

Transitional Justice and Reconciliation

SANAM NARAGHI ANDERLINI, CAMILLE PAMPELL CONAWAY AND LISA KAYS

When violent conflict ends or a harsh totalitarian state collapses, the perpetrators and victims of violence must often resettle together in their communities. This can be immensely difficult when neighbours and even family members have fought on opposite sides of a conflict or attacked each other. The sheer numbers of participants in the violence, the various perceptions of who was in the “right” or in the “wrong” and the presence of struggling state institutions make the pursuit of justice and reconciliation quite complex. Nonetheless it is important to have some means by which to acknowledge crimes committed during a period of totalitarian rule or violent conflict. Often the international community—working with governments and civil society—establishes temporary courts or commissions to provide some sense of justice for victims and initiate a longer-term process of healing.

Women are affected in many ways during war, but there has been particular attention given to sex-based crimes. While such offences are among the worst acts of war, the focus on sex-based crimes to the exclusion of other forms of violence (such as displacement or loss of property) can limit the understanding of the many experiences of women in war and conflict. This chapter highlights the key factors underlying transitional justice processes, drawing attention to the role of women.

1. WHAT IS TRANSITIONAL JUSTICE?

Transitional justice refers to the short-term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society’s transition away from conflict or authoritarian rule.

The goals of transitional justice include:

- addressing, and attempting to heal, divisions in society that arise as a result of human rights violations;
- bringing closure and healing the wounds of individuals and society, particularly through “truth telling;”
- providing justice to victims and accountability for perpetrators;
- creating an accurate historical record for society;
- restoring the rule of law;

- reforming institutions to promote democratisation and human rights;
- ensuring that human rights violations are not repeated; and
- promoting co-existence and sustainable peace.

There are two underlying values involved: *justice and reconciliation*. Although they appear to be at opposite ends of the spectrum, the goal in both cases is an end to the cycles that perpetuate war, violence and human rights abuses.

JUSTICE

In the aftermath of conflict or authoritarian rule, people who have been victimised often demand justice. The notion that there cannot be peace without justice emerges forcefully in many communities. But justice can be based on *retribution* (punishment and corrective action for wrongdoings) or on *restoration* (emphasising the construction of relationships between the individuals and communities).

Elements of Retributive Justice: **Retributive justice** is based on the principle that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess and ask forgiveness.

Those who uphold this approach contend that punishment is necessary to:

- make perpetrators accountable for their past actions;
- deter future crime;
- counter a culture of impunity; and
- create an environment in which perpetrators and victims can realistically be expected to live next to one another.

Other positive elements of retributive justice, according to its supporters, are:

- avoiding vigilante justice in which victims seek punishment, or justice, from their perpetrators, potentially creating cycles of revenge;
- ensuring that the perpetrators do not rise to power again;
- individualising guilt to ensure that entire communities or groups are not held responsible for crimes; and
- instilling trust in the new legal, justice and political systems, ensuring that people believe in those systems and do not become cynical towards them if perpetrators go unpunished for crimes.

Retributive models of transitional justice suffer from several shortcomings.

- Prosecutions focus primarily on the perpetrator and do not give victims the attention or healing they need.
- Trials can lead to revictimisation, as those giving testimony are cross-examined in a potentially hostile and humiliating proceeding.
- Criminal courts, due to the necessity for clear-cut “yes” or “no” answers, may limit information sharing, making it difficult to obtain the whole truth. Additionally, perpetrators have no incentive to confess, tell the whole truth or make the record public.

- There is no examination of systemic and institutional structures (e.g. secret police, paramilitary units) that allowed or contributed to the crimes.

Retributive justice also includes **restitution**—recovery of losses or compensation to rectify harm. It generally takes the form of a financial payment made to the victim either by the offender or by the state. Both retribution and restitution have symbolic value, as they are concerned with “righting an imbalance.”¹

Elements of Restorative Justice: Restorative justice is a process through which all those affected by an offence—victims, perpetrators and by-standing communities—collectively deal with the consequences. It is a systematic means of addressing wrongdoings that emphasises the healing of wounds and rebuilding of relationships. Restorative justice does not focus on punishment for crimes, but on repairing the damage done and offering restitution.

The goals of restorative justice include:

- resolving the original conflict;
- integrating all affected parties;
- healing the pain of victims through apologies and restitution; and
- preventing future wrongdoing through community-building measures.

