

Between rhetoric and reality: exploring the impact of military humanitarian intervention upon sexual violence – post-conflict sex trafficking in Kosovo

Samantha T. Godec

Samantha Godec currently works for a charity providing legal assistance to prisoners facing execution. She previously worked in the International Law Program at Amnesty International, and was formerly a project manager at an NGO working with female victims of sex trafficking in the UK. She holds a Masters in Human Rights Law from the School of Oriental and African Studies, London, and a degree in International Relations and Development Studies from the University of Sussex.

Abstract

Adopting a feminist perspective, this paper analyses the doctrine of humanitarian intervention and its impact on women in recipient states, particularly with regard to sexual violence. By analysing the phenomenon of post-conflict trafficking in Kosovo following the NATO intervention, the author presents a challenge to the ‘feminist hawks’ who have called for military intervention in situations of systematic sexual violence. It is the author’s contention that such intervention would be counterproductive for women’s rights and thus constitute a disproportionate response to sexual violence in terms of the international law governing the use of force.



Following the military interventions in Kosovo and East Timor in 1999, there has been a growth in support for the idea that military force may constitute a legitimate response to genocide, ethnic cleansing, and systematic human rights abuses. This doctrinal shift towards ‘new interventionism’ has been partly attributed to the end of the cold war, during which the Security Council (‘the Council’ or SC) had been unable to exercise its powers under Chapter VII of the UN Charter because of the threat or use of the veto by the five permanent members.¹ Scholars have also highlighted that, since the Gulf War in 1990, the Council has adopted a broad interpretation of ‘threats to the peace’, which fall under the Council’s jurisdiction by virtue of Article 39, Chapter VII of the Charter.² The numerous Council resolutions passed with regard to Yugoslavia, Somalia, Rwanda, Haiti, and East Timor have been interpreted as demonstrating the Council’s increasing willingness to treat humanitarian crises as a threat to international peace and security.³

Amid the surge of support for humanitarian intervention, this article attempts to diverge from mainstream debate and analyse the impact of this doctrine upon women in the recipient states from a feminist perspective. Some feminists have embraced the new doctrine of humanitarian intervention as *lex ferenda*⁴ (contributing in part to its rising acceptance), and have argued for military interventions in response to systematic sexual violence. Such arguments have been made with regard to the situations in Bosnia (1993), Afghanistan (2001), and Iraq (2003), as well as more recently in Sudan and Somalia.⁵ In contrast to these feminist ‘calls for troops’,⁶ this article asserts that such a response would be counter-productive for women’s rights, and disproportionate in terms of the international law governing the use of force.

Following the approach of feminist scholarship, which looks for silences in dominant discourse and seeks to interject alternative voices, this article departs from the mainstream legal and normative discourse surrounding humanitarian intervention to ask some marginalized questions: first, how does military humanitarian intervention directly and indirectly impact upon women’s rights? Furthermore, is military humanitarian intervention a proportionate response to humanitarian crises, including situations of systematic sexual violence? In seeking to answer these questions, this article will consider the recent convergence between (some) feminists and interventionists, and offer a critique of the appropriation of women’s rights to justify military action. It will then offer a contextual basis for its

1 Between 1945 and 31 May 1990, the veto was exercised 279 times. See Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge University Press, Cambridge, 2003, p. 3.

2 Christine Gray, *International Law and the Use of Force*, 3rd edn, Oxford University Press, Oxford, 2008, pp. 1–3.

3 *Ibid.*, pp. 1–3.

4 Not written law, but an emerging legal norm.

5 Catherine MacKinnon, ‘Women’s September 11th: rethinking the international law of conflict’, in *Harvard International Law Journal*, Vol. 47, No. 1, 2006; Karen Engle, ‘“Calling in the troops”: the uneasy relationship among women’s rights, human rights, and humanitarian intervention’, in *Harvard Human Rights Journal*, Vol. 20, 2007, p. 190.

6 This is a term used in Engle, above note 5.

critique by analysing the direct and indirect impacts of military intervention in relation to sex trafficking and forced prostitution in Kosovo. It is the author's contention that the dangers of military interventionism may be demonstrated by adopting a feminist perspective. The article will conclude by evaluating responses to sexual violence at the international level, reflecting upon the wider implications both for the laws on the use of force and for women's rights.

The author is mindful of the potential criticism that it is pessimistic to focus on the 'dark sides'⁷ of one of the few humanitarian practices that exist within international relations, and, furthermore, that it is regressive to criticize feminist calls for humanitarian intervention, which has been hailed by many as a success for women's rights. However, Kennedy encourages us, as scholars of international law, to evaluate that which is seen as virtuous, and to search for the dark sides, blind-spots, and biases of humanitarian practice.⁸ Such an approach also lies at the core of feminist theory, the purpose of which is to look to the margins of mainstream discourse and to expose the blind-spots and biases within dominant narratives.

By analysing the converging relationship between feminists and interventionists, it is evident that the relationship between the two schools has been counterproductive. In exposing the disjuncture between rhetoric and reality in intervention narratives, this article illustrates that the political potency of women's rights is vulnerable to appropriation by 'heroic' governments seeking to liberate female 'victims'. In reality, women's experiences of military intervention have been far from liberating. By simply shifting the focus of the lens, important alternative narratives are revealed. It is imperative that these narratives be included and understood within future debates surrounding intervention.

The emergence of feminist hawks

There are numerous developments within state practice and *opinio juris* to indicate an emerging norm of humanitarian intervention within customary international law. Evidence can be found in the statements issued by the UN Secretary-General in relation to Rwanda and Kosovo, General Assembly resolutions regarding interventions throughout the 1990s, and the general support of the international community with regard to the interventions in Kosovo and East Timor. In the context of Kosovo, for example, widespread consensus asserts that, although NATO's action was illegal under positive law owing to the lack of Security Council authorization,⁹ it could nevertheless be exceptionally condoned on the grounds of

7 David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press, Princeton, 2004, p. xiii.

8 *Ibid.*, p. xix.

9 The only exceptions to the prohibition on the use of force are provided for in Article 51 of the UN Charter, which allows states to exercise self-defence in the event of an 'armed attack', and in Article 42 thereof, which permits the Security Council to authorize the use of force.

humanitarian principles.¹⁰ In response to criticism by legal scholars regarding the dubious legal justifications for NATO's intervention, Secretary-General Kofi Annan stated:

'[T]he genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder ... If ... a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?'¹¹

More recently, the World Summit Outcome Document, 2005, demonstrated a strong commitment from the General Assembly to the 'Responsibility to Protect' (R2P) doctrine, stating that 'we are prepared to take collective action ... through the Security Council ... should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.¹²

Feminist scholars have also seized on the R2P doctrine as an opportunity to draw attention to the systematic abuses of women and to demand a military response. The convergence of feminism with interventionism was notably demonstrated in the case of Bosnia. Engle explains that feminist 'success' in equating Serbian rape policy with acts of genocide provided a huge moral imperative to the international community.¹³ Nesiah describes the partnership between certain feminists and 'military hawks' as forming a 'marriage' of convenience between the two entities that has, since Bosnia, been further demonstrated in justifications for interventions in Afghanistan and Iraq.¹⁴ Drawing on the work of Engle and Nesiah, this article therefore uses the term 'feminist hawks' to refer to this convergence between the two constituents.¹⁵

10 For arguments that the NATO intervention in Kosovo was legitimate on humanitarian grounds, see discussions in Bruno Simma, 'NATO, the UN and the use of force: legal aspects', in *European Journal of International Law*, Vol. 10, No. 1, 1999, p. 22; Antonio Cassese, 'A follow up: forcible humanitarian countermeasures and *opinio necessitatis*', in *European Journal of International Law*, Vol. 10, No. 4, 1999, pp. 791–799; Ruth Wedgwood, 'NATO's campaign in Yugoslavia', in *American Journal of International Law*, Vol. 93, 1999, pp. 826–827; Michael Glennon, 'The new interventionism: the search for a just international law', in *Foreign Affairs*, Vol. 78, No. 3, 1999, pp. 2–7 (arguing that justice can be attained extra-legally).

11 'UN Secretary-General presents his Annual Report to the GA', UN Press release SG/SM/7136 GA/9596, 20 September 1999, available at <http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html> (last visited January 2009).

12 UN General Assembly, *World Summit Outcome Document*, UN Doc. A/RES/60/1, 16 September 2005, p. 31, para. 139, available at <http://www.un.org/summit2005/documents.html> (last visited 24 November 2009).

