

Chapter 7: Justice

Chantal was living in a UN refugee centre in Goma in the eastern part of the Democratic Republic of the Congo (DRC) run by the United Nations High Commissioner for Refugees (UNHCR) when we met her. She was anxious to return to her native Rwanda. At first sight, Chantal could have been any strong young village woman, a farmer from Rwanda's high, steep hills, who brought her produce to market and carried water and wood for miles. But her face was absolutely blank and her eyes stared ahead as she described her last five years deep in the forests of DRC with a group of Interahamwe militia – some of whom were the genocidaires of 1994. The militia used thousands of women like Chantal, some kidnapped from Rwanda, others from local towns and villages, as human shields, as porters, as sex slaves. "We ate when we went to villages," Chantal told us. "We walked and walked in the forest. We carried very heavy loads of what we took from their places. Often there was fighting. Every man raped me."

Most survivors of sexual violence do not talk about it. Chantal was able to tell her story because she felt no risk of stigma or rejection from her husband, family or community; she had already lost everybody and everything she was attached to. We doubt very much that Chantal will ever see justice done. She is not likely to receive reparations for the violations she suffered, or to see her perpetrators prosecuted. She probably won't receive adequate medical or psychosocial support. Chantal may have contracted HIV/AIDS from the multiple rapes, but it is unlikely that she will ever be tested. Even if she is tested, and is HIV-positive, she will probably not have access to treatment or care. If Chantal has children some day, they may have the chance to go to school, but Chantal herself is not likely to receive any form of education or training. If she makes it back home, she will have to struggle to claim the property she lived on, the inheritance due to her and the possessions she left behind. The chances are very high that Chantal will be violated again.

Our visits to conflict situations confirmed the stark reality that women are being denied justice. With few exceptions, those who commit heinous crimes against women in war are not punished, nor are women granted redress. Worse yet, with alarming consistency, little is being done to prevent new abuses.

Throughout history soldiers have abducted, raped, tortured and enslaved women in wartime. But attacks against women and girls in contemporary conflicts seem to occur on a greater scale and have reached an even higher level of depravity. They spread terror, destroy families and shatter community cohesiveness. Violence does not happen randomly – it is determined and deliberate. We spoke with women who survived rape, torture, mutilation and assault, and women who lost their families, their homes and their livelihoods. One of the advisers to this report, Isha Dyfan, is a survivor of Sierra Leone's civil war. Dyfan was a public figure in Freetown in the early 1990s, a lawyer and an activist for peace and women's issues. When she received death threats, she sent her daughter to Guinea for safety. One morning Dyfan arrived on the main street in Freetown to find the buildings surrounding her office in flames. She fled to Guinea, leaving everything she owned behind.

Dyfan is passionate in her support for legal redress for Sierra Leoneans. "No one can put a price tag on what we've lost," she told us. "Our homes, our children's future, the

feet and hands cut by diamond-hungry rebels. We cannot be compensated. But now we must begin to rebuild, and truth and reconciliation are necessary for this. In some ways, justice is an intangible thing. But it is also very concrete and mundane. We hope the Special Court and the Truth and Reconciliation Commission will provide a safe place where the truth can be spoken without fear.

“We need to hear that these atrocities are condemned to at least relieve some of the shame and the grief. It is not just a legal issue. It is about people's lives. Something must be done so the society that was affected by the conflict can invest in peace. That is why we need both a Special Court, to deal with the planners of the war, and a Truth Commission, so that people can speak about what happened.”

Increased levels of violence against women continue into the post-conflict period. Criminal activity often thrives in such situations, where law enforcement is generally weak and there is rarely an effective judicial system. Women are exposed to physical and sexual violence in camps, on the street or in their homes. Perpetrators may be returning combatants, neighbours or family members. Women have nowhere to turn: law enforcement agents, military officials, peacekeeping forces or civilian police may be complicit or themselves guilty of these acts. The failure to prevent and punish such crimes is a betrayal of women on a massive scale.