Truth telling and the meeting of victims and perpetrators are important in the process, as are expressing remorse and making restitution to the victim and his or her family. In conflict-affected societies in which children have perpetrated violence, a restorative justice approach can be a means of getting children to admit to their actions and to acknowledge their wrongdoing, while providing a means of rehabilitation and return to “normal” life without permanent stigmatisation.

RECONCILIATION

Reconciliation varies in meaning and significance. It can simply mean co-existence or it can mean dialogue, remorse, apology, forgiveness and healing. For each person, reconciliation can begin at a different point in the post conflict transition: at the negotiating table, during the prosecution of perpetrators or with the adoption of a new constitution, for example.

Some Meanings of Reconciliation²

- reconstruction of the community, neighbourly relationships, families, etc. which were broken due to pain, distrust and fear.
- construction of a non-racist and non-exclusive ideology, such as a new social consensus out of respect for human rights that is expressed in terms of political changes.
- promotion of intercultural understanding. Among cultures whose co-existence has deteriorated, it promotes mutual understanding, respect and development.
- a moral conversion: a personal change, acceptance of others and acknowledgment of one's own mistakes, crimes, etc.
- restitution of the victim's integrity and a path to the psychosocial rebuilding of experiences of suffering and resistance.
- a way of coming to terms with the past by the victims and those responsible for the atrocities.

An important point about reconciliation is that it is not an attempt to restore things to how they were *before* the conflict, but rather about constructing relationships in a way that allows everyone to move forward together. It is therefore not so much about an end result, such as punishment, but rather about a sequence of processes that build and improve relationships. *National* reconciliation refers to a political form of consensus and interaction among parties and leaders. *Societal* reconciliation refers to the longer-term, more difficult process of community and individual reconciliation.

A 1996 study indicated that the following are necessary for reconciliation to occur:

- “some form of justice;
- community-level confidence-building measures; and
- strategies and mechanisms for dealing with actors who could potentially derail the peace process.”³

Reconciliation is often seen to be crucial if peace processes are to succeed, as it establishes relations among parties after a conflict and decreases the risk of further violence.

In recent years, in the majority of post conflict states, efforts have been made to implement both justice and reconciliation mechanisms. In general, justice mechanisms have focused on the leaders or key instigators of conflict or repression, while reconciliation mechanisms have been aimed at the lower ranks.

2. WHO IS INVOLVED IN TRANSITIONAL JUSTICE MECHANISMS?

A variety of tribunals, courts, commissions and local conflict-resolution processes exist and are drawn upon in post conflict situations. International, national and local actors are involved.

AT THE INTERNATIONAL LEVEL

The precedent for international tribunals was set when Nazi and Japanese military and political leaders, who committed war crimes during World War II, were tried before international military tribunals in Nuremberg and Tokyo. Under Chapter VII of the UN Charter, the Security Council, in cases of war, has the right to establish international tribunals and appoint international representatives to run them. The International Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were the first such courts to be established since the end of World War II.

In July 2002, the **International Criminal Court (ICC)** became the first permanent mechanism for transitional justice. It will try individuals responsible for international crimes including genocide, war crimes and crimes against humanity. Its power extends to the citizens and territories of governments that have ratified the treaty—90 countries as of May 2004.⁴

International tribunals are important when, at the national level, there is either a lack of capacity or

political will to try suspected war criminals. The tribunals can be held either in-country (as in **Sierra Leone**) or externally. In the case of the ICTY and ICTR, the courts were established outside the countries, as it was felt that holding the trials in-country could exacerbate tensions. The downside, however, is that in both cases, there is little local ownership of the process, and ordinary citizens feel disconnected from the high-level processes that have been taking place outside their countries.⁵ As a result, although some key perpetrators have been tried, the courts have not contributed to long-term reconciliation in either **Rwanda** or the **Balkans**. Moreover, international tribunals tend to produce relatively few results for a high financial price. The ICTR in Arusha, Tanzania, has been notoriously slow in trying the major perpetrators of the Rwandan genocide; as of 2004, only fifteen judgments have been handed down since the first trial took place in 1997.⁶

“Mixed” international and national mechanisms are increasingly used to creatively address a country’s specific needs and concerns. In **East Timor**, for example, the Special Panels with Exclusive Jurisdiction over Serious Crimes were established in 2000 within the domestic judicial system, but with two international judges and one Timorese judge. The **Iraqi** war crimes tribunal set up in 2004 offers yet another model with Iraqi lawyers and judges using Iraqi and international law to try former officials, but drawing on international (primarily American) expertise and support in preparing the cases and gathering evidence.