13 K. Engle, above note 5, p. 2.

14 Vasuki Nesiah, 'From Berlin to Bonn to Baghdad: a space for infinite justice', in *Harvard Human Rights Journal*, Vol. 17, 2004, cited in Engle, above note 5, p. 197.

15 Other terms have been used to refer to feminists who have adopted an agenda of military intervention. Nadia Al Ali and Nicola Pratt, for example, use the term 'imperial feminists' in *What Kind of Liberation? Women and the Occupation of Iraq*, University of California Press, London, 2009.

‘Saving women’ narratives

‘Will the Marines never land for [women]?’¹⁶

The rhetoric employed by advocates of intervention in Bosnia-Herzegovina (1995), and more recently in Afghanistan (2001) and Iraq (2003), demonstrates the increasing incorporation of women’s rights as a justification for military intervention. In Afghanistan, perhaps more prominently than elsewhere, Afghan women, supported by numerous feminists, lent their rhetorical potency to the US Department of State and became the symbolic face of Operation Enduring Freedom: ‘as we drive out the Taleban and the terrorists, we are determined to lift up ... the women and children of Afghanistan, [they] have suffered enough’.¹⁷ The US First Lady, Laura Bush, delivered radio broadcasts drawing attention to the plight of women in Afghanistan: ‘I’m delivering this week’s radio address to kick off a world-wide effort to focus on the brutality against women and children by the al-Qaida terrorist network and the regime it supports in Afghanistan, the Taleban’.¹⁸ At present, support for military intervention in Darfur and the Democratic Republic of Congo continues to increase as media attention focuses on the documentation of systematic rape within these conflicts.¹⁹ From the perspective of radical feminism, this represents a significant victory for women’s rights campaigns that posit women’s sexual vulnerability as the factor to be addressed by feminist politics.

Furthermore, in June 2008, the UN Security Council Resolution (SC Res) 1820, which supplements the Council’s earlier resolution SC Res 1325 on women, peace, and security,²⁰ established a new binding instrument specifically focused on sexual violence in conflict and post-conflict situations.²¹ The passing of this significant resolution indicates that the ‘marriage of convenience’ between women’s rights and military interventionists is now influencing international law.²² Most notably for the present discussion, operative paragraph 1 (OP 1) of SC Res 1820, states that the Council ‘expresses its readiness, when considering situations on the

16 C. MacKinnon, above note 5, p. 22.

17 Voice of America, ‘Bush pledges post-war help to Afghanistan’, 12 December 2001, <http://www1.voanews.com/english/news/a-13-a-2001-12-12-37-Bush-67243592.html?moddate=2001-12-12> (last visited 30 January 2009).

18 Laura Bush, transcript of radio broadcast, 17 November 2001, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=24992> (last visited 23 March 2010).

19 For example, see the Oxfam campaigns in UK national newspapers such as the *Independent* concerning rape in Darfur, and the television commercial *How Will History Judge Us?*, CNN Television, broadcast in October 2006, available at http://www.savedarfur.org/pages/advertising_campaign (last visited 18 December 2009), arguing that history will judge us if we allow rape to continue without our intervention.

20 SC Res 1325 on Women, Peace and Security, S/RES/1325, 31 October 2000.

21 SC Res 1820 on Women, Peace and Security, S/RES/1820, 19 June 2008.

22 Although the Council is not endowed with legislative powers, its resolutions are binding on member states and its statements are interpreted as authoritative. For a discussion on the quasi-legislative nature of the Council, see Michael C. Wood, ‘The interpretation of Security Council resolutions’, in *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 73.

agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence'.²³

What exactly such 'appropriate steps' may entail is not elaborated on in this resolution, but it is certainly inferred by the text of OP 1 that widespread or systematic sexual violence may incite the authorization of force under Article 42. Heathcote points out that most of SC Res 1820 deals with sexual violence as a violation of international humanitarian law (*jus in bello*), whereas OP 1 implies that sexual violence may also fall within the definition of a 'threat to international peace and security', placing sexual violence within the framework of the laws on the use of force (*jus ad bellum*).²⁴ While the political will to invoke such an authorization is substantially lacking, the language of OP 1 indicates that sexual violence may have made its way onto the agenda of the Council as a threat to international peace and security, further broadening the potential scope of Chapter VII authorization for humanitarian intervention.

In addition to the resolution itself, public statements reflect the growing consensus that the R2P doctrine may extend to the realm of women's rights. Condoleezza Rice, in the Council's Debate on Women, Peace and Security that preceded the drafting of SC Res 1820, stated that 'When women and girls are preyed upon, and raped, the international community cannot be silent or inactive. It is our responsibility to be their advocates and their defenders'.²⁵ Secretary-General Ban Ki-Moon in his opening remarks at the debate, urged the Council to adopt resolutions with stronger language on sexual violence, in order that 'the UN can respond more forcefully', which may implicitly denote endorsement of the use of force.²⁶

At a discursive level, key feminist scholars have contributed to fostering a recognition of sexual violence as a security threat worthy of military response. For example, MacKinnon, in her analysis of the paradigmatic shift in approaches to security following the 11 September 2001 terrorist attack on the United States, embraces the emerging R2P doctrine, yet questions why it is not applicable to violence against women, or the 'war on women'.²⁷ MacKinnon recognizes that violence against women does not constitute a conventional 'armed attack'²⁸ and has therefore not been relevant to *jus ad bellum*.²⁹ However, since 9/11 there has, she

23 SC Res 1820, above note 21, operative para. 1, available at http://www.un.org/Docs/sc/unsc_resolutions08.htm (last visited December 2008).

24 Gina Heathcote, 'From Security Council Resolution 1325 to 1820', unpublished manuscript on file with author, 2008, p. 4.

25 Condoleezza Rice, address to the United Nations Security Council thematic debate on women, peace, and security, 19 June 2008, available at http://www.peacewomen.org/un/sc/Open_Debates/Sexual_Violence08/Protection.htm (last visited 23 March 2010).

26 Ban Ki-Moon, 'Remarks to the Security Council meeting on Women, Peace and Security', 19 June 2008, available at http://www.un.org/apps/news/infocus/speeches/search_full.asp?statID=268 (last visited 23 March 2010).

27 C. MacKinnon, above note 5, understands violence against women as inclusive of physical, sexual, and psychological violence.

28 UN Charter, Art. 51.

29 C. MacKinnon, above note 5, p. 5.

argues, been a radical re-conceptualization of the nature of ‘armed attacks’ within international law, which must now be extended beyond terrorism to systematic acts of violence against women; both, she claims, constitute crimes against humanity.³⁰ Feminist hawks such as MacKinnon demand to know why the severe abuses of Afghan women under the Taliban regime were not, in themselves, valid justifications for military intervention: ‘Why ... was their treatment alone, not an act of war or a reason to intervene (including militarily) on any day up to September 10, 2001?’³¹

While MacKinnon is justified in questioning the prioritization of terrorism as a greater security threat, her recommendations that force must be deployed in response to violence against women fail to recognize the impacts of intervention and post-conflict militarization of society upon women. The fundamental assumption underlying her question is that military intervention will ‘save’ these women.³² The following section offers a critique of ‘saving women’ narratives, which presuppose that military intervention will lead to liberation.

Deconstructing ‘saving women’ narratives

It is the author’s contention that ‘saving women’ narratives, as discussed above, are regressive for women’s rights. First, they are based upon the articulation of women as ‘victims’ and dispossess women of their self-determination. This can be seen in the transition from the first Security Council resolution adopted on women, peace, and security, SC Res 1325 of 2000, which focused predominantly on women’s participation, to SC Res 1820 with its narrow focus on women’s sexual vulnerability.³³ Kapur argues that the reliance upon the status of victimhood in an effort to claim rights for women is based upon gender essentialism.³⁴ In this sense, the oversimplified perspective of SC Res 1820 ignores the intersectionality that bears upon women’s experiences, where not only gender but also race, class, ethnicity, and nationality all contribute to experiences of oppression.³⁵ To narrow the focus of women’s experiences down to their shared commonality as women is

30 *Ibid.*, pp. 12–13.

31 *Ibid.*, p. 20.

32 It is these narratives, as presented by MacKinnon, Rice, and Bush, and implied by SC Res 1820, that the author has termed ‘saving women’ narratives, as they all perceive women as victims of oppression in need of a heroic military intervention to liberate them from their oppressors.