The Need for Accountability

Accountability on the part of states and societies for crimes against women means more than punishing perpetrators. It means establishing the rule of law and a just social and political order. Without this, there can be no lasting peace. Impunity weakens the foundation of societies emerging from conflict by legitimizing violence and inequality. It prolongs instability and injustice and exposes women to the threat of renewed conflict. Despite the fact that international humanitarian, human rights and refugee law protects women against war-time atrocities,¹ Dr. Kelly D. Askin, Director of the International Criminal Justice Institute, points to the limitations of these laws: "Treaties have been drafted outlawing, in excruciating detail, everything from particular kinds of bullets to the destruction of historical buildings, while maintaining enormous silence or providing only vague provisions on crimes against women." Ultimately, she argues, "provisions are needed in international humanitarian law that take women's experiences of sexual violence as a starting point rather than just a by-product of war."²

Rarely have women been consulted about the form, scope and modalities for seeking accountability. Women's stake in these processes has been minimized or denied and, in most cases, crimes against them go unrecorded. In Rwanda, for example, thousands of women were raped and tortured during the genocide. Only a few of the survivors have testified to the sufferings they endured or have seen any attempt to hold the perpetrators accountable.

Historically, women have been underrepresented in judicial processes. Only one woman has served as a judge on the International Court of Justice since it was established more than 80 years ago. The 34-member International Law Commission had no women throughout its 55-year history until 2001, when two women were elected. No more than three women have served at any one time among the 14 permanent judges of the

International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR).³

Impunity for violations against women exposes the weak link in all legal frameworks: accountability is subject to political will. In the DRC women described their frustrations. One activist told us: "Large numbers of atrocities have been committed during the war here, but even now there is no justice. We cannot go to local authorities, as they have no power. We call for the establishment of a truth and reconciliation commission and an international criminal tribunal for the DRC. We know those who have committed war crimes and their accomplices. We will testify to ensure that they are brought to justice. But the Security Council must accelerate its decisions on the situation in our country."

The failure throughout history to deal with crimes committed against women in war has only recently begun to be addressed. The jurisprudence of the ICTY and ICTR are examples of this. However, change is slow and in many cases non-existent. The sexual enslavement of at least 200,000 girls and women by the Japanese Army during World War II as so-called 'comfort women' has never been tried by any local or international court. This glaring injustice led a coalition of grass-roots non-governmental organizations (NGOs) to convene a People's Tribunal in December 2000, one half century after the atrocities were committed. Seventy-five survivors came to testify before the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery. What drove the women to appear before the Tribunal was the wish to tell their story before it was lost to history.

Suhanah, an elderly survivor from Indonesia, was one of those who testified. "I was a virgin. Ten men raped me," she told the Tribunal. "One got off and another replaced him. They treated us like animals." Maxima Regala Dela Cruz from the Philippines also bore witness, after more than 50 years of silence: "We went back home and we were crying. We couldn't tell anyone or we would be executed. It was so shameful so we dug a deep hole and covered it." The outcome of the Tribunal was not legally binding but the goal, as expressed by the organizers, was "not vengeance but justice ... not only for the survivors, but for those who have perished and for generations to come."⁴ Trials such as this one can give victims of atrocities the satisfaction of knowing that their grievances are being heard and documented, and that future crimes can be prevented, sanctioned and punished.

Reparations are also important for achieving justice and accountability for women. They may take the form of restitution, compensation, rehabilitation or guarantees that similar crimes will not be committed. State-to-State reparations for violations of humanitarian law are owed to the injured State rather than individual victims, according to the International Law Commission, but "the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights." In other words, if a nation receives reparations for intrusions by an army whose soldiers attacked and exploited women, States must ensure that women will be among the beneficiaries of such reparations. Increasingly there are international norms that recognize reparations due to an individual. The UN Commission on Human Rights has appointed a Special Rapporteur on the right to reparations, and principles relating to the right to a remedy have been drafted. In addition, individuals have the right to reparations under the Rome Statute of the International Criminal Court (ICC) under Article 75.

But many obstacles prevent women from seeking justice. They may not have enough money to travel to a trial or the ability to take time off from work or to leave their families; they may be intimidated or disillusioned by the justice system. Support services and legal aid are rarely provided to women, and gender bias within the judicial process – the very process that regulates how equality is achieved in society – prevents women from receiving fair treatment as witnesses, as complainants and in investigations. Women are often blamed for the crimes committed against them and risk retribution for pursuing justice. According to Dr. Askin, "There should be no shame or stigma whatsoever attached to survivors of rape crimes – the shame and dishonour belongs on the physical perpetrator(s) and others responsible for the crimes, and to some extent on the legal, protective, and enforcement systems and global society which have ignored, silenced or otherwise failed to respond appropriately to gender-based crimes."⁵

The social and political instability of judicial systems during conflict and in post-conflict situations further impedes women's access to justice. As structures of power and authority shift, conflicting legal standards and judicial methods may be applied, ranging from international, military and customary laws, to national and traditional approaches to justice. Women confronted with this barrage of contradictory systems may be frustrated in their efforts to seek redress.