Other new transnational justice mechanisms include trials in a third country based on **universal jurisdiction**—a rule that allows national courts of one country to try cases of the most serious crimes, even if they were not committed in that country’s territory. For example, **Chilean** dictator General Augusto Pinochet was arrested in London in 1998 on charges of murder, torture and disappearances that were brought forward by a Spanish court.⁷

Women and International Tribunals: International humanitarian law provides equal protection for women and men. The four **Geneva Conventions** of 1949 and their two additional protocols of 1977 also recognise women’s special needs (see international policies section below). More recently, as a result of advances at the ICTY:

- sexual violence is now recognised as a “grave breach” of the Fourth Geneva Convention;
- sexual violence, including rape, is a violation of law and customs of war; and
- rape constitutes torture.⁸

In practice, however, gender-based crimes are underrepresented in international tribunals and in national courts.⁹ This is, in part, because few women are in leadership positions within these institutions and are rarely consulted during the design of tribunals. According to the **UN Development Fund for Women (UNIFEM)**, of the 14 permanent judges at the international criminal tribunals for the former **Yugoslavia** and **Rwanda**, no more than three at any one time have been women.¹⁰ In addition, there is ample evidence to indicate that the adversarial and public nature of trials and tribunals offers limited protection for women witnesses. At the ICTR, for example, even though rules and procedures addressed witness protection and included specific provisions for women, these were not initially put into operation, and women feared testifying.¹¹ Even when women are willing to come forward, they are often faced with having to relive their worst experiences without having the opportunity to fully tell their stories.

AT THE NATIONAL LEVEL

National Law: In situations of internal conflict, where the state has been a party to war, the government is often reluctant to try its citizens, but has attempted to do so in several cases. In **Cambodia**, with support from the UN, some Khmer Rouge leaders were put on trial in national tribunals. Post-genocide **Rwandan** courts tried 7,000 individuals between 1997 and 2002, while the state was rebuilding its justice system.¹² The challenges have been immense, including security issues for the protection of witnesses, a shortage of personnel and allegations of one-sided justice. Faced with similar allegations, the Indonesian government succumbed to pressure and is conducting domestic trials for the military, police and government officials accused of human rights violations in **East Timor**.

Women and National Law: Given the collapse of the legal system in many post conflict states, justice mechanisms are most likely to fail women at the

national level. Sentences on rape and sexual violence are often minimal. Evidence is nearly impossible to collect, and in some cases, amnesty is granted. Furthermore, even in peacetime situations, women are often discriminated against by court systems, which apply national laws that are influenced by customary or religious norms and laws. In some countries women are subject to gender-specific laws, detained illegally, publicly humiliated or have their testimony disregarded.

Truth Commissions: Official, temporary investigative bodies, often referred to as **truth commissions**, have been established to clarify the “truth” about atrocities and events that took place during an earlier period of repression or conflict. They are non-judicial bodies that generally produce a report of their findings with conclusions and recommendations for future reform.”¹³ **Commissions of inquiry** are usually distinguishable from truth commissions because they investigate crimes from a specific event (rather than over a period of time).

The objectives and mandates of truth commissions vary. Key goals in many cases include:

- highlighting the root causes of the conflict and the institutions involved;
- providing accurate documentation of human rights abuses and violations;
- allowing a space for victims to share their stories;
- officially recognising and condemning the wrongdoings; and
- making recommendations to prevent future violence, reform institutions and enhance justice, accountability and respect for human rights.

Some truth commissions have pursued additional activities, including naming perpetrators, granting amnesty or providing reparations. Concerns regarding the effectiveness of truth commissions include the selectiveness of the “truth;” an increase in tensions during the process; additional trauma felt by witnesses during testimony; the reliance on other institutions to implement recommendations; and the dangers of unfulfilled expectations.

The **South African Truth and Reconciliation Commission (TRC)** lasted 10 years. It involved many

public hearings across the country, informing communities of the process. Thousands of people came before the TRC to give testimony about their experiences as victims as families of victims, and as perpetrators. It was a public event, broadcast on television and radio. At its conclusion, reports were compiled and presented to the government. From the start, it was agreed that victims would be compensated. In the end, the government agreed to award some compensation, but there is still controversy about the role of reparations in truth commissions.