33 G. Heathcote, above note 24. For further analysis see Sam Cook, ‘Security Council Resolution 1820: a move to end sexual violence in conflict’, 2008, available at http://www.peacewomen.org/un/sc/Open_Debates/Sexual_Violence08/PeaceWomenAnalysis.pdf (last visited 18 December 2009).

34 Gender essentialism is the attributing of fixed, essential characteristics to women that are shared universally on the basis of sex. See Ratna Kapur, ‘The tragedy of victimization rhetoric: resurrecting the native subject in international/postcolonial feminist legal politics’, in *Harvard Human Rights Law Journal*, Vol. 15, 2002, p. 5.

35 See Marlee Kline, ‘Race, racism, and feminist legal theory’, in *Harvard Women’s Law Journal*, Vol. 12, 1989, p. 115, for a critique of MacKinnon’s ‘dominance feminism’.

to ignore the complexity of the wider context and falsely reduce women's experiences.

The victim/agency dichotomy creates an inaccurate lens through which to understand women's experiences and provokes an endless debate. Women are not simply one or the other. Agents, whether of change or of warfare, may also be victims of sexual violence or affected by it in some way. In fact, experiences of victimization may invoke agency. Victimhood and agency, violence and participation, are inextricably linked. SC Res 1325 and 1820 therefore need to be applied holistically, not dealt with as two distinct resolutions.

Secondly, 'saving women' narratives are premised upon a notion of cultural essentialism, portraying non-Western women as victims of their culture. As interventionists observe the victimized 'Other' through the neo-colonial lens, they adopt the stance of an 'arrogant perceiver'.³⁶ This 'arrogant perception' 'reinforces stereotypes and racist representations of that culture and privileges the culture of the West', while wholly ignoring the influence of colonialism, dominant racial regimes or religions, and cultural hegemonies.³⁷ Kapur warns scholars to show caution with regard to narratives reminiscent of imperialist intervention that incite protectionist responses from states. Furthermore, these protectionist responses, invoked by the violence against women discourse, are counter-productive to the promotion of women's rights.³⁸ This will be demonstrated below in the analysis of the case of Kosovo.

It is the popular acceptance of 'saving women' narratives that forms the preface of the 'heroic' intervention story. Drawing upon feminist and post-colonial theories, Orford suggests that interventionist narratives 'create a powerful sense of self for those who identify with the hero of the story'.³⁹ Orford argues that these interventionist narratives produce subjects that are dependent upon sexual and racial differentiation, depicting the Western white male as the hero and defender of the non-Western, non-white female.⁴⁰ The 'heroic' narrative is therefore wholly reliant upon the construction of female victimhood and the illusion that women need 'saving'. Fanon's theory of racial differentiation can be transcribed onto sexual differentiation in the sense that 'not only must the [hero] be a [hero]; he must be a [hero] in relation to the [female victim]'; the 'hero' must also be positioned in the narrative as the antithesis of the 'rogue' state or oppressor.⁴¹ The interdependency of these narratives serves to reinforce racist and sexist perceptions of the subjects, simultaneously denying women's agency and promoting the 'heroes' of the story as the agents of change.

36 Term coined by Marilyn Frye, cited in Stanlie M. James, 'Listening to other(ed) voices: reflections around female genital cutting', in Stanlie M. James and Clare C. Robertson (eds.), *Genital Cutting and Transnational Sisterhood: Disputing US Polemics*, University of Illinois Press, Urbana, 2002, pp. 87–113.

37 R. Kapur, above note 34, p. 6.

38 *Ibid.*, p. 6.

39 Anne Orford, 'Muscular humanitarianism: reading the narratives of the new interventionism', in *European Journal of International Law*, Vol. 10, No. 4, 1999, p. 679.

40 *Ibid.*, p. 672.

41 Franz Fanon, cited in Orford, above note 39, p. 5.

Finally, 'saving women' narratives remain unsubstantiated beyond the rhetoric. When one considers how intervention has impacted on women in recipient states, it is beyond dispute that such a strategy is counterproductive. By shifting the focus away from 'heroic' rhetoric, and by focusing instead upon the effects of military intervention upon women in Kosovo, the following analysis presents a significant challenge to the interventionist standpoint.⁴²

The NATO intervention in Kosovo

Background

The conflict in Kosovo dates back centuries, mainly to the Battles of Kosovo in the fourteenth century, which continue, to this day, to arouse nationalist tensions between the Serbian and Albanian populations. In 1946, Kosovo was absorbed into Serbia, although it was given autonomous status as a concession to the demands of the Albanian majority. In 1963, Kosovo became an autonomous province and, the following year, under Tito's constitution, was granted virtual self-government.⁴³ However, after Tito's death the 1980s were characterized by a climate of fear and systematic discrimination as violence between the two ethnic groups escalated.⁴⁴ In 1989, Slobodan Milosevic, President of the Socialist Federal Republic of Yugoslavia, asserted that the Serb minority in Kosovo was at significant risk and revoked Kosovo's autonomy. This enabled the government of Serbia to exert direct control over the previously self-governed areas and to impose ethnically based, centralized rule. In response, a resistance movement, the Kosovo Liberation Army, was formed and engaged in hit-and-run attacks on Serb forces. In turn, the Serbian army carried out large-scale frequent military attacks, and by 1998 some 200,000 Kosovar Albanians had been displaced.⁴⁵

The treatment of the Kosovar Albanians was denounced by the international community as ethnic cleansing. The Council passed Resolution 1199 (1998) requiring Belgrade to allow international monitors to observe the situation

42 What is interesting about the case of Kosovo is that, unlike those of Bosnia, Afghanistan, and Iraq, there was no strong 'saving women' narrative put forward by the international community; the emphasis was on the ethnic cleansing of the Albanian population as a whole, despite the systematic use of rape by the Serb forces as a feature of ethnic cleansing. One possible explanation for the lack of women's rights rhetoric may be as follows: given the strength of ethnic solidarity among the Albanian population in Kosovo, to admit sexual abuse by the enemy is to undermine the solidarity of the national group, to risk rejection, and to foreground gender identity over national identity. See Jayne Rodgers, 'Bosnia and Kosovo: interpreting the gender dimensions of international intervention', in Colin McInnes and Nicholas J. Wheeler (eds.), *Dimensions of Western Military Intervention*, Frank Cass Publishers, 2002, p. 189.

43 R. Wedgwood, above note 10, p. 828.

44 *Ibid.*

45 *Ibid.*, p. 829.

in Kosovo, and to withdraw security forces used for civilian repression.⁴⁶ In January 1999, negotiations between the Kosovar Albanians and Serbs were held by the ‘Contact Group’⁴⁷ in Rambouillet, France. The purpose of these negotiations was to establish a political framework for Kosovo’s autonomy, following a three-year interim period.⁴⁸ In order to guarantee compliance, the Contact Group demanded that NATO be allowed to operate in the Federal Republic of Yugoslavia (FRY). The Kosovar Albanians consented to the conditions set out by the Contact Group; the FRY remained intransigent.

The NATO intervention in Kosovo

On 24 March 1999, after diplomatic efforts failed to halt the ethnic cleansing of Kosovar Albanians by Serbian forces, NATO began a seventy-eight-day bombing campaign against Serbia. NATO did not receive the authorization required from the Council under Chapter VII of the UN Charter,⁴⁹ nor did its actions constitute self-defence as provided for under Article 51 thereof, which refers explicitly to the occurrence of an ‘armed attack’ against a sovereign entity.⁵⁰ Despite this, NATO Secretary General Solana declared ‘that NATO saw sufficient factual and legal grounds to threaten the use of force, and if necessary, to use force’.⁵¹

While the majority of international lawyers and scholars concede that the intervention was illegal,⁵² there are a number of liberal scholars who argue that on the contrary it was legal,⁵³ as well as others who hold that it could at least be condoned on humanitarian grounds.⁵⁴ Those who provide a critique of the intervention do so either on positivist legal grounds or by setting out the underlying

46 SC Res 1199, para. 4(a) and (b).

47 The Contact Group consisted of the United States, the United Kingdom, France, Germany, Italy, and Russia.

48 R. Wedgwood, above note 10, p. 829.

49 Although the Security Council passed three resolutions on the situation in Kosovo prior to the NATO intervention – SC Res 1160, 1199, and 1203 – not one of these resolutions authorized the use of force.

50 For a discussion of this, see Peter Hilpold, ‘Humanitarian intervention: is there need for a legal re-appraisal?’, in *European Journal of International Law*, Vol. 12, No. 3, 2001, p. 450.

51 Javier Solana, cited in *ibid.*, p. 440.

52 E.g. Jonathan Charney, ‘Anticipatory humanitarian intervention in Kosovo’, in *Vanderbilt Journal of Transnational Law*, Vol. 32, No. 5, 1999; Christine Chinkin, ‘Kosovo: a “good” or “bad” war?’, in *American Journal of International Law*, Vol. 93, No. 4, 1999, pp. 841–847; Louis Henkin, ‘Kosovo and the law of “humanitarian intervention”’, in *American Journal of International Law*, Vol. 93, No. 4, 1999, pp. 824–828; P. Hilpold, above note 50; B. Simma, above note 10; R. Wedgwood, above note 10.

53 This case has been made by referring to the possible loopholes in Art. 2(4) of the UN Charter, wider interpretations of the concept of self-defence, and/or the development of customary international law regarding humanitarian intervention. See Anthony D’Amato’s defence of NATO in Jianming Shen, ‘The non-intervention principle and humanitarian interventions under international law’, in *International Legal Theory*, Vol. 7, No. 1, 2001, p. 15; and M. Glennon, above note 10.

54 See B. Simma, above note 10; M. Glennon, above note 10; A. Cassese, above note 10; J. Shen, above note 53; and Fernando R. Teson, ‘The liberal case for humanitarian intervention’, FSU College of Law, Public Law and Legal Theory Working Paper, No. 39, 2001.

non-humanitarian motivations.⁵⁵ Proportionality considerations are generally sidelined, except by Chinkin, who contends that the intervention was disproportionate (in terms of *jus ad bellum*) because it ultimately failed to end the human rights abuses.⁵⁶ However, not one of these mainstream critiques considers the impact on women. Drawing upon evidence collated by non-governmental organizations (NGOs), UN agencies, and journalists, the following section considers the effects of the intervention upon women, in particular the increase in sex trafficking and forced prostitution, before discussing the legal implications for international law on the use of force.

Sex trafficking and prostitution in Kosovo⁵⁷

Since the deployment of the UN Kosovo Force (KFOR), in July 1999, alongside the establishment of the UN Mission in Kosovo (UNMIK), Kosovo has become a major destination country for the trafficking of women and girls into the sex industry.⁵⁸ The majority of women are trafficked from the neighbouring countries of Moldova, Bulgaria, and Ukraine, mainly via routes through Serbia. More recently, however, there has been a surge in internal trafficking of local women and girls and trafficking both into and out of Kosovo, facilitated by porous borders and weak visa regimes.⁵⁹ While Kosovo appears to have had a non-existent sex industry prior to 1999, reports show that, by July 2003, over 200 locations exploiting trafficked women were identified by UNMIK and the Organization for Security and Co-operation in Europe.⁶⁰

This phenomenon is a result of a number of interrelated consequences of intervention that will be analysed below. First, the sudden presence of military

55 For positivist legal arguments, see P. Hilpold, above note 50; for an analysis of the non-humanitarian motivations behind the intervention, see Daniel Zolo, *Invoking Humanity: War, Law and Global Order*, Continuum, London, 2002.

56 C. Chinkin, above note 52, p. 845.

57 Although I choose to focus on sex trafficking and forced prostitution, there were many other prolific forms of sexual violence that took place in Kosovo directly after the NATO intervention. Human Rights Watch, for example, reports on the escalation of rape during the bombing campaign, which most commonly took place as women fled in refugee convoys, in women's homes, in abandoned buildings. See J. Rodgers, above note 42, p. 189.

58 Trafficking is defined under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'. All further references to trafficking relate specifically to trafficking in women and children for forced prostitution and sexual exploitation.

59 'Kosovo (Serbia and Montenegro): "So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo', in *Amnesty International Report*, 2004, p. 1.

60 *Ibid.*

personnel created an immediate increase in demand for sexual services in a region with previously negligible demands. Secondly, the post-intervention militarization of Kosovo sustained this demand and fostered an environment where organized criminal networks could reap substantial profits. Thirdly, the disruption of society and the economy resulted in increased numbers of vulnerable women and girls in need of remuneration, thereby creating the supply for a burgeoning sex industry. Finally, the failure of UNMIK to adequately address the problem of trafficking allowed for a culture of impunity to prevail.

Enter the heroes

During the latter half of 1999, around 40,000 KFOR troops were deployed to Kosovo, along with hundreds of UNMIK personnel and more than 250 international non-governmental organizations.⁶¹ Within months of their arrival, brothels had been established around the military bases and Kosovo had become a major destination country for trafficked women; a small local trade in prostitution became a flourishing industry based on trafficking by organized criminal networks.

A study conducted by the UN Development Fund For Women (UNIFEM) in 1999 identified eighteen main locations for prostitution. These included brothels in the Gnjilane area, predominantly servicing US military personnel; Prizren, where clients were mainly German KFOR soldiers; Pejë, servicing Italian KFOR soldiers; and Mitrovicë, where clients were largely French KFOR soldiers.⁶² By January 2001, the number of brothels had grown to approximately 75, and by January 2004 over 200 locations harbouring trafficked victims had been identified.⁶³

In February 2000, the International Organization for Migration (IOM) publicly recognized KFOR and UNMIK staff as a significant factor in the increase of trafficking and prostitution.⁶⁴ The IOM also acknowledged that the trafficking industry was fuelled by Kosovo's proximity to source countries with established routes to European Union countries via Albania, as well as by co-operation among Serbian, Albanian, and Macedonian criminal networks.⁶⁵ Furthermore, the sudden international presence stimulated economic growth through the resultant increase of foreign money in the region. This meant that certain sections of the Kosovar population experienced a rise in prosperity and hence that the local population was given the possibility, which they may not have had before the intervention, of purchasing sexual services.

61 *Ibid.*, p. 6.

62 UNIFEM, 'No safe place: an assessment of violence against women in Kosovo', 2000, pp. 94–95, available at <http://www.iknowpolitics.org/en/node/50> (last visited 23 March 2010).

63 These premises were documented by UNMIK and published in an off-limits list, which was issued to all UNMIK staff. For more information see UNMIK Trafficking and Prostitution Investigation Unit end of year report, 2003, cited in 'Kosovo', above note 59, p. 8.

64 *Ibid.*

65 *Ibid.*

A hero's welcome

'The problem is that nobody considers the need for brothels in the German contingent. The Americans and the French ... have their army brothels. I'm not trying to say that the prostitutes have to come over from America or France, but ...'⁶⁶

While the traffickers proved more prescient than the international community in anticipating the market for trafficked women and girls, they also recognized that years of conflict, displacement, and trauma had left many women across the Balkans particularly vulnerable, such as those living in refugee camps in Macedonia and Albania.⁶⁷ The disruptions in the economy caused by the NATO intervention also led to greater numbers of unemployed women in need of some form of remuneration; these women and girls were to become the supply for the new market opportunities.⁶⁸

According to the UNMIK Trafficking and Prostitution Investigation Unit (TPIU) set up to combat trafficking in Kosovo, around 90% of women working in prostitution there have been trafficked.⁶⁹ While women trafficked from abroad are often led to believe that they are migrating for legitimate employment, NGOs report that increasing numbers of Kosovar women are being abducted by force and trafficked internally – the majority of them are girls from families displaced by conflict.⁷⁰ Kosovar women and girls also face increased risk of being trafficked out of Kosovo, most commonly to Italy or to ethnic Albanian areas of Macedonia.⁷¹

Trafficked women and girls interviewed by NGOs and journalists in Kosovo have provided firsthand evidence that the demand is predominantly fuelled by international peacekeepers. In an interview with the BBC, 'Monica'⁷² discusses her client profiles: 'most of them were Americans and Germans Of course, I appealed to them for help ... but all of them said that they would get into trouble if they helped'.⁷³ A Bulgarian woman interviewed by Amnesty explains that 'Germans came ... even after their commander did forbid that. They said they would get in a lot of trouble. They told the pimp that if someone would be coming he should alarm them ... the pimp employed a guardian'.⁷⁴

66 Interview with German KFOR soldier, Inge Bell Archive, cited in 'Kosovo', above note 59, p. 51.

67 UNIFEM report, above note 62, p. 24.

68 *Ibid.*, p. 16.

69 Its data indicate that 48% of trafficked women originate from Moldova, 21% from Romania, 14% from Ukraine, 6% from Bulgaria, and 3% from Albania.

70 According to a local NGO, the Centre for the Protection of Women and Children, 81% of the internally trafficked victims whom they assisted between 2000 and 2002 were under the age of 18, and 32% were between 11 and 14 years old. See 'Kosovo', above note 59, p. 19.

71 *Ibid.*

72 Woman trafficked from Romania to Kosovo after being sold by her boyfriend.

73 'Boys will be boys', 14 June 2002, available at <http://news.bbc.co.uk/1/hi/programmes/correspondent/2043794.stm> (last visited 23 March 2010). For a critique of personal narratives of trafficked women, see Jo Doezema, 'Loose women or lost women? The re-emergence of the myth of "white slavery" in contemporary discourses of "trafficking in women"', in *Gender Issues*, Vol. 18, No. 1, 2000, pp. 23–50.

74 Bulgarian woman trafficked to Macedonia, interviewed in 2001, Inge Bell Archive, in 'Kosovo', above note 59, p. 50.

The armour of impunity

‘It is absolutely essential that all U.N. forces are held to the same standards of international human rights law as nation states ... to do otherwise, creates a climate of impunity in which offences proliferate.’⁷⁵

The militarization of a society has been linked to increased impunity for gender-based violence – the greater the military presence, the greater the possibility that men may violate women without consequences.⁷⁶ This theory is substantiated by evidence found in Kosovo. Despite the eventual recognition by UN agencies that peacekeeping personnel were both complicit in facilitating trafficking and in using the services of trafficked victims, little action has been taken to address these crimes.

As the interim administration in Kosovo, UNMIK was legally responsible for taking effective action against those suspected of involvement in trafficking. Under Article 6 of the Convention on the Elimination of Discrimination against Women (CEDAW), as well as General Recommendation 19 on violence against women by the Committee for the Elimination of Discrimination against Women,⁷⁷ UNMIK is required to exercise ‘due diligence to prevent, investigate and ... punish acts of violence against women, whether those acts are perpetrated by the state or by private persons’.⁷⁸

To date, however, UNMIK’s record of dealing with trafficking cases has been far from diligent. It did not take any decisive action on trafficking until November 2000, when it established the TPIU as a division of UNMIK police.⁷⁹ Until January 2001, trafficking was subsumed under the FRY and Serbian Criminal Codes, particularly Article 251 – dealing with ‘intermediation in the exercise of prostitution’ – and Article 18(8) of Kosovar law, which established the minor offence of intermediating in prostitution or forcing another into prostitution.⁸⁰ The absence of a codified law on trafficking meant that trafficked women involved in

75 Special Rapporteur on Violence against Women, April 2001, address to UN Human Rights Council, cited in *ibid.*, p. 39.

76 Madeleine Rees, ‘International intervention in Bosnia-Herzegovina: the cost of ignoring gender’, in Cynthia Cockburn and Dubravka Zarkov (eds.), *The Post-War Moment: Militaries, Masculinities and International Peacekeeping*, Lawrence and Wishart, London, 2002, p. 66.

77 CEDAW, Art. 6, 1979, and General Recommendation 19 on Violence against Women (11th session, 1992), UN Doc. A/47/38.

78 ‘Kosovo’, above note 59, p. 6. Although UNMIK is not a state party to CEDAW, as the interim authority in Kosovo at that time it was bound by international legal standards. UNMIK Regulation 1999/24 on the Law Applicable in Kosovo, 12 December 1999, states that some, but not all, international human rights standards and laws apply in Kosovo. Section 1.3 of the regulation states that: ‘In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in: (f) The Convention on Elimination of All Forms of Discrimination against Women of 17 December 1979’.

79 ‘Kosovo’, above note 59, p. 23.

80 *Ibid.*, p. 6.

prostitution were being dealt with as criminals, whereas trafficking crimes were not being punished. By February 2001, only four persons had been convicted under Article 251 for 'intermediation into prostitution'.⁸¹

In January 2001, the Special Representative of the UN Secretary-General introduced UNMIK Regulation 2001/4,⁸² which criminalizes the acts of engaging in trafficking,⁸³ organizing and facilitating trafficking,⁸⁴ and withholding identity documents of trafficked women.⁸⁵ Significantly for the purpose of this analysis, Regulation 2001/4 also addresses the demand side by making it a crime to knowingly use the services of a trafficked person.⁸⁶ A further vital development incorporated in it is the recognition that trafficked persons must not be treated as criminals for their involvement in prostitution or other illegal activities.⁸⁷

Although the promulgation of this regulation marked a positive development in addressing impunity of the domestic population, it did not address impunity among the international personnel. UNMIK and KFOR personnel⁸⁸ are protected from prosecution in Kosovo by immunity granted under UNMIK Regulation 2000/47.⁸⁹ UNMIK personnel may only be prosecuted if a waiver is granted by the UN Secretary-General, while KFOR personnel's immunity may only be waived by the head of the national regiment.⁹⁰ The Ombudsperson Institution in Kosovo has criticized the regulation as being 'not in accordance with the law', particularly with regard to its failure to protect individuals in Kosovo against arbitrary conduct by KFOR or UNMIK personnel.⁹¹

Despite the establishment of the TPIU and the promulgation of Regulation 2000/47, law enforcement has been weak and criminal justice proceedings scarce. Amnesty International suggests that lack of training and consultation with local judiciary has led to problems with interpretation and implementation of this law, including the failure to correctly identify trafficked women and to provide adequate support, and the continuation of arrests, prosecutions, and deportations of trafficked women for border violations or on prostitution charges.⁹² While scores

81 *Ibid.*, p. 23.

82 UNMIK Regulation 2001/4 on the Prohibition of Trafficking in Persons in Kosovo.

83 *Ibid.*, Section 2.1. Penalties of two to twelve years' imprisonment, and up to fifteen years' imprisonment for trafficking of a minor (Section 2.2).

84 *Ibid.*, Sections 2.3 and 2.4. Penalties of five to twenty years' imprisonment.

85 *Ibid.*, Section 3, cited in 'Kosovo', above note 59, p. 24.

86 UNMIK Regulation 2001/4, above note 82, Section 4.1. Sentences range from six months' to five years' imprisonment. Cited in 'Kosovo', above note 59, p. 24.

87 UNMIK Regulation 2001/4, above note 82, Section 8.

88 This includes all contractors working for both these establishments.

89 'On the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo', 18 August 2000.

90 KFOR personnel are not accountable either to UNMIK or to the Provisional Institutions of Self-Government: see 'Kosovo', above note 59, p. 9.

91 It was also criticized in relation to the European Convention on Human Rights, with regard to its inaccessibility to the public and its unclear provisions. See Ombudsperson's Special Report No. 1, available at http://www.stopvaw.org/UN_Peacekeeping_Missions.html (last visited January 2009).

92 In 2002 for example, around 100 foreign women were arrested by the TPIU, 22 of them on charges of prostitution, 25 for the possession of false documents, 22 for illegal border crossing, and 10 for soliciting or procurement. See 'Kosovo', above note 59, p. 25.

of women have continued to face charges of prostitution and related offences, there have been very few charges laid against men who knowingly used the services of trafficked women.⁹³ Despite the growing demand for trafficked women, demonstrated by the staggering increase in illicit premises from 1999 to 2003, alongside the TPIU finding that 90% of sex workers in Kosovo have been trafficked, not a single prosecution has been brought under Section 4 of the Trafficking Regulation.

Weak law enforcement and lack of political will are further consolidated by some affected women's acceptance of the 'heroic' narrative. This has resulted in trafficked women and girls being reluctant to give evidence against the peacekeepers. When the Rural Women's Network approached women's organizations to hold a round table on prostitution and sexual harassment, many were reticent, stating that they 'do not agree to discuss topics which will offend the internationals'.⁹⁴

Responses at the international level

'... if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law'⁹⁵

Response at the international level has been just as weak as activity on the ground. In 2002, the UN Secretary-General submitted a report to the Council pursuant to SC Res 1325, in which he tentatively acknowledged that 'there is *some* evidence that prostitution increases with international intervention. In some instances, peacekeeping personnel *may* have condoned the establishment of brothels and been complicit in the trafficking in women and girls'.⁹⁶ The Secretary-General emphasized the responsibility of member states to prosecute their nationals, as status-of-forces agreements⁹⁷ accord exclusive jurisdiction to the contributing member state in the event that one of its nationals commits a crime during a peacekeeping operation.⁹⁸ The report also reaffirms Article 101(3) of the Charter, which requires

93 This is criminalized under Section 4 of the Trafficking Regulation. It is also important to note that private military contractors such as those contracted by the US agency Dyncorp are even less likely to face charges, because they are not accountable to the US government but to the private company. One private contractor working for KFOR was arrested in October 2003, but was dismissed and repatriated; no criminal proceedings were brought against him. *Ibid.*, p. 26.

94 UNIFEM report, above note 62, p. 24.

95 Report of the UN Secretary-General to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, para. 33.

96 'Women, peace and security', study submitted by the Secretary-General pursuant to Security Council Resolution 1325, 2000, UN publication, 2002, para. 268 (emphasis added).

97 These agreements are signed by the UN, the host state, and the contributing state.

98 'Women, peace and security', above note 96, p. 85, para. 271. With reference to the Secretary-General's emphasis on member states' responsibility, consideration of the low level of conviction rates for sexual offences in the UK (only 5.7% of reported rape cases result in a conviction) shows that member states may not be effective with regard to the prosecution of sexual offences perpetrated by peacekeeping personnel and suggests that such personnel may be best investigated and prosecuted in a forum with greater international accountability.

all UN staff to uphold the highest standards of integrity, and the UN peacekeepers' Code of Conduct, which states that peacekeepers must not 'indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children'.⁹⁹ The Code of Conduct has, however, been criticized by many experts as largely ineffective,¹⁰⁰ and the Assistant Secretary-General for Peacebuilding Support, Jane Holl Lute, has acknowledged the difficulties in unifying 103 troop-contributing countries under one code.¹⁰¹

Some small progress has been made in dealing with impunity relating to sexual exploitation. In March 2002, the UN established the IASC Task Force,¹⁰² whose mandate was to develop definitions of sexual exploitation and abuse and produce codes of conduct.¹⁰³ In October 2003, the Secretary-General issued a bulletin that emphasized that misconduct in the form of sexual exploitation would be subject to disciplinary measures and dismissal.¹⁰⁴ In 2004, he appointed an Adviser on Sexual Exploitation and Abuse by UN Peacekeeping Personnel, who subsequently issued a report detailing strategies for eliminating sexual exploitation within UN peacekeeping missions.¹⁰⁵ In response to large-scale exploitation in the Democratic Republic of Congo in 2004, the Secretary-General reinforced a zero-tolerance policy: 'We cannot tolerate even one instance of a United Nations peacekeeper victimizing the most vulnerable among us. ... The basic policy is clear: zero tolerance of sexual exploitation and abuse of any kind'.¹⁰⁶

99 UN, 'Ten rules code of personal conduct for blue helmets', available at <http://ocha.unog.ch/ProCapOnline/docs/library/UN%20Blue%20Helmets%20Codes%20of%20Conduct.pdf> (last visited 16 March 2010).

100 For example, when new brothels are established that have not yet been included in the 'off limits' list, then a peacekeeper visiting this establishment will not be held accountable. See John T. Picarelli, *Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program*, report of conference held by the Transnational Crime and Corruption Center and the UN Interregional Crime and Justice Research Institute, Turin, Italy, 9–10 May 2002, p. 16, available at http://policy-traccg.gmu.edu/publications/TIP&PKO_EWG_Report_Final.pdf (last visited 18 December 2009).

101 Ms Lute explained that there are 103 troop-contributing countries, each with different laws, social values, and varying criminal justice systems, which makes it very difficult to reach a consensus on a unified Code of Conduct. See Michael Fleshman, 'UN takes tough line against peacekeeper abuses', in *Africa Renewal*, Vol. 19, No. 1, 2005, p. 16.

102 Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises.

103 See the website of the UN Office for the Coordination of Humanitarian Affairs (OCHA) at <http://ochaonline.un.org/> (last visited 18 December 2009). The IASC task force was later replaced by the Task Force on Protection from Sexual Exploitation and Abuse, of the Executive Committees on Humanitarian Affairs and on Peace and Security (ECHA/ECPS) in 2005.

104 Secretary-General's Bulletin, 'Special measures for protection from sexual exploitation and sexual abuse', ST/SGB/2003/13, 9 October 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=451bb6764&page=search> (last visited 23 March 2010).

105 Zeid Report, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations', A/59/710, 2005, available at http://www.stimson.org/fopo/pdf/Prince_ZeidRpt.pdf (last visited 18 December 2009).

106 Letter from the Secretary-General to the President of the Security Council, S/2005/79, 9 February 2005, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/233/27/PDF/N0523327.pdf?OpenElement> (last visited 18 December 2008).

This has been supplemented by a strong discouragement of *all* forms of sexual behaviour, including consensual relations,¹⁰⁷ and a more recent focus on victim protection.¹⁰⁸

Despite this progress, allegations of sexual exploitation and abuse continue to be brought against international peacekeepers.¹⁰⁹ The prevailing problem is the lack of accountability of military personnel. In the 2007 Secretariat Report, which addresses criminal accountability of UN officials and experts on mission, the Secretariat expressed concern that if contributing states ‘have not extended the operation of their criminal laws to apply to crimes committed in the host State – then there is a jurisdictional gap and the alleged offender is likely to escape prosecution’.¹¹⁰ The report therefore recommends the promulgation of a convention that would extend the jurisdiction of member states to cover crimes committed by all UN personnel. However, the Secretariat upholds the exclusion of military personnel, reaffirming the exclusive jurisdiction of the contributing state with regard to its military and thus preserving the jurisdictional gap and perpetuating impunity.¹¹¹

107 ‘Sexual relations between UN personnel and their beneficiaries of assistance are strongly discouraged because they are based on inherently unequal power dynamics’: Secretary-General’s Bulletin, ‘Special measures’, above note 104, Section 3.2(d). For a critique of the UN’s zero-tolerance policy, see Dianne Otto, ‘Making sense of zero tolerance policies in peacekeeping sexual economies’, draft chapter for Vanessa Munro and Carl F. Stychin (eds.), *Sexuality and the Law: Feminist Engagements*, Glass House Press, London, 2007, p. 3, available at http://cigi.anu.edu.au/cigi/link_documents/Survival_Sex.pdf (last visited 23 March 2010); ‘Zero tolerance is the wrong response to the complex set of circumstances that give rise to survival sex economies because it is driven by “sexual negativity” (Rubin, 1984: 278) rather than by the desire to address the underlying human rights and social justice issues’.

108 For example, in September 2007 the Special Committee on Peacekeeping Operations called for the protection of and assistance to all victims of sexual exploitation by UN personnel: Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 Substantive Session, New York, 28 February–16 March and 23 May 2007, Doc. A/61/19, Part II, para. 71. Subsequently, in March 2008, the UN General Assembly passed Resolution 62/214, outlining a ‘Comprehensive strategy on assistance and support to victims of sexual exploitation and abuse by United Nations staff and related personnel’ (A/RES/62/214). In addition, a number of toolkits and other materials have been produced by the UN Department of Peacekeeping Operations, OCHA, and UNICEF for the training of UN peacekeepers. See e.g. the training film *To Serve with Pride*, available at http://www.un.org/en/peacekeeping/video_english.shtml (last visited 23 March 2010).

109 OCHA statement at <http://www.ochaonline.un.org>.

110 Note by the Secretariat on Criminal accountability of United Nations Officials and Experts on Mission, 2007, A/62/329, Section II (B) para. 17, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/502/05/PDF/N0750205.pdf?OpenElement> (last visited 18 December 2009).

111 *Ibid.*, p. 2. Interestingly, operative para. 4 of SC Res 1820 ‘stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes’. Even the Trafficking in Persons (TIP) report overlooks the problem of impunity. The TIP Report, produced by the US State Department (self-appointed ‘trafficking watchdog’), lists Kosovo as a ‘special case’ rather than ranking it under the tier system. The report praises the work of the Kosovo Police Service in carrying out brothel closures and ensuring good conviction rates of domestic traffickers, while dismissing the involvement of international personnel in trafficking offences, owing to the lack of prosecutions: ‘While there were reports of some officials’ involvement in trafficking, particularly in the area of employment contract registration, there were no reported prosecutions or convictions of any such officials’ (TIP Report, US Department of State, 2008, p. 273, ‘Special cases’, Kosovo).

Undermining the heroic narrative

Such a phenomenon cannot be dismissed from assessments regarding the proportionality of military intervention; the scale of trafficking in women and girls constitutes one of the most severe forms of human rights violations, defined by some as a crime against humanity, and included in the Rome Statute of the International Criminal Court (ICC) as one of the most serious crimes.¹¹² It has also been argued, based on the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, that sexual violence constitutes a violation of *jus cogens*.¹¹³ Moreover, states are under an obligation to suppress trafficking and exploitation of prostitution.¹¹⁴ Trafficking also violates the right to liberty and security of the person (International Covenant on Civil and Political Rights (ICCPR), Article 9; European Convention on Human Rights (ECHR), Article 5); rights to freedom of movement (ICCPR, Article 12), rights to privacy and family life (ECHR, Article 8; ICCPR, Article 17); and the right to be free from inhuman or degrading treatment (ICCPR, Article 7; ECHR, Article 3; Un Convention on the Rights of the Child, Article 37).¹¹⁵ In addition, trafficking violates the right to freedom from slavery, enshrined in the Trafficking Protocol,¹¹⁶ ICCPR, Article 8(1); ECHR, Article 4; the African [Banjiul] Charter on Human and Peoples' Rights (ACHPR), Article 5; the American Convention on Human Rights (ACHR), Article 6; the International Labour Organization Convention (105) on the Abolition of Forced Labour; and Article 1(a) of the Convention supplementary to the Slavery Convention.¹¹⁷ Furthermore, the authorities' failure to identify victims of trafficking and subsequent repatriation of them to their country of origin, where they are vulnerable to re-trafficking, may violate the principle of *non-refoulement*¹¹⁸ and by extension make that state responsible for a violation of the right to be free from torture.¹¹⁹ By creating and sustaining demand for an industry that violates the prolific number of rights listed

112 'Kosovo', above note 59, p. 2.

113 Kelly D. Askin, 'Holding leaders accountable in the International Criminal Court (ICC) gender crimes committed in Darfur', in *Genocide Studies and Prevention*, Vol. 1, No. 1, 2006, p. 349.

114 CEDAW and UN Convention on the Rights of the Child (CRC): 'States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women', CEDAW, Art. 6; 'States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: a) The inducement or coercion of a child to engage in any unlawful sexual activity; b) The exploitative use of children in prostitution or other unlawful sexual practices; c) The exploitative use of children in pornographic performances and materials', CRC, Art. 34; 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form', CRC, Art. 35.

115 'Kosovo', above note 59, pp. 4–5.

116 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 2000.

117 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Art. 1(a); 'Kosovo', above note 59, p. 18.

118 Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3.

119 ECHR, Art. 3; ACHR, Art. 5(2); ACHPR, Art. 5. See 'Kosovo', above note 59, p. 5.

above, and on some occasions by directly facilitating trafficking, international peacekeepers have dispelled one system of abuse under Milošević only to replace it with another system of abuse under their own ‘protection’. The ‘heroes’ of the story have failed to fulfil the rhetorical promises to ‘save women’ and have instead undermined the very purpose for which military action was taken.

By creating and sustaining a market for sex trafficking, military intervention justified in the guise of humanitarian action thus subverts the ‘heroic’ narratives asserted by feminist hawks and interventionists. In the case of Kosovo, intervention merely replaced a system of ethnic cleansing with an environment where trafficking and forced prostitution are rife. Traffickers simply adopted the tactics used in the rape camps and deployed them in the post-conflict situation for the trafficking of women:

‘Methods used to confine women in the Kosovo brothels do not differ much from those used in the camps in the Bosnian war ... the criminal organisations behind the ‘business’ made use of the experience gained during the IFOR and SFOR missions in Bosnia-Herzegovina.’¹²⁰

Implications for the laws on the use of force

Any legal consideration of the right to use force, in accordance with *jus ad bellum*, must determine whether the proposed use of force is proportionate to the initial breach or grievance. The key criterion is whether the benefits of the use of force will outweigh the costs.¹²¹ The resort to force is limited by this principle of customary law, the classic formulation of which can be found in the case of the Caroline Incident of 1838, which establishes that the use of force must be proved to be necessary (that is, ‘instant, overwhelming, leaving no choice of means and no moment of deliberation’) and proportionate (that is, ‘nothing unreasonable or excessive’).¹²² The proportionality requirement has since been confirmed, in relation to self-defence, by the International Court of Justice in the *Nicaragua* case¹²³ and more recently in the *Nuclear Weapons* case.¹²⁴

120 Nadine Puechguirbal, ‘Sexual exploitation of women and girls by peacekeepers: how to curb the dark side of peacekeeping’, in Marie Vlachová and Lea Biason (eds.), *Women in an Insecure World: Violence against Women – Facts, Figures and Analysis*, Centre for the Democratic Control of Armed Forces, Geneva, 2005, p. 125; also confirmed by experts in Picarelli, above note 100, p. 12.

121 Judith Gardam, ‘Proportionality and force in international law’, in *American Journal of International Law*, Vol. 7, 1993, p. 391.

122 *Parliamentary Papers*, 1843, Vol. LXI, *British Foreign and State Papers*, Vol. 30, p. 193, cited in R. Y. Jennings, ‘The *Caroline* and *McLeod* Cases’, in *American Journal of International Law*, 1938, Vol. 32, No. 1, p. 89.

123 International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, cited in Gardam, above note 121, p. 391.

124 ICJ, *On the Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, cited in Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law*, Manchester University Press, Manchester, 2000, p. 260.

In the case of humanitarian intervention, the application of this principle becomes uncertain, as it is not based on the conventional Charter rights to use force but on a *lex ferenda*. However, Gardam points out that the proportionality principle is also relevant to any action taken under Chapter VII. This is confirmed by a statement of the former UN Secretary-General Perez de Cuellar, who declared that the Council must 'satisfy itself that the rule of proportionality in the employment of armed force is observed', extending the principle to cover situations envisaged by Article 42 (i.e. the authorized use of force).¹²⁵ It may therefore be inferred that an emerging norm must also be subject to the same customary principles.

In light of the proportionality requirement, the following question arises: to what extent can military intervention achieve its aim of protecting persons from genocide, war crimes, ethnic cleansing, and crimes against humanity, while ensuring that the intervention itself respects human rights and prevents further violations? If the Security Council or NATO cannot satisfy this legal requirement, which they failed to do in Kosovo, military intervention can be deemed disproportionate and counterproductive. Considering once again SC Res 1820's operative paragraph 1, which ambiguously infers that the Council may exercise its Chapter VII powers to counter systematic sexual violence, how can the Council ensure that the use of force will not merely be a catalyst for new forms of sexual violence as seen in Kosovo?

Proportionality assessments of intervention currently do not incorporate any understanding of the impact upon women. Conventional measurements look at the degree of aggression employed by the hostile states, and even the impact upon cultural property and the environment,¹²⁶ yet fail to take into account the extent of sexual violence that women suffer as a direct and indirect result of military intervention. The above analysis of post-intervention trafficking in Kosovo indicates a need for the international community to incorporate an understanding of women's experiences into their legal assessments. This would require an awareness at the international level of the impact of the use of force on women's lives and women's rights, such as their right to be free from sexual exploitation and abuse, and their right to be free from inhuman and degrading treatment and slavery and slave-like practices. Proportionality assessments must not only consider the immediate effects of intervention but must also take into account the long-term impact of military presence on women's experiences: the disruption in socio-economic stability leading to high numbers of unemployed women, the creation

125 UN Department of Public Information, 'Report of the Secretary-General on the work of the Organization', UN Doc. DPI/1168-40 923 (1991), cited in J. Gardam, above note 121, p. 391. UN Charter, Art. 42: 'Should the Security Council consider that measures provided for in Article 41 [non-forceful measures, e.g. economic blockades] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations'.

126 Christine Chinkin, 'The Legality of NATO's action in Yugoslavia', in *International and Comparative Law Quarterly*, Vol. 49, 2000, pp. 923-4.

and sustenance of illicit markets, the consolidation of power of male-dominated organized criminal networks, the trafficking of women and girls for forced prostitution, the sexual health of women and the wider community,¹²⁷ and the attitudinal and behavioural transformation of the domestic male population in relation to women and women's bodies in society.

Kosovo does not stand alone with regard to women's devastating experiences of intervention. One can see a pattern emerging in the cases of Kuwait,¹²⁸ Afghanistan¹²⁹ and Iraq,¹³⁰ where 'saving women' rhetoric is disjunctive from the reality of women's lives. Terms such as 'empowerment' and 'liberation' for women have been declared from the platform of the Bush administration and from some sectors of the feminist movement. On pausing to evaluate the reality of women's post-intervention experiences, very few would agree that women have been 'saved'. Some may hold that intervention is the lesser of two evils for women, echoing the thoughts of NATO's Secretary General: 'We know the risks of action but we have all agreed that inaction brings even greater dangers'.¹³¹ Others may argue that the process of liberation is gradual. Nevertheless, the current situation is dire. Women should not be forced to choose between 'two evils', nor must they endure years of military presence before a 'free' society can emerge.

Conclusion

The outcome of the present analysis puts us in an uncomfortable position. Does exposing the 'dark side' of 'saving women' and 'heroic' narratives mean we must remain inactive in the face of systematic sexual violence? Should we adopt the stance of John Stuart Mill, and recognize that intervention is not the best method of ensuring freedom and liberty; rather, 'it is during an arduous struggle to become free by their own efforts that these virtues have the best chance of springing up'?¹³²

127 The increase in trafficking of women and girls for sexual exploitation is having wider repercussions in terms of health: for example, doctors are reporting increased transmission of AIDS from mother to child. A further social consequence of the increase in trafficking into the region has been an increase in divorce, as men have left their wives to marry women in brothels. See J. T. Picarelli, above note 100, p. 12.

128 For a discussion on Kuwait, see Human Rights Watch, *A Victory Turned Sour: Human Rights in Kuwait since Liberation*, NY, 1991; and *Punishing Victims: Rape and Mistreatment of Asian Maids in Kuwait*, NY, 1992.

129 Post-conflict research conducted in Afghanistan shows a steady rise in human trafficking. Agricultural workers in debt-bondage to local militia and drug traffickers are increasingly selling their daughters to traffickers. Ranking second in value after land, women are the most profitable asset used to settle debts in the Badakhshan province, where the market price for daughters and sisters ranges between US\$1000 and US\$4000. The IOM has confirmed the growing problem of human trafficking in Afghanistan, particularly among young rural women and children who are destitute and displaced. See Deniz Kandiyoti, 'Between the hammer and the anvil: post-conflict reconstruction, Islam and women's rights', in *Third World Quarterly*, Vol. 28, No. 3, 2007, p. 513.

130 N. Al Ali and N. Pratt, above note 15.

131 Dr Javier Solano, Press Statement (1999)040, 23 March 1999, available at <http://www.nato.int/docu/pr/1999/p99-040e.htm> (last visited 15 March 2010).

132 John Stuart Mill, 'A few words on non-intervention', 1859, in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Allen Lane, London, 1977, p. 87.

Should women, in contexts of systematic sexual violence, therefore be left to struggle for their own self-determination? The question of whether to intervene or not to intervene in response to sexual violence seems to leave us in a dilemma. But this is not the only way to frame it, between these two alternatives. Orford points out that one must step back from the question of whether to intervene or not and consider instead how international law might be best employed, not at the moment of crisis but as a preventative or deterrent mechanism so that such a crisis point may be avoided.¹³³

Some feminists have argued that the answer lies in reform of military culture itself. Connell argues that the military is composed of a diversity of masculinities that are socially constructed, not biologically fixed, and therefore capable of transformation.¹³⁴ Taking a similar viewpoint, Spurling argues that the 'warrior ethic', or the hegemonic masculinity within the military, must change before SC Res 1325 and 1880 can take any effect. She argues that militaries are trained to use brute force, and not to keep peace among peoples; any change in the violent culture of the military would be seen as a weakening and emasculation of the army.¹³⁵ Similarly, Featherston points out, 'if we only train people for war it is far more likely that that is what we will get'.¹³⁶ Adopting this standpoint, one answer may be to improve educational programmes for militaries and peacekeepers, incorporating gender awareness within training strategies. A report produced by the Transnational Crime and Corruption Center and the United Nations Interregional Crime and Justice Research Institute has supported this notion, and suggests the need for a comprehensive training programme for both peacekeepers *and* local institutions¹³⁷ that would both raise awareness of the issues of sexual exploitation within peacekeeping regions and improve anti-trafficking capacities.¹³⁸ Mazurana argues that training must include human rights law, especially women's rights.¹³⁹

Another solution may be to refocus attention on SC Res 1325 concerning the advancement of women's participation in decision-making processes and

133 A. Orford, above note 1, p. 18.

134 Robert Connell, 'Masculinities, the reduction of violence and the pursuit of peace', in Cockburn and Zarkov, above note 76, p. 34.

135 Karen Spurling, 'Peacekeepers, Timor and the urgent need to address the warrior ethic', unpublished paper given at the Dutch Defence College Conference, June 2007. Evidence of this attitude can be seen, for instance, in the numerous reservations to CEDAW regarding equality in public life, on the basis that the principle of equality cannot be extended to combat and combat-related duties. Reservations of this kind have been made by Australia, Austria, Germany, New Zealand, and Thailand. See H. Charlesworth and C. Chinkin, above note 124, p. 258.

136 Liza Featherston, cited in Dyan Mazurana, 'Gendered institutions, gendered interventions', in Cockburn and Zarkov, above note 76, p. 40.

137 Andrea McKay headed a field test programme using gender materials in East Timor, Eritrea/Ethiopia, the Democratic Republic of Congo, and Sierra Leone. She found the most successful training sessions to be those that included the local people as well as the military peacekeepers, as this allowed local men and women to share their experiences and stories with members of the armed forces. See D. Mazurana, above note 136, p. 48.

138 J. T. Picarelli, above note 100, p. 34.

139 D. Mazurana, above note 136, p. 43.

senior-level positions within peacekeeping and military institutions. Mazurana points out that the most successful peacekeeping operations are those that have had more women personnel, strong human rights monitoring mandates, and more civilian and fewer military personnel.¹⁴⁰ ‘Success’ has been measured, *inter alia*, on the basis of reports of the local population providing positive interactions with peacekeepers.¹⁴¹ Charlesworth and Chinkin, however, have reservations about increasing women’s participation in the military, as it implies that the ability to use force is an important part of society and a necessary element of citizenship, which deflects attention away from exploring methods for reducing the use of force, and instead transforms the gender balance of the actors using force.¹⁴² In the light of interviews with women’s organizations across Bosnia-Herzegovina regarding male dominance in the military, Cockburn and Hubic concluded that the women were implicitly asking for a re-gendering of the notion of the soldier and of the military culture, in which the strength of military force in dealing with war criminals and providing security could be accompanied by sensitivity and responsiveness to women’s needs and their humanity.¹⁴³

What is required now is a divorce of women’s rights from interventionist agendas, so that women’s rights are not subsumed into counterproductive narratives and appropriated for their political potency. A genuine understanding of women’s experiences would see beyond the crisis point which ‘calls for troops’, and instead would look to the aftermath of their arrival. The convergence of interventionist doctrine with the feminist concern about systematic sexual violence, underscored by ‘saving women’ and ‘heroic’ narratives, has proved to be a relationship of inequality. While women’s rights have been conveniently appropriated by governments, the military, and the media to serve their own interests, women’s experiences demonstrate that the ‘marriage’ has not turned out to be quite so convenient after all.

Many scholars have pointed to the ‘dark sides’ of humanitarian intervention: state self-interest, neo-imperialism, collateral damage. What the above analysis shows is that there is another ‘dark side’ to this doctrine that often goes unnoticed, that manifests itself in the illicit world of trafficking and forced prostitution; and that, perhaps, the darkest shadow of all is cast upon women.

140 Examples of this include the UN operations in Haiti, Guatemala, and South Africa. See *ibid.*

141 *Ibid.* Success was also measured in terms of the operation’s ability to fulfil its mandate, contribute to the peaceful resolution of disputes, promote rights education, assist the development of civil society, and empower the local community to reconstruct society.

142 H. Charlesworth and C. Chinkin, above note 124, p. 259.

143 Cynthia Cockburn and Meliha Hubic, ‘Gender and the peacekeeping military: a view from Bosnian women’s organizations’, in Cockburn and Zarkov (eds.), above note 76, p. 116.