Women's rights advocates worldwide have slowly and steadily constructed an international legal framework to address these grievances and concerns. The campaign to end violence against women took root and gained momentum throughout the 1990s on the agendas of UN World Conferences, from Vienna in 1993 to Cairo in 1994 to Beijing in 1995, where the principles for codifying international law on violence against women began to be recognized. Those principles were later tested and articulated in landmark decisions by the International Criminal Tribunals for the Former Yugoslavia and Rwanda and ultimately informed the definition of crimes of sexual violence included in the Rome Statute of the ICC.

Ensuring accountability to women within the justice system will require a range of strategies. These can be carried out at national, regional or international levels, and through a variety of judicial methods: the ICC, ad hoc tribunals, special courts and tribunals and national justice systems. Non-judicial methods, such as truth and reconciliation commissions and traditional mechanisms, can also play an important role in establishing accountability for crimes against women in war. A combination of methods may be appropriate in order to ensure that all victims secure redress.

BOX: International customary law: Unlike treaty law, international customary law is not adopted formally by governments. It is created by the common practice of States developed over a period of time and the belief of States that they are legally bound to follow that practice. That belief can be evidenced in a variety of ways, including on the basis of resolutions and declarations—on women's rights, for example—adopted by the United Nations and other intergovernmental bodies, as well as from patterns of national practice, including legislation and national court decisions.⁶ International customary law is binding on all States once the norms have been accepted or acquiesced to by the international community as a whole. The Statute of the ICC illustrates this process. According to Justice Theodor Meron of the ICTY, the crimes recognized by the ICC Statute, including the gender-specific offences, may well, "take on a life of their own as an authoritative and largely customary statement of international humanitarian and

criminal law, and ... become a model for national laws to be enforced under the principle of universality of jurisdiction."⁷

Universal Jurisdiction covers grave breaches of the Geneva Conventions, certain very serious human rights violations (like torture) and genocide. All States have a duty to prosecute the perpetrators, regardless of their nationality, the nationality of the victims or where the crimes took place.

WAR CRIMES are serious violations of humanitarian law, whether customary or conventional, and include grave breaches and violations of Common Article 3 of the 1949 Geneva Conventions. Further, Article 27 of the Fourth Geneva Convention states that women should be protected against "rape, enforced prostitution, or any form of indecent assault" in times of war. Rape and other forms of sexual violence have been recognized as serious violations of international humanitarian law in the ICTY. For example, in the Furundzija case, a paramilitary leader was convicted of outrages upon personal dignity and torture by means of rape (a violation of Common Article 3 to the Geneva Conventions, constituting a serious violation of the laws or customs of war) for verbally interrogating a woman in front of laughing soldiers while his colleague physically raped her. In the Celebici case, an accused was convicted of torture for the *actus reus* of forcible sexual penetration – as both a violation of Common Article 3 and a grave breach of the Geneva Conventions – and of inhuman treatment for forcing two male detainees to perform fellatio on each other – a grave breach of the Geneva Conventions (note: the Judgement indicated that the conviction would have been for "rape" instead of "inhuman treatment" if it had been pleaded "in the appropriate manner"). It is not necessary that rape or sexual violence take place systematically to constitute a war crime.

CRIMES AGAINST HUMANITY are acts of violence committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. According to the ICTY, crimes against humanity, which can occur in war or peace time, are "serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment."⁸ Rape is explicitly listed among the crimes against humanity within the jurisdictions of both *ad hoc* tribunals (ICTY/ICTR). In the cases of Akayesu and Kunarac, the Tribunals convicted the accused of rape as a crime against humanity when the crimes were committed during the course of a widespread or systematic attack against civilians.

GENOCIDE was first defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which has since passed into customary international law. Acts of genocide are committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, by killing or causing serious bodily or mental harm to members of the group, deliberately inflicting conditions calculated to bring about destruction of the group in whole or in part, imposing measures intended to prevent births or forcibly transferring children of the group to another group. In the Akayesu case, the ICTR found the defendant guilty of genocide, based in part on evidence that he had

witnessed and encouraged rapes and forced nudity of women during the genocidal campaign against the Tutsi population.

The International Criminal Court

The establishment of the International Criminal Court marks a new era of international justice and accountability for women. The Rome Statute of the ICC includes forms of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization in the definition of crimes against humanity and war crimes. Persecution, with gender as a basis for persecution, and the crime of enslavement, including the trafficking of women and children, are also listed as crimes against humanity. A statement in the commentary of the Statute explains further that rape and other sexual violence can constitute acts of genocide.⁹

Formed in 1997 the Women's Caucus for Gender Justice in the ICC galvanized hundreds of groups and individuals to bring a gender perspective into the substance and procedure of the new Court. The Statute's rules of procedure guarantee witness protection for women who testify. This reduces the risk of retaliation against women who give evidence. A Victim and Witnesses Unit (VWU) within the ICC will provide protection, counselling and other security measures. The VWU calls explicitly for staff "with expertise in trauma, including trauma related to crimes of sexual violence." The Court will also establish reparations through compensation, restitution and rehabilitation, which may take the form of communal reconstruction and healing programmes. In a notable innovation, the ICC will create a Trust Fund for victims. The ICC Statute requires that its judges, both male and female, have legal expertise on specific issues, including violence against women. It also calls for "fair representation of women and men" among judges.¹⁰

Perhaps the most significant effects of the ICC for women will be at the national level, as the Statute is intended to set in motion a process of national law reform. States that ratify the Statute will need to amend their national law and adopt new legislation, if necessary, to ensure conformity with the Statute's provisions. If this does not happen, the State runs the risk of being deemed unwilling or unable to investigate or prosecute those crimes. Since the Court operates on the principle of 'complementarity' – proceeding with investigation and prosecution only when national governments are unwilling or unable to do so – it may act as a driving force for national and local judicial systems to improve monitoring and reporting and to address crimes of sexual violence against women.

***Ad hoc* Tribunals**

The International Criminal Tribunals of the Former Yugoslavia and Rwanda have raised the standards of accountability for crimes of sexual violence against women. Even though the judgements they have handed down constitute a tiny fraction of cases, these set historic precedents in prosecuting war crimes, crimes against humanity and genocide.¹¹ In so doing, the judgements of the *ad hoc* Tribunals have clarified definitions of sexual violence, recognizing rape as a means of torture and a form of persecution. Sexual slavery, forced nudity and sexual mutilation are included within the scope of the judgements, and the Tribunals have noted explicitly that forced impregnation, forced

marriage, forced abortion and sexual humiliation are serious violations of international law, and within the courts' jurisdiction.

The Tribunals have also recognized that sexual violence is a weapon of war, used as a tool of terror and destruction, as is clear from the description of the testimony of Witness A:

“Witness A explained that she testified before the ICTR in order to see the perpetrators brought to justice. She told how for three months, until the genocide was stopped, she did not leave her bedroom. There were constantly men in her house, raping her. One group of men would sit in the living room, while another group was waiting in the bedroom. While one perpetrator was raping her, another one would get ready to take over. The mother-in-law and the children of Witness A were in the same house during all this time. Until today witness A is still suffering from the sexual violence she experienced during 1994. Her stomach is still very swollen. Some days she is not in touch with her surroundings as she sees in her mind the militiamen coming into her bedroom and undressing, over and over again. But she emphasized the fact that the men who raped her are not the only ones who are guilty. More important are the men and women who planned the genocide and gave the orders. ‘They were killing the men and raping the women,’ she said, ‘that was the plan.’”¹²

Despite the achievements of the ad hoc Tribunals, they have been hampered by serious lapses and inconsistencies. The actual process of prosecuting crimes of sexual and gender violence in the proceedings of both Tribunals has been slow, as well as painful for victims and witnesses. According to the Honourable Elizabeth Odio-Benito, a former judge of the ICTY, the Tribunal was not at first prepared to consider crimes of sexual violence against women: "About one year after the tribunal was set up, we faced the first public appearance of the Court. I was one of the three judges in this trial. I noticed that rape and sexual violence were absent in the indictment. This being my first experience as a judge, I did not always behave in the traditional way. I pointed out the necessity to examine crimes of rape and sexual violence. Everybody was very shocked by this. But soon they learned that this would be very successful. Sexual violence started to appear among the charges."¹³

The Honourable Navanethem Pillay, President of the ICTR, has emphasized the importance of how and by whom the law is applied: "Who interprets the law is at least as important as who makes the law, if not more so . . . I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defence, witness protection and judiciary."¹⁴ Women judges and prosecutors have played a key role in advancing the interpretation of the law with respect to crimes against women in both ad hoc Tribunals. However, to be fully effective, both female and male judges should be experienced in gender issues.

Over the past eight years, the ad hoc Tribunals have established numerous mechanisms in an effort to ensure that victims and witnesses are protected and respected, but the process has been difficult and has, at times, failed the women involved. Noeleen Heyzer, Executive Director of UNIFEM, has been one of the international women leaders to bring attention to these lapses. Reflecting the needs of Rwandan women, she has called for better witness protection, counselling and security, as well as sanctions against Tribunal

staff who do not respect the rights of witnesses, and a separate chamber with female judges to hear cases of women survivors of sexual violence. If gender-based crimes are to be prosecuted, they need to be investigated and indicted according to international standards, and the investigators and prosecutors need to be trained in gender crimes and sensitive to the needs of the victims.

When we visited Rwanda, we met with women who were still trying, after eight years, to come to terms with what they experienced. "We feel great pain to know that our attackers, the people who killed our husbands and male relatives, who tortured, raped and mutilated us, have not been punished," a young woman told us. "Many of these people are in exile. It is as if they are being rewarded for the crimes that they committed. They deserve to be punished. And what is happening to us here? We have been reduced to suffering, begging and misery. It is as if we are the guilty ones. We would like you to be a voice for us, by asking the United Nations and the international community for justice. Then we can rebuild our lives."

The determination of women survivors has been the driving force behind the successful prosecutions of both Tribunals despite the psychological duress, intimidation, indignities and physical threats that women who testify have endured. When a doctor assigned to victims testifying before the ICTY proposed that they be provided with psychological support during testimony, the initial response was that the Tribunal was "not engaged in 'social work,' but important legal proceedings."¹⁵

In some cases, women have withdrawn because the Tribunals have failed to provide adequate support and protection. The ICTR in particular has come under criticism for failing to protect women witnesses. In one fact-finding mission, defence lawyers were found to have degraded and discredited women by demanding that they name, unnecessarily and in extreme detail, sexual organs and how they were used during violations. A number of women have reported that lawyers for the accused and judges have mocked and humiliated them by joining in the general laughter at their embarrassed responses.

Women have not received witness protection as required by the Rules of the Tribunal. When Witness B was called to testify, she told investigators that anonymity was essential because the accused knew her and she was concerned about retaliation against her family. But when she arrived at the Tribunal and toured the Trial Chamber she realized that she could not remain anonymous from the accused. Fearing for her safety and the safety of her family, she refused to testify.¹⁶

Although Tribunal Rules require confidentiality, judges have taken little or no action to prevent and punish the copying of confidential court transcripts, which have been sent back to the communities where the widows are living among the killers. A number of women seeking justice at the ICTR paid with their lives. Partly in response to this, the UN Security Council resolved that 18 *ad litem* judges are to be appointed to the ICTR, to expedite the hundreds of pending cases.¹⁷

Given the risks, why do so many women consider it their responsibility to testify? A support officer of the ICTY Victims and Witnesses Unit provided several reasons: "Frequently I wonder, and frequently I am asked, why do witnesses come to testify?... I have learned that witnesses come for reasons that seem to fit into four main areas: To speak for the dead; to look for justice in the present; to help the truth be known by the world; in the hope that such crimes can be prevented in the future."

Special Courts and Tribunals

Viet Nguyen-Gillham, a counsellor for the Centre for Victims of Torture in Sierra Leone, has described the difficulties involved in assisting survivors who are still traumatized by the war. Some were forced by rebel forces to witness atrocities: "They would place bets on whether the baby in the womb was male or female," she said, "then they would slit the woman's belly open." Nguyen-Gillham is struggling to find ways to help people recover and return to a meaningful community life. "There's only so much sensitization you can do," she explained. "If there's no more assistance forthcoming, and no legal system to punish the offenders, it will perpetuate itself."

Since judicial systems in Sierra Leone had virtually collapsed by the end of the conflict, the Special Court for Sierra Leone was created by an international treaty between the United Nations and the Government of Sierra Leone to provide justice for crimes committed during the war.¹⁸ The innovative Court structure will involve both national and international judges and lawyers and will draw upon international and national legal systems. The Statute of the Special Court refers explicitly to crimes of sexual violence and stipulates that "due consideration should be given in the appointment of staff, to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice." Unlike the ICTY and ICTR, the Special Court is funded on a voluntary basis by donor countries. Although the Court's independence is guaranteed by its Statute, some NGOs have raised concerns as to whether the Court can function independently from the Government of Sierra Leone and ensure that the interests of all victims are properly served.¹⁹ Despite the potential difficulties, many hope that the hybrid character of the Court and its location in Sierra Leone will provide an opportunity to rebuild the domestic judicial system and make it easier for women affected by the conflict to participate in and attend trials.

In East Timor a combination of methods are being used to attempt to bring perpetrators to account for war crimes and crimes against humanity committed at the time of the August 1999 referendum on independence. But the women of East Timor are not yet convinced these methods will work. We met Maria, who fled her village as everything she owned burned to the ground in fires set by Indonesian-supported militia. She, like many of the women we spoke to, knew the people who had committed crimes against her community, but had never had the satisfaction of seeing them tried. "We know who these people are," she told us, "We know them by name, by face and we know that many are still hiding in West Timor. We will not agree to live side-by-side with them in East Timor unless justice is done."

Public confidence in systems of justice-seeking has eroded in East Timor. The UN Transitional Administration in East Timor (UNTAET) established a Serious Crimes Investigation Unit to investigate hundreds of human rights violations that took place in 1999, including sexual violence and rape. Although the Unit secured the conviction of a former militia leader for crimes against humanity in November 2001, additional progress has been slow, due in part to the lack of resources. Most of the top militia commanders believed to have been responsible for the worst violations during the 1999 massacres have not been indicted,²⁰ and many victims are frustrated.

In August 2002 the Indonesian Ad Hoc Human Rights Tribunal convicted the former Governor of East Timor of war crimes, but he received only a 3-year sentence. A

general and five other officers charged with allowing subordinates to take part in the massacres were acquitted. Mary Robinson, the High Commissioner for Human Rights at the time, criticized the verdict and called for broader jurisdiction and more thorough investigations. During her visit to Dili in August 2002, the High Commissioner met with the women's organization Fokupers and other women who are continuing the quest for justice. The women sent a formal letter to the High Commissioner, stating that they rejected the authority of the Indonesian Ad Hoc Tribunal. They called for the establishment of an international tribunal for East Timor instead: "Women have been interrogated, abused, raped, forced to be sexual slaves ... East Timorese women and all victims and families of victims are still waiting for justice. Many of the women we work with ask us, 'when will this justice come?' "

National Approaches

Getting indictments for crimes against women has proven to be most difficult at the national level. In the countries we visited, we found that national judicial systems have not delivered for women. After a peace agreement is signed and the fighting stops, governments emerging from conflict face enormous challenges in rebuilding the judicial system. Judges, lawyers and other legal experts may have fled or been killed. In some cases, broad amnesties may be granted to specific individuals or groups of individuals, which invariably result in impunity for crimes against women.²¹ Investigations at the national level rarely focus on violations against women. When they do, the lack of technical capacities and the absence of systematic procedures for forensic investigations hamper effective prosecution. Too often, national courts discriminate against women, detaining them without due process, dismissing their testimony and subjecting them to public humiliation. When a judge presiding over a case in Bosnia ridiculed a victim of trafficking by asking her if she was a virgin, other women were discouraged from testifying against traffickers.

A just and effective national justice system is vital for women. Without it, and without laws that adequately protect them from domestic violence, rape and other gender-based violence, women cannot seek justice or compensation. They may lose confidence and hope in the possibility of justice. A Congolese lawyer we met in the DRC told us, "You can't have justice in a context like this. Magistrates are not paid. They can't refuse gifts. It's the same with the security services ... women don't see the point in complaining. Even if they say something, what will change?"

In attempting to set new national standards for their protection, women can look to international conventions and customary laws, the jurisprudence of the ICTY and ICTR, and the ICC Statute, and demand that these precedents be used during national trials. Despite the difficulty inherent in this, such trials may have several advantages over international tribunals. They generally have better access to evidence and involve witnesses who might be unable to travel outside the country; they engage the local population, enabling them to claim ownership; and they help build a collective historical memory. Some legal experts argue that war crimes trials in national courts can also play an important role in re-establishing the national judiciary by building court infrastructure and training local judges and lawyers.

In the process of rebuilding their societies, women in conflict situations may have the opportunity to reform laws and traditions that restricted their human rights even before the conflict began. They may be able to put an end to patterns of discrimination that have gone on for centuries. In Kampala, in 2000, a coalition of Sudanese and international human rights and women's groups created a shared vision for a future transitional government in the Sudan which would "cancel any laws and policies that are incompatible with the rights of women as enshrined in international human rights conventions." They also called on political parties to "ensure adequate representation of women at all levels, including the highest."²²

The co-existence of multiple legal systems at the national level further limits women's access to justice. In many post-conflict situations, family law codified under colonial regimes may continue to be applied, perpetuating some of the most egregious forms of gender inequality. In Mozambique, despite a comprehensive process of constitutional reform, men continue to maintain the head-of-household status granted to them by a Civil Code based on Portuguese colonial law. In the DRC, the 1987 Family Code is based on Belgian colonial law that requires married women to obtain their husband's permission before taking any kind of judicial action. In Somalia and Sudan, traditional leaders have introduced militant, conservative and highly politicized interpretations of Sharia in local-level Islamic courts. Rulings typically include harsh punishments and stringent restrictions on women's participation in public life.

"First, there is the colonial law, and then the customary law, and also Muslim law in our system," said Isha Dyfan, the Sierra Leonean lawyer and women's advocate. "For women, and even for lawyers, this proliferation of law is like a minefield, and really discourages them from facing the legal system. There has to be a consolidation of national and international law, so that women can apply the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) and other international standards."²³

"The best way to ensure that the highest standards of protection for women are enforced," she says, "is to use legal experts on women's rights as advisers to local and national systems of transitional justice."

In Cambodia, Croatia, and Kosovo women's groups are working with the judiciary to sensitize judges and lawyers about gender issues. But much more can and must be done. Legal literacy programmes can help raise women's awareness about the operation of courts and the judicial system. Police units trained to recognize and investigate crimes against women can improve the chances of fair redress. Counselling programmes can advance the process of healing and reconstruction. States can ensure that when reparations are provided, women benefit through medical assistance, psychosocial counselling, vocational training or financial compensation.

Truth and Reconciliation Commissions

"Maybe I can learn to forgive, but I will never forget."

- Rose, a survivor of the genocide in Rwanda

Truth commissions provide a public forum for victims to express their grievances and seek reconciliation. They establish an official public record of crimes committed in

war by gathering testimony and other evidence from survivors. Whereas the truth-telling functions of criminal trials are restricted by law and procedure to deal only with facts that are legally relevant to the case at hand, truth commissions are able to develop a more comprehensive record and understanding of the full scale of violations.

More than 20 countries have established truth commissions or similar processes.²⁴ Generally, these have been created, vested with authority, sponsored and/or funded by governments, international organizations or both. Some non-governmental human rights investigations have also adopted truth commission-like roles, as was the case with the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery.

The work of truth commissions—in which people describe what happened to them in their own words—can answer the need for a cathartic public recounting of women's suffering. When truth commissions have gender-sensitive mandates and procedures, they can legitimize women's experiences, making them part of the official public record. Like prosecutions, truth commissions are most effective when the affected populations feel a degree of ownership in the process. For women, this usually requires special measures to inform them about the commission's structure, functions and procedures.

Truth and reconciliation commissions do not fulfil the requirement under international law to prosecute grave crimes. Nevertheless, "If you look at the experience of countries in the past, and the impact that information from truth commissions has had in feeding into prosecutions that followed, I think we can argue very strongly that truth commissions are complementary and even strengthen prosecutions," argues Priscilla Hayner, Program Director of the International Center for Transitional Justice, based in New York City.²⁵

For truth commissions to serve women, their mandates must reflect the nature of the violence and human rights violations against women. Crimes that are not explicitly mentioned in mandates are at risk of being ignored or underemphasized. This is especially true for crimes of sexual violence, since crimes against women traditionally have been given less importance and less credibility by public institutions, and victims have often been treated as if they were criminals themselves. When compared to the actual frequency of violations committed against women during armed conflict, testimony about these violations, including rape and sexual violence, is given to truth commissions far less often than testimony about other abuses.²⁶ This is due in part to the stigma associated with reporting these crimes, in part to the lack of protection and support for women survivors and in part to women's unfamiliarity with the processes.

Women often downplay their own experiences and focus on crimes committed against their husbands, sons and families. In some cases they may speak more easily about crimes committed against other women, saying, for example, "Oh yes there were rapes, I saw it, but it never happened to me." One consequence of underreporting is that commissioners may perceive crimes against women as non-political, or unrelated to the type of violence that they are investigating. This was the case in South Africa where some members of the South African Amnesty Committee are said to have believed that rape was a non-political crime, outside the reach of their investigation.²⁷

Reportedly, most truth commissions have not been proactive in seeking out, encouraging or facilitating testimony from women.²⁸ Commissioners, like judges in criminal tribunals, may not be sensitive to the violations women experience in conflict or

the long-term effects of those violations. Gender-sensitive policies and procedures would allow women to appear before panels of women commissioners and to give testimony *in camera* (in closed sessions). The act establishing a truth and reconciliation commission in Sierra Leone, for example, directs it to pay "special attention to the subject of sexual abuses" and refers to the importance of confidentiality and witness-sensitive procedures when investigating gender-based crimes.

Like trials, truth commissions require investigation and fact-finding. Yet monitoring and reporting violations in conflict is one of the most neglected and under-resourced activities. Human rights organizations, women's groups and United Nations special rapporteurs all have key roles to play in gathering the necessary evidence.

Traditional Justice

In post-conflict situations where widespread atrocities have been committed, national judicial systems may lack adequate financial and human resources to handle the large number of cases. In addition, national judicial systems may be subject to ethnic or religious bias arising from the conflict. Given the limited number of cases that international and national courts can handle, traditional and community-based approaches are being viewed in some cases as a complementary, if not alternative, system of justice.

Traditional approaches to justice often involve religious leaders, village elders and local officials in resolving domestic or communal conflicts, including rape and domestic violence. However, it is essential that traditional justice mechanisms are consistent with international human rights standards and protect the rights of witnesses, victims and defendants.

In a unique use of traditional courts, the Government of Rwanda shifted approximately 115,000 defendants accused of atrocities during the country's genocide into a traditional justice system known as *gacaca* courts. Many of the accused have remained in overcrowded prisons for years without trials. The *gacaca* courts will relieve the burden on the national court system that, by some estimates, would have required hundreds of years to try all of the accused. The *gacaca* system will not consider 'first category offenses,' which include charges brought against those believed to be responsible for the genocide, or those accused of rape. It will focus instead on those who killed acting on orders, who caused physical injury and who destroyed property. Women parliamentarians were instrumental in advocating that the crime of rape during genocide be changed from category four – or on a par with common theft – to the most serious category one offense. But since the national courts are so overwhelmed with cases, some fear that by excluding crimes of rape from the *gacaca* process, many perpetrators may never be tried.

While the *gacaca* courts are less costly and faster than the international war crimes tribunal taking place in Arusha, concerns have also been raised that these courts will not be able to maintain international human rights standards. Some observers worry that the courts may institutionalize patterns of discrimination against women that have historically been part of traditional approaches to justice, especially since in the first nominations women were not elected to the courts. In addition, many Rwandans are worried about safety. "Women stayed behind [in their communities] and saw more. We will have to say where our husbands were at the time. We are afraid for our families," one

woman told us. We heard similar fears from many others. A worker from Catholic Relief Services added, "If there is any danger to their families, the women will not speak out." Yet numerous Rwandans remain anxious to see justice done, and to see it done in their own country where they can observe the process. Many agree with the woman who told us that the *gacaca* system "reflects the collective identity of Rwandans and is in touch with the culture."

In times of war and societal breakdown, crimes against women reach new levels of brutality and frequency. These assaults on individuals and basic decency must be identified, and those responsible must be held to account. Each conflict runs its own brutal course and demands a unique approach to seeking accountability. Recognizing the tragedies of history is one way to protect against their recurrence. Without accountability for crimes against women, the legal foundations of new governments will be weakened, the credibility of governing institutions will be undermined and women will continue to suffer discrimination.

On Justice the Experts call for:

- 1. The Secretary-General to appoint a panel of experts to assess the gaps in international and national laws and standards pertaining to the protection of women in conflict and post-conflict situations and women's role in peace-building.**
- 2. State Parties to the Statute of the International Criminal Court to undertake national law reform to ensure compatibility with the Statute as a matter of priority, with particular attention given to the substantive and procedural provisions regarding crimes against women.**
- 3. National legal systems to penalize and remedy all forms of violence against women** in conflict and post-conflict situations. Specially trained police units should be established to investigate crimes against women and law enforcement officials, including judges, police and armed forces, should be sensitized about such crimes. Women's access to justice should be ensured through legal literacy programmes, support services and legal aid.
- 4. Gender equality in constitutional, legislative and policy reforms.** The principle of gender should be integrated into all relevant constitutional clauses, reaffirming the principles of non-discrimination, equality, affirmative action, freedom and security. Special attention should be given to family, civil and labour laws and land reforms.
- 5. Rapid establishment by the UN of interim judicial systems capable of dealing effectively with violations against women by family members and society at large.** Rape and sexual violence should be addressed by post-conflict truth- and justice-seeking mechanisms at national and local levels. The treatment of crimes against women in traditional mechanisms should be consistent with international standards.
- 6. National electoral laws and international electoral assistance to establish quotas to achieve gender parity in decision-making positions, beginning with a minimum of 30 per cent,** to ensure voter registration and education for women, to increase the ratio of women in electoral commissions and observer missions and to provide training for women candidates.