Approximately 25 truth commissions have been or are being conducted worldwide in countries ranging from Argentina to East Timor, from Sierra Leone to Sri Lanka.¹⁴

Women and Truth Commissions: In truth commissions, women tend to focus their testimony on their husbands, children and other loved ones, rather than on their own experiences. While some researchers argue that women are exploited by this, as their own stories are overshadowed, new research on the **South African TRC** indicates that in many cases women intentionally came to the TRC to tell the story of their loved ones as a strategy to generate empathy and compassion with members of both sides of the conflict.¹⁵

Prior to the ICTY and ICTR, sexual violence against women, including rape, was often sidelined. The **Salvadoran Commission on Truth** in 1993 did not include reports of rape at all in its final report because they were seen as outside of its mandate to report on “politically-motivated acts.”¹⁶ In **Guatemala**, sexual violence was included in the truth commission report as part of the section on torture.

Sexual violence cases are generally underreported. This is often complicated by the fact that members of government may have been the perpetrators. Women victims face a difficult choice. Disclosure of sexual assault is risky and can result in estrangement from their family, mistreatment of their children and social exclusion. On the other hand, if crimes are not reported, women may be ineligible for reparations or other forms of legal redress.

Access to commissions is another challenge for women. Often those in rural areas have no way to get to cities where commissions are typically held. In

addition, women's testimony is not explicitly sought. In the case of **South Africa**, these issues were addressed in a number of ways. In an attempt to make it easier for women to be heard, a special women's hearing was convened. A range of programs were also introduced.

- Gender training was provided for all the commissioners.
- Preparatory workshops were held, particularly for rural women.
- Gender-sensitive reparations policies were developed (e.g. including compensation for work in the home).

Since then, truth commissions in **Sierra Leone** and **East Timor** have held special sessions for women. East Timor's public hearing, in particular, was extremely comprehensive and gathered victim, witness and expert testimony.

Reparations: Efforts to redress past wrongs through compensation, the restoration of property and rights, guarantees of non-repetition or other forms of restitution for victims are termed **reparations**. They may be directed toward individuals or communities and can include goods, services, money and legal rights such as citizenship or nationality, as well as symbolic gestures such as disclosures of truth, apologies from perpetrators and commemoration of victims. In **Rwanda**, for example, perpetrators have been known to rebuild the homes of genocide survivors. Obstacles to reparations programmes include a lack of resources, challenges in determining the eligibility of victims, and complexities in deciding the most appropriate forms of reparation.

Women and Reparations: In general, reparations policies and procedures can be gender-blind, not recognising the different needs and concerns of men and women. This can leave women without adequate compensation, as was the case in **South Africa**, where the reparations policy was initially formulated without regard for gender (but was later corrected through a special hearing). In **East Timor**, the Gender Affairs Unit of the UN mission convened 500 women in 2000 to recommend policies on a variety of issues, including reparations for women victims of violence during the conflict. Gender-sensitive reparations policies take into account, for example, the impact

on women's lives of the loss of the male breadwinner, the costs of women's unpaid labour in the home and the unquantifiable value of women's care giving functions. Such reparations might include transporting children to school, contributing financially to meet household needs, providing vocational training and assisting with medical care, particularly psychosocial counselling.

To date, there are few examples of reparations programmes for victims of sexual violence. Notably, **Guatemala's** state-proposed reparations programme includes compensation to rape victims, although the overall programme has, to a large extent, not been implemented.

Due to the nature of sexual violence and the many obstacles to obtaining justice for victims, "Realisation of the right to reparation will in many cases be tied to larger questions concerning women's access to social services and other entitlements."¹⁷ In other words, the existence of laws and policies that discriminate against women in all sectors of society can inhibit their access to reparations. Gender-sensitive reparations policies would break down these barriers—that is, they would serve as a catalyst to obtaining equality for women in the legal, political, economic and social spheres of post conflict countries.

Amnesty: Amnesty is a controversial component of some transitional justice mechanisms in which perpetrators are granted freedom from punishment in order to encourage truth-telling and promote social reconciliation. It can take the form of a **general** or "**blanket**" **amnesty** that covers all crimes committed by a group of individuals or **conditional amnesty** whereby the perpetrators must admit to the crime to be granted immunity from prosecution. It may also apply only to crimes committed during a certain time period.

Generally, the ability to grant amnesty is reserved for a head of state or the parliament. In **South Africa**, the TRC had the power to grant amnesty and in some cases did so in exchange for testimony or information. In this case, strict rules accompanied every application for amnesty, including the right of victims to oppose applications for amnesty, cross-examination of applicants and the potential for future prosecution if the person did not fully

cooperate with the TRC. In addition, individuals that refused to appear before the TRC, and those that did not apply for amnesty directly, faced potential prosecution in national courts.

In the past, amnesties for mass violence have been granted for a number of reasons including:

- demands of political leaders as a condition for negotiations;
- the popular belief that it would contribute to national reconciliation; and
- the inability of a new government to tackle crimes of the past.

Amnesty provisions can, however, create resentment among victims who feel that they received no justice. They can also foster a culture of impunity and lack of respect for the rule of law.

Women and Amnesty: A decision to grant amnesty also has a specific impact on women. The decision not to prosecute sexual violence obstructs justice and opportunities for rehabilitation for the victim. For example, in **Sierra Leone**, it is very difficult for some women to speak about and return to villages governed by the men who raped them.

Granting amnesty also may minimise the issue of sexual violence in the eyes of the population, allowing it to be set aside as an individual act or a private concern. In **South Africa**, crimes of a sexual nature, such as rape, were eligible for amnesty if they were proven to be politically motivated. This can be very difficult for women seeking justice, as the lines between political and personal motivation are blurred and difficult to prove.

Lustration: Sometimes called **vetting**, **lustration** refers to the banning of known human rights violators from holding political office or participating in the new government. It has rarely been used in post conflict situations, but it is sometimes a recommendation of truth commissions. One particular problem associated with lustration is the lack of experienced personnel for many positions in post conflict government.

In **El Salvador**, an Ad Hoc Commission was established as part of the peace accord to review the activities of military officers during the war. Through

its work, and that of the truth commission, 102 officers were “retired” due to human rights violations perpetrated during the conflict.¹⁸ In **Serbia**, a lustration law was passed in May 2003 stating that the records of public officials would be examined to see if they had violated human rights; if found guilty, they would be removed from any current office they held and could be banned from running for public office for the following five years.¹⁹

Institutional Reform and Capacity Building: This consists of judicial, legal, police, penal and military reform that promotes the rule of law and an end to human rights violations and systematic discrimination. In **South Africa**, the entire military, intelligence, police and legal system underwent massive changes in the early 1990s with the end of apartheid. In **Iraq**, the Working Group on Transitional Justice, composed of Iraqi expatriates, developed recommendations for transitional justice mechanisms following the ousting of Saddam Hussein in 2003. Their work included an analysis of the Iraqi legal code to identify provisions that violate basic human rights.²⁰

AT THE LOCAL LEVEL

Traditional Systems: Traditional justice mechanisms are increasingly used in some countries as complementary or alternative processes to international or national systems. Traditional justice procedures tend to take place at the community level and involve religious leaders, elders, local officials or other respected community members. These initiatives may lessen the burden on the formal system, offer familiarity and legitimacy to the population and contribute to reconciliation and reconstruction.

Traditional justice mechanisms face three central challenges:

1. how to standardise values, norms and processes throughout a country;
2. how to ensure victims do not feel that justice has been compromised; and
3. how to avoid overburdening the community with the large and difficult task of administering justice.

In **Rwanda**, the *gacaca* “court,” a traditional system of community-based conflict resolution and justice,

is being adapted to oversee the “trials” of the overwhelmingly large numbers of perpetrators of the 1994 genocide. It has already encountered various obstacles, however, and at the time of publication was under national review. In **East Timor**, the Community Reconciliation Process was established to complement the work of the Special Panels by addressing lesser crimes at the local level. Immunity from prosecution is granted when the perpetrator has admitted guilt, and victims and community members have determined appropriate actions for restitution.

In some instances, community members can initiate traditional mechanisms. For example in **Sierra Leone**, women in communities conduct healing rituals for child ex-combatants. By ritually cleansing them of their past deeds (killings, maiming, raiding), they enable the children to return and be accepted into a community (see chapter on children’s security).

Women and Traditional Forms of Justice: It is difficult to generalise about traditional justice because it varies by region, country and even community. Some general trends can be identified, however, that affect women.

- Women tend to be absent as decision-makers, judges, or prosecutors.
- Gender-based violence is often not recognised as a crime and thus is not addressed.
- For a variety of reasons (including social pressure and the fear of bringing shame), women are often reluctant to come forward and make accusations of rape or other forms of sexual assault.

The post conflict environment does at times provide a window of opportunity for women. In **Rwanda**, for example, women were not traditionally permitted to be judges in *gacaca* courts. But as the system was re-established to deal with genocide crimes, 35 percent of judges elected were women.²¹

THE ROLE OF CIVIL SOCIETY

Because transitional justice is about healing and establishing relations between people within a state, justice and reconciliation processes are dependent upon the active participation and input of civil society to make them truly effective.

Citizens are often the first to demand such initiatives. In **Taiwan** and **Korea**, women’s rights NGOs, rather than political dissidents, have led the fight to bring justice for former “comfort women” who served as sexual slaves to Japanese soldiers during World War II.²²

Civil society groups also play a key role in implementing justice mechanisms. They can offer expertise and input in the design phase, gather information for proceedings and raise awareness throughout the population. In **South Africa**, representatives of NGOs were intimately involved in the design and implementation of the TRC. In **Chile**, religious organisations collected numerous judicial transcripts about disappearances under Pinochet that were crucial for the work of the National Commission for Truth and Reconciliation. In **East Timor**, reconciliation proceedings involved churches, local governments, local chiefs and commissioners who ran the processes, but also depended upon hundreds of community members who came to watch and participate in proceedings.²³

Lastly, civil society groups lead reconciliation efforts. Often local populations create organisations to support victims of war, provide trauma counselling and promote healing, forgiveness and reconciliation at the community level. In **Guatemala**, for example, in addition to making submissions to the formal transitional justice procedures, many citizens also wanted to share experiences with communities with whom they were in conflict or distanced from because of the war. These informal processes led to joint initiatives, ceremonies and programs for collective healing; in one case, 28 communities organised to build a cross on top of a mountain to mark the graves of 916 people from the community.²⁴

3. HOW DO WOMEN CONTRIBUTE TO TRANSITIONAL JUSTICE?

Although there has been little documentation of women’s contributions to transitional justice, it is clear that they have a positive impact in a number of ways.

WOMEN AS PLANNERS AND DESIGNERS

On an international level, over 300 organisations supported the work of the Women’s Caucus for Gender Justice during the design of the International Criminal Court and its statutes. Their presence and

advocacy led to several advances in international law on issues of transitional justice and women including:

- guaranteed witness protection, support and counselling through the establishment of a Victim and Witnesses Unit;
- a mandate that judges have expertise on specific issues, including violence against women;
- a requirement of fair representation of men and women among judges; and
- a more far-reaching condition whereby states that ratify the Statute “amend their national law and adopt new legislation, if necessary, to ensure conformity with the Statute’s provisions.”²⁵

In the design of the ICTY, women judges drafted rules of procedure, requiring not only a higher level of sensitivity to gender issues but also better witness protection and rules for evidence than found previously in international processes.

At the national level, in **Sierra Leone**, women’s participation in the design of the truth commission ensured the existence of a special unit to investigate war crimes from a gender perspective. There is a Women’s Task Force, made up of members from women’s associations, UN agencies, the police force, the media and the legal profession, that works to create an atmosphere in which women can participate in both institutions. The Task Force is credited with addressing the need for gender balance and sensitivity within the truth commission.

In **East Timor’s** Commission for Reception, Truth and Reconciliation, women’s groups have been involved in public dialogues regarding the various options for transitional justice, the decision to establish a truth commission and as members of the steering committee that is formulating the commission. In particular, the two female commissioners (of seven total) have been at the forefront in ensuring that women’s issues are included throughout the process.

In **South Africa**, women participated in workshops and conferences to discuss transitional justice options and conducted education and awareness-raising activities regarding the transition. Women were thoroughly involved in the creation and design of the

TRC and made valuable contributions in promoting public hearings and participating at the community level. At the outset, the TRC was not designed to address issues and crimes specific to women. This was later changed, and a special session on gender was held.

Lastly, in the design of **Rwanda’s** transitional justice mechanisms, women parliamentarians played a vital role in moving rape from a “category four,” low-level offence to the most serious “category one” level, which require a trial by the ICTR or the national courts. However, because of the overwhelming number of such crimes, there is concern now that many rape perpetrators may never be tried.

WOMEN AS JUDGES AND COMMISSIONERS

In some cases, women serve as judges on tribunals and courts. In February 2003, seven of the eighteen judges elected to the International Criminal Court were women, a milestone in terms of the number of women serving on any international tribunal.²⁶ Five of the fifteen commissioners in **South Africa’s** Truth and Reconciliation Commission were women.²⁷ It is interesting to note, however, that women were assigned primarily to the Reparations and Rehabilitation Committee, which essentially had only an advisory role. Of the 25 truth commissions conducted worldwide, two have been chaired by women: the UN International Commission of Inquiry for **East Timor** and the **Sri Lankan** Commission on the Western and Southern Provinces. As of 2004, women participated in and presided over *gacaca* proceedings, and a woman chaired the Department of Gacaca Jurisdictions in **Rwanda**.

As judges, women are in a position to affect change for women and contribute a new perspective to cases in general. For example, in every ICTY case resulting in significant redress of sex crimes (perpetrated against women *and* men), women judges were on the bench.²⁸

WOMEN AS WITNESSES

Women are also important witnesses, providing information about crimes committed against them and family members to truth commissions and courts. In **South Africa’s** TRC, 52.9 percent of witnesses (11,271 out of 21,297) were women.²⁹ It was accepted that mothers could speak and cry on behalf of their children, whereas men were not as comfortable showing emotions publicly.³⁰

Women who testify often do so at great personal risk. In the ICTY, many **Bosnian** women who were raped were afraid to testify out of fear that they would never be able to marry, that they would be shamed by society or that their attackers might seek revenge. After demanding protection before, during and after the trial, some women did come forward despite the risks.³¹

When women do come forward—they were 21 percent of witnesses at the ICTY—they provide critical testimony on a range of crimes. In the words of an ICTY investigator, “Women often heard and saw things that men did not, including mass murder and rape.”³²

WOMEN AS PERPETRATORS

While women are often victims of war crimes, they also have been perpetrators, though generally on a far lesser scale than men. In **Rwanda**, approximately 3,000 women (out of more than 100,000 people accused nationwide) are awaiting or have been tried as perpetrators of genocide.³³ In many cases, women participated in lesser crimes and were bystanders, witnesses, accomplices or agitators.

WOMEN AS CIVIL SOCIETY ADVOCATES

As noted above, women have organised through civil society to participate in transitional justice processes.

Where no transitional justice mechanism has existed, women advocates have often organised and advocated for their creation. Asian women and human rights organisations, after a decade of advocacy and awareness raising, organised an international “people’s tribunal”—without legal standing but with strong symbolic implications—to try **Japanese** military leaders for acts of rape, torture and slavery against so-called “comfort women” in the 1940s. The Women’s International War Crimes Tribunal ruled in December 2001 in The Hague that Japanese generals were guilty of crimes against humanity.³⁴ Although not binding, this verdict raised awareness and set precedents; for example, the Canadian Bar Association publicly and officially acknowledged the judgment of the tribunal and urged the Canadian government to do the same.³⁵

At the ICTY, the significant advances in international law were a direct result of successful lobbying by international women’s groups and **Bosnian** women’s organisations. According to a 2004 study, chief

prosecutor Richard Goldstone claims “that if women had not been involved with the tribunal in its early years, there might not have been any indictments for gender-based crimes.”³⁶

In **South Africa**, a study titled “TRC and Gender,” produced in 1996, documented 33 years of repression of women’s perspectives throughout truth commissions.³⁷ This report is seen as one of the most successful civil society lobbying efforts to influence the TRC. It resulted in:

- the inclusion of gender-based and sexual violence in the definition of gross human rights violations;
- changes to the statement protocol to inform women of the importance of relating incidences during which they themselves were the victims; and
- the addition of special women-only hearings.

In **Peru**, women’s organisations advocated for a focus on women and gender-based crimes in the truth commission. The Truth and Reconciliation Commission of Peru sponsored a programme that “developed training documents and communication strategies, circulated suggestions for investigators and guidelines for interviewers, ran workshops, produced educational documents for the public, and created a gender working group...These initiatives encouraged integration of gender throughout the commission in a multitrack approach that mainstreamed gender while also treating it as a specific focus area.”³⁸

In **Rwanda**, ProFemmes/Twese Hamwe, a collective of 40 women’s NGOs throughout the country, conducts a variety of projects to maximise women’s participation in *gacaca*. These include advocacy for the integration of a gender perspective in implementation of the *gacaca* law and awareness-raising sessions for 100,000 women leaders, local government representatives and persons in detention centres.³⁹

In addition to these efforts, women in civil society are working to ensure access to justice within their countries, as well. In **Cambodia**, a network of 62 women’s organisations has worked with the women’s ministry to draft a domestic violence law that remains in limbo before the National Assembly.⁴⁰ UNIFEM writes: “...without laws that adequately protect them from domestic violence, rape, and other

gender-based violence, women cannot seek justice or compensation...⁴¹

WOMEN AS BRIDGES TO LOCAL COMMUNITIES

Women often play an important role in transitional justice at the local level as links between official processes and communities. In **Bosnia and Herzegovina**, “local women’s groups were particularly active in counselling and materially supporting survivors of wartime abuses. Because they had already forged relationships with victims and survivors, members of these groups were in the position to serve as witnesses. Investigators...spoke of Bosnian women’s groups as important ‘communication links’ between The Hague and Bosnian people and, in many cases, as ‘partners’ in the investigation process.”⁴²

Women in communities also facilitate reconciliation at the local level. As individuals, women are disproportionately represented among the social workers, nurses and teachers who assist former fighters in their return to civilian life. Through women’s organisations, they offer services to bring conflicting sides together informally to rebuild society. In **El Salvador**, women have conducted psychosocial programmes for the population because formal processes did not address that need. In **Rwanda**, women—through an initiative led by a woman—have adopted children orphaned during the genocide, regardless of ethnicity, as a mechanism for reconciliation and moving society forward.

Women have also crossed the former conflict divide in order to promote reconciliation between communities of women. In **Bosnia and Herzegovina**, for example, a group of women from Srebrenica formed Bosfam to provide support to women refugees and returnees, many of them widows. These Serb and Muslim women jointly knit sweaters for displaced Serbian children.⁴³

4. WHAT INTERNATIONAL POLICIES EXIST?

International Humanitarian Law (IHL) protects civilians during times of armed conflict (see chapter on human rights). Protection under IHL is enshrined in the four **Geneva Conventions** of 1949 and the two

Additional Protocols issued in 1977. It applies to women and men equally, but affords women some special protection due to their unique circumstances. For instance, it states that women:

- must have separate sleeping and sanitary quarters from men if detained;
- must be granted special protection if pregnant or nursing; and
- are protected against attack, particularly rape, enforced prostitution or any other form of indecent assault.⁴⁴

In post conflict situations, **International Human Rights Law (IHRL)** is also an important tool, for which the foundation was outlined in the **Universal Declaration of Human Rights** of 1948.

In recent years, IHL and IHRL have been further developed to define violations against women as more serious crimes. In the **International Criminal Tribunal for the Former Yugoslavia**, rape was defined in Article 5 of the statute as a “crime against humanity.” The Tribunal, in practice, also prosecuted sexual violence under other articles of the statute, including as a “grave breach” or “violation of the customs and laws of war.”⁴⁵ Furthermore, the **International Criminal Tribunal for Rwanda** ruled that sexual violence is a component of genocide.

Particularly relevant for transitional justice, the **Joinet Principles** were issued in 1997 by Special Rapporteur on Impunity, Louis Joinet and the Sub-Commission for the Prevention and Protection of Minorities of the UN Commission on Human Rights. It outlines victims’ rights in terms of past human rights violations, including:

- the right to know the truth;
- the right to justice; and
- the right to reparation.⁴⁶

Since rape and other sexual crimes have been prosecuted as war crimes under the tribunals in **Rwanda** and the former **Yugoslavia**, a precedent has been established that, when combined with the Joinet Principles, further protects women’s right to access to justice and reparations for sexual crimes.

UN Security Council Resolution 1325 “emphasises the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard, *stresses* the need to exclude these crimes, where feasible from amnesty provisions...”⁴⁷

Most recently, entering into effect in July 2002, the **Rome Statute of the International Criminal Court (ICC)** considers sexual violence a “war crime;”⁴⁸ it acknowledges that “rape is an act of torture, an act of genocide, a war crime, a crime against humanity.”⁴⁹ It further declares sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation and any other form of sexual violence to be grave violations of the Geneva Conventions and war crimes when conducted in international or internal conflicts.

Finally, in reference to these recent standards, UNIFEM notes: “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.”⁵⁰

5. TAKING STRATEGIC ACTION: WHAT CAN WOