erasure of women's issues from the nationalist agenda in Vietnam.

"During the 1930's there seemed little tension between advocating women's rights and joining the struggle for national rights: each served to bolster the other;... Then... problems were legitimate if they were obstacles to nationalist unity; they were illegitimate if they made men in the nation anxious. ... But every time women succumb to the pressures to hold their tongues about problems they are having with men in a nationalist organization, nationalism becomes that much more masculinized." Enloe C, note 9 above at p60.

transformation of society. Both writers conclude that despite their early important role in the nationalist struggle women play only a minor role in the post revolutionary society and have once again been marginalised from positions of power.²⁰

What these accounts make very clear is that feminism in the Third World is not a Western or communist import and that a gendered perspective of international law must include the experiences of non Western women.²¹ What Western women need to understand more fully is that in many such countries the struggle against women's oppression was inextricably entwined with that for self-determination as it was "acted out against a background of nationalist struggles aimed at achieving political independence, asserting a national identity, and modernising society."²² Western women have tended to ignore the contribution of these women to the challenge to "the existing framework of men-women relations in which the subordination of women is located." Third world feminists coming from this tradition of struggle against colonialism and foreign domination are drawing the political connections between what occurs at home and the international structures; the same forces that operate to maintain marginalisation and oppression of women at home operate internationally in actions by stronger States against weaker States. The methods used are also identical – rape,²³ battering, aggression, economic exploitation, rendering invisible.²⁴

Western feminists have developed these connections most fully in the context of peace studies, notably in the 1980's.²⁵ Peace, in the sense of not just an absence of conflict but as a substantial modification in the inherent tendencies of

20 Jayawardena K, note 11 above at pp196–212, especially 212; Enloe C, at p60.

21 This can be difficult for Western feminists whose analyses, coloured by cultural misunderstandings, of the oppression of non Western women can seem insulting, patronising and neo-colonialist to those women. See Newland, "From Transnational Relationships to International Relations: Women in Development and the International Decade for Women", (1988) 17 *Millennium* No 3 507, 510.

22 Kayawardena, note 11 above at 3.

23 On the connection between rape and war see Strange, "It'll Make a Man Out of You" in Russell D (ed), *Exposing Nuclear Phallacies* (1989) pp104,114.

24 Scales, "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?" (1989) 12 *Harv. Women's LJ* 25, 26. These words could well be used to describe the Iraqi invasion of Kuwait in August 1990.

25 See especially Ruddick S, *Maternal Thinking Toward a Politics of Peace* (1989); Brock-Utne B, *Feminist Perspectives on Peace and Peace Education* (1989); Pierson R, *Women and Peace, Theoretical, Historical and Practical Perspectives* (1987); Reardon B, *Sexism and the War System* (1985); Russell D (ed), *Exposing Nuclear Phallacies* (1989); Harris A & King Y (eds), *Rocking the Ship of State, Toward a Feminist Peace Politics* (1989); Caldicott H, *Missile Envy: The Arms Race and Nuclear War* (1984); Harford B & Hopkins S (eds), *Greenham Common: Women at the Wire* (1985).

the international system to conflict,²⁶ is not fostered by the prevailing patriarchal ideology of most nation States and nationalist movements nor therefore by the prevailing emphasis on statism. While this theme cannot be developed in this paper, international lawyers seeking to determine how best to achieve the maintenance of international peace and security that is the objective of the legal prohibition of force should give weight to the growing number of feminist peace studies.

3. Outcomes Of Nationalist Movements: A Gendered Perspective

1. Independence

Nationalist movements for self-determination have produced a variety of outcomes, all problematic for women. The achievement by nationalist movements of their objective of independence has not necessarily improved the position of women. The newly independent State has too often replicated the patriarchal power structures of the colonising State with women again consigned to the private, non public domain, possibly even losing the societal positions they may have held in pre-colonial times. It has been demonstrated how the economic changes to society introduced by colonial powers and continued since independence profoundly eroded women's position in those societies.²⁷ Modernisation programmes that may accompany independence do not necessarily liberate women; for example in Iran "urbanization and increased economic prosperity in the Pahlevi era meant greater seclusion and more limited economic and social activities for many women."²⁸ Even for those women where this was not the case and modernisation did lead to some improvement in terms of their subordination within State, religious or family structures, the reforms were not necessarily long lasting where the bourgeois middle classes lost political control to religious fundamentalism, its own appeal strengthened by a backlash response to those same developments.

The pursuit of self-determination as an abstract political goal has not terminated oppression and domination of one part of society by another. States are patriarchal structures not solely in the sense of the exclusion of women from elite positions and decision-making roles, but also in the assumptions as to the concentration of power and control in an elite and the domestic legitimization of

²⁶ Crawford, "The Rights of Peoples: Some Conclusions", in Crawford J (ed), *The Rights of Peoples* (Oxford 1988) p163.

²⁷ Harrell Bond, *Imposing Aid—Emergency Assistance to Refugees* (1988) p266.

²⁸ Higgins, "Women in Iran" (1985) 10 *Signs* 477. In attempting to analyse why initial protests from women within Iran lessened as the Islamic revolution continued, Higgins argues that changes in the position of women that Western and Western-educated Iranian feminists find offensive "may not have seemed so negative to the bulk of Iranian women." One reason might be that the so-called liberations of the Shah's regime were not so liberating in practice. These comments further highlight the dangers of feminists from the West seeing events in other countries through their own eyes.

the use of force to maintain that control. These assumptions are reinforced by international legal principles of sovereign equality, political independence and territorial integrity and the legitimate use of force to defend those attributes.²⁹ In addition, economic self-determination as worked out through the so-called right to development has not, as is discussed in another paper,³⁰ improved the lot of millions of rural women.

2. *Prolonged Struggle*

Where independence was either achieved only after a long period of coercive resistance to foreign domination, or where such resistance is continuing, women have been seen as vehicles for continuation of the struggle. Robin Morgan describes graphically the position of refugee women in the Palestine camps where, under appalling conditions, they are expected to produce the next generations of freedom fighters to continue the fight.³¹ Any attempt to resist this role and to assert control over their own reproductive rights is seen as undermining the Palestinian cause. However, as is so often the case within such resistance movements, the position of women is complex. Enloe describes how while "militarization is providing Palestinian men with new opportunities to prove their manhood", Palestinian women are bearing the brunt of the *Intifadah*.³² The imposition of a strict curfew and the arrest and detention of numerous Palestinian males have raised women's household and other chores to the position of "national imperatives" essential to the continuing struggle. As ever, the issue of whether the importance of their role will be recognised and women's issues remain on the agenda when and if self-determination is achieved remains the crucial question.

The Palestine example demonstrates the tensions created for women where the resistance to outside forces is militarised. Militarisation traditionally means that women become even more marginalised. The connection between men and the military is well recognised. Men hold the leading positions in command, in policy making, in the invention, construction and sale of weapons;³³ the images of war are either masculinised³⁴ or dehumanised;³⁵ men are the judges, the

²⁹ Notably through the right to self defence in United Nations Charter, Article 51.

³⁰ Charlesworth H, "The Public/Private Distinction and the Right to Development in International Law" p 190 above.

³¹ Morgan R, *The Demon Lover On the Sexuality of Terrorism* (1989) especially Chapter 8 "What Do Men Know About Life?: The Middle East."

³² Enloe C, note 9 above at p58.

³³ "The world's generals and negotiators, bombardiers and captains, chiefs of staff, and defense secretaries have been and still are mostly men. More men than women shoot the pistol and work the missiles; certainly more men than women command them." Ruddick, "Mothers and Men's Wars", in Harris A & King Y (eds), *Rocking the Ship of State, Toward a Feminist Peace Politics* (1989) p77.

³⁴ Eg the "rape" of countries, the use of rape as an instrument of war, war makes "men" out of boys and the "penetration" of weapons. There is a wide literature on

enforcers and the interpreters of what constitutes legitimate military action.³⁶ At times one group of men abdicate the responsibility of determining the legitimacy of what another group of men have done under the abstract legal doctrine of "political question" or "military necessity".

There are two other aspects of the militarisation of nationalist movements, again both entwined. The first is the creation of huge refugee flows, the second is the complete irrelevance of any gendered viewpoint for national decision-makers when forming their military strategies and alliances. In turn, any appeal to legitimacy under international law of any given use of force is made without reference to the implications of the conflict for women of either side. The legal prohibition against the use of force is to maintain the incidents of the abstract entity of Statehood, territorial integrity and political independence. The primacy of State interests remain paramount.

A good example of both these aspects of the militarisation of nationalist movements is Afghanistan. The West, led by the United States, analysed the Soviet invasion of Afghanistan in traditional cold war and statist terms. The violation of the territorial integrity and political independence of Afghanistan (and other strategic, economic and geo-political concerns) persuaded the United States of the legal and moral right to its support for the local Afghan insurgents. This decision gave no attention to the position of Afghan women; the *mujahidin* insurgents were committed to an oppressive, rural, unambiguously patriarchal form of society. "One of the policies the Soviet-backed government in Kabul pursued that so alienated male clan leaders was expanding economic and educational opportunities for Afghanistan's women".³⁷ A consequence of the continued support was the creation of a vast refugee flow into Pakistan; 30% of these refugees are women, 40% children under 13.³⁸ In these refugee camps the mullahs have imposed a strict fundamentalist regime which has confined women

this see Scales, "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?" (1989) 12 Harv. Women's LJ 25 (1989); Morgan R, *The Demon Lover On the Sexuality of Terrorism* 139; Strange, "It'll Make a Man Out of You" in Russell D (ed), *Exposing Nuclear Phallacies* (1989) p104.

35 Cohn, "Sex and Death in the Rational World of Defense Intellectuals" (1987) 12 Signs No 4, 687. Cohn describes how military talk relies on abstractions and euphemisms which prevent the speaker or listener from dwelling on the realities of nuclear war.

36 Falk points to the use of domestic courts by citizens to challenge government (military) policy in the war/peace area. He mentions, *inter alia*, cases arising from "acts of conscience" by citizens engaging in the "daring response" of civil disobedience but without reference to the particular role of women in this movement, for example through the peace camps at Greenham Common and Seneca; Falk, "The Rights of Peoples (In Particular Indigenous Peoples)", in Crawford J (ed), *The Rights of Peoples* (1988) p30. On women and civil disobedience see Scales, "Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?" (1989) 12 Harv. Women's LJ 25 (1989).

37 Enloe C, note 9 above at p57.

38 *New York Times* 27 March 1988, sec 1 p 16.

to the camps, isolated them, and even deprived them of their traditional tasks within a rural community. There is no indication that any different policy would be followed if the *mujahidin* were able to form a government in Afghanistan. Indeed it will continue, for the education services provided by UNHCR are overwhelmingly for boys; "total enrolment in the United Nations schools stands at 104,000 boys and 7,800 girls".³⁹ The vital impact of education on women and its effect in undermining male domination has been fully documented.⁴⁰

Although international law is applicable to the situation out of which the desperate situation of these women has arisen (the invasion of Afghanistan) and although they may well have international legal status (refugees under the Refugee Convention)⁴¹ they have become internationally and nationally marginalised and isolated. Further, they are located in a Muslim patriarchal State where women suffer from legal disadvantages.⁴² These realities were irrelevant to decisions made to give support to the *mujahidin* and form no part of the Geneva Peace agreements, to which Pakistan and Afghanistan, as well as the United States and the Soviet Union, are parties and which have been regarded as resolving the international legal problem.⁴³

It has been pointed out that the United States used the repression of women by the Khomeini regime as an additional justification for its hostility to that regime, but did not draw the same conclusions with respect to Afghanistan. The refugee camps of the Sahrawi in Algeria are again mainly occupied by women. Here however they have been able to assert themselves and to make considerable progress. Women have built hospitals and schools and achieved high rates of literacy. The Women's Union founded in 1974 supports the "fight for independence" and "the right of the woman and the mother."⁴⁴ The international community through the International Court of Justice and the General Assembly has reiterated the right of the people of Western Sahara to self-determination.⁴⁵ Despite this verbal support the Sahrawi's only backing comes from Algeria while

³⁹ *New York Times* 27 March 1988, sec 1 p 16.

⁴⁰ Jayawardena K, note 11 above pp17-19.

⁴¹ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137; Protocol, to Convention Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

⁴² "The process of the islamization of laws has reinforced the already deeply rooted and staunch notions of male domination in Pakistani society." Mehdi, "The Offence of Rape in the Islamic Law of Pakistan", (1990) 18 Int'l J Sociology Law 19.

⁴³ Agreement between Afghanistan and Pakistan on the Principle of Mutual Relations in Particular of Non-Interference and Non-Intervention, Geneva, 14 April 1988; Bilateral Agreement between Afghanistan and Pakistan on the Voluntary Return of Refugees, Geneva 14 April 1988; Declaration of International Guarantees, Geneva 14 April 1988; Agreement on the Inter-relationships for the Settlement of the Situation relating to Afghanistan, Geneva 14 April 1988, all rep. 27 ILM 587 (1988).

⁴⁴ Cumming, "Forgotten Struggle for the Western Sahara", *New Statesman* (sic), 20 May 1988 pp14-15. "Women are at the heart of the revolution; their own struggle for rights doesn't have to wait until the war is over, the two are indivisible."

Morocco is backed *inter alia* by France and the United States. The determination of these women to keep alive a "democracy, based on proportional representation, with centralised and equal distribution, full employment, social and political parity between the sexes..." in the adverse conditions of refugee camps has received little international support.⁴⁶ The complete indifference shown by States of the realities for women of their military policies and strategies and the international invisibility of women is dramatically shown by these examples.

Women have never been viewed as a "peoples" for the purposes of the right to self-determination and, given the assumptions about the content and implications of that right, they never will or should be. Unfortunately the international community recognises only the right of "peoples" to self-determination, and self-determination is in practice most frequently linked to the notion of independence and Statehood. Thus after the exercise of the Soviet veto against a resolution on the Soviet invasion of Afghanistan, the General Assembly reaffirmed "the inalienable right of all peoples to determine their own form of government free from outside interference ..." ⁴⁷ and that the Afghan people must be free to "choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever." The emphasis is on "outside"; women are not free to choose their role in society free from the constraints of masculine domination from within the State and are constantly subject to male coercion. These high sounding ideals do not apply to them, for their self-determination is subsumed by that of the group. The international response to the continued subordination of the largest oppressed group in the world - women - is limited to the passing of a human rights convention aimed at achieving equality for women with no thought to any radical rethinking of international norms.⁴⁸ The Convention imposes no significant duties upon, or consequences for, States for their continued oppression of women. There is nothing in the International Law Commission's work to indicate that systemic oppression and marginalisation of women is to be regarded as an international crime under Article 19 of the Draft Articles of State Responsibility, although it could be under Article 19 (3)(c) which states that an international crime may result from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*."⁴⁹ The words

45 *Western Sahara Case* ICJ Rep 1975, p12 (Adv. Op. 16 October).

46 Whether the electoral victory in Algeria of a fundamentalist party in 1990 will change the situation in these camps remains to be seen.

47 GA Res ES-6 2 14 Jan 1980.

48 Convention on the Elimination of all Forms of Discrimination against Women, adopted by the UN General Assembly 18 December 1979, UNGA Re 34/180 (XXXIV), 19 ILM 33 (1980).

49 [1979] 2 YBILC II Pt 2 90; [1980] 2 YBILC II Pt 2 14, 70. The legitimate responses to the commission of an international crime are being considered by the International Law Commission in Part II of the Draft Articles. See generally Weiler J, Cassese A

"such as" indicates that this is not a comprehensive list and that violations of equivalent seriousness could be similarly regarded as international crimes. However oppression and acts of brutality towards women have never been regarded in the same light as slavery, genocide and apartheid. The denial to women of the freedom to determine their own economic, social and cultural development is irrelevant to States when they are determining the legitimacy of claims for assistance in achieving self-determination or for the use of force.⁵⁰

Admittedly to take into account any such considerations would run directly counter to the statist model of modern international law and would be an "assault upon the positivist and neo-positivist views of international law as dependent upon State practice and acknowledgement."⁵¹ As such it would be highly destabilising to that system. The invasion of Afghanistan was, after all, contrary to Article 2(4) and the resistance of the *mujahidin* is seen as supporting the right of self-determination of the Afghan people against foreign domination.⁵² But despite its wording Article 2(4) has not been treated as absolute.⁵³ A variety of claims for exceptions to it have consistently been made and arguments as to their legitimacy have proliferated in modern international law.⁵⁴ These claims include Cold War claims of regional hegemony; justifications of humanitarian intervention; protection and rescue of nationals; and requests for assistance by ruling elites. In December 1989 the United States justified its actions in Panama on a number of grounds, including the commission of serious drug offences by the State ruler, General Noriega. These claimed exceptions too are destabilising to the State system but it is argued by their proponents that their acceptability rests upon other imperatives in the contemporary international legal order.

& Spinedi M (eds), *International Crimes of State: A Critical Analysis of the ILC'S Draft Article 19 on State Responsibility* (1989); Spinedi M & Simma B (eds), *United Nations Codification of State Responsibility* (1987).

- 50 Again compare this with the position of a people fighting for self-determination who can seek help from third States in their struggle and those third States are under an obligation to provide such an assistance. See Reisman, "The Resistance in Afghanistan is Engaged in a War of National Liberation", (1987) 81 AJIL 906.
- 51 Falk, "The Rights of Peoples (In Particular Indigenous Peoples)", in Crawford J (ed), *The Rights of Peoples* (1988) pp17,19.
- 52 Cf, Reisman, note 50 above.
- 53 In addition to the right to self-defence as contained in United Nations Charter, Article 51.
- 54 Eg see Higgins, "The Legal Limits to the Use of Force by Sovereign States, United Nations Practice", (1961) 37 BYBIL 269; Franck, "Who Killed Article 2(4)? Or Changing Norms Governing the use of Force by States", (1970) 64 AJIL 809; Henkin, "The Reports of the Death of Article 2(4) Are Greatly Exaggerated", (1971) 65 AJIL 544; Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)", (1984) 78 AJIL 642; Schachter, "The Legality of Pro-Democratic Invasion", (1984) 78 AJIL 645; Schachter, "In Defense of International Rules on the Use of Force", (1986) 53 U Chi LR 113; Schachter, "Self-Defense and the Rule of Law", (1989) 83 AJIL 259, 263-266.

However, although contextual arguments for the non-applicability of Article 2(4) in the particular circumstances have been routinely presented in all instances of the international use of force, the commission of offences against women or their regular subordination within a patriarchal hierarchy have never been so used. The invisibility of women in any legal justifications for the use of force is striking. When assessing the impact of possible responses to aggression the concerns and needs of women are simply not raised by governments or even by other groups.

While it may be thought unacceptable to argue the relevance of women's issues in the context of the maintenance of international peace and security, two further comments may be made. First, it was once unthinkable that colonial peoples had the international legal right to self-determination. This view has been exploded with the recognition of the threat to international peace and security posed by continuing colonial practices. Even the position in international law of indigenous peoples is now on the international agenda⁵⁵ despite the prescriptions of State sovereignty and domestic jurisdiction. The subject matter of international legal regulation has expanded enormously since 1945 and now includes such areas as international environmental law, international economic law, human rights. International law is not static and new criteria against which to assess legal norms can and should be developed where refusal to do so can undermine the international world order and international community goals. Secondly, the invasion of Kuwait by Iraq and the crisis in the Gulf is requiring a reappraisal and reaffirmation of the practical application of Articles 2(4), 51 and Chapter 7 of the United Nations Charter in the post Cold War era. The initial international response to the Iraqi invasion of the sovereign State of Kuwait has been to reinforce the statist orientation of international law.⁵⁶ However among the underlying causes of both the bilateral dispute between Iraq and Kuwait and the wider dispute between Iraq and most of the international community are the continuing consequences of colonialism and the economic importance of oil, matters that undermine the statist model. Iraq's control of vast oil reserves may be a stronger motivating factor for the international community than protection of the sovereignty of Kuwait or Saudi Arabia.⁵⁷ The realisation that many potential causes of international conflict both transcend State boundaries (economic interests, environmental concerns, claims of peoples, the spread of AIDS) and lie within those boundaries (violations of

⁵⁵ See International Labour Conference, Provisional Record, 76th Session, Geneva 1989, text of the Convention Concerning Indigenous and Tribal peoples in Independent Countries, submitted by the drafting committee.

⁵⁶ Eg the international response is markedly different from that to Iraq's treatment of the Kurds.

⁵⁷ Although the Security Council Resolutions condemning the aggression against Kuwait rest upon violations of Kuwait's territorial integrity and political independence, the speed and cohesion of the response may have been influenced more by economic concerns. SC Res 660 2 August 1990; SC Res 661 6 August 1990.

human rights, seizure of and threats to hostages, genocidal regimes) may require a rethinking of the primacy of political independence and territorial integrity within Article 2(4). At the same time the almost unanimous condemnation of Iraq has shown that where there is sufficient incentive within the international community a coherent collective response can be achieved.

It seems that the Cold War analysis of incidents of the use of force that has dominated international law since the late 1940's will no longer be adequate.⁵⁸ If there is to be rethinking on the appropriate norms governing both the collective and unilateral use of force with recognition that threats to other interests than State sovereignty may justify coercive response, it seems that the subordination of women within States or as a result of coercive action should no longer be ignored and regarded as irrelevant. Falk has pointed out that the role of nation States as the "sole legitimate source of law-making and law-applying" is coming under pressure through initiatives taken by "civil society" independent of any State or government authorization. He argues that such initiatives should not be ignored when determining the normative order on the international level.⁵⁹ Within the structure of the international law making process the verdicts of such representatives of the "international civil community" would have to be regarded as expressions of *opinio juris*. In *Nicaragua v the United States* the International Court of Justice gave greater emphasis to the requirement of *opinio juris* as expressed through Resolutions of the General Assembly, even in the face of inconsistent state practice.⁶⁰ The further step that would need to be taken is to find *opinio juris* in the opinions of non-governmental bodies. Falk cites a number of commissions of inquiry and tribunals as examples⁶¹ but interestingly, although perhaps not surprisingly, omits reference to the International Tribunal on Crimes Against Women. This non-governmental Tribunal held in Brussels in 1976 heard evidence from women across the world on the continued oppression of women and the commission of acts of violence against them.⁶² Condemnation of these acts by the tribunal is as valid an expression of peoples' views on the appropriate international normative order as the other examples Falk cites. And,

58 Indeed they never were as is demonstrated by the inclusion of non Cold War justifications of such incidents as the invasion of Grenada and the Falklands/Malvinas.

59 Falk, note 51 above, pp27-31; cf, comments on the "international civil community" thesis by Crawford, "The Rights of Peoples: Some Conclusions", in *ibid* at pp159, 174-175.

60 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, ICJ Rep 1986 p 14 at 99 (Judgment of 27 June).

61 The MacBride Commission to investigate Israel's actions in the 1982 invasion of Lebanon; Permanent Peoples Tribunal established by the 1976 Algiers Declaration on the Rights of Peoples; the 1982 tribunal in Nuremberg organised by the Green Party to investigate the legality of nuclear weapons.

62 Russell D (ed), *Crimes Against Women: The Proceedings of the International Tribunal* (First published Les Femmes 1976; republished Frog in the Well 1984).

as argued earlier, the motivation for taking this step is that acts of violence tolerated within States are too often replicated in the international arena.

It must be acknowledged that inclusion of gender issues in determining norms of international law and in assessing what behaviour is contrary to those norms will pose a major challenge to the prevailing legal notions of authority and sovereignty located in nation States.⁶³ It will require rethinking the sources of international law to take account of practice that is not State generated, with the reservations to such a change that have been expressed, most forcefully by Brownlie.⁶⁴ However the objective of the prohibition of the use of force is the maintenance of international peace and security and the question to be asked about any claim as to the legitimacy of the use of force is whether it will undermine or preserve world order and community goals.⁶⁵ Reisman has argued that mechanical application of Article 2(4) can lead to the continued denial of democracy for some peoples, but again this criticism is made without any reference to gender.⁶⁶ Continued subordination of women cannot be conducive to the achievement of these goals. International law is sufficiently flexible for these issues to be placed on the international legal agenda. All that is needed is the will to tackle some extremely complex and controversial issues.

⁶³ See Halliday, "Hidden from International Relations: Women and the International Arena", (1988) 17 *Millennium* No 3 425-7 for a discussion of the implications and problems of including gender issues in international relations.

⁶⁴ "The elements of the formation of the rules of general international law - international custom - are not some esoteric invention but rather they provide criteria by which the actual expectations and commitments of States can be tested". Brownlie, "The Rights of Peoples in Modern International Law", in Crawford J (ed), *The Rights of Peoples* at p15.

⁶⁵ Reisman, "Coercion and Self-Determination - Construing Charter Article 2(4)", (1984) 78 *AJIL* 642.

⁶⁶ *Ibid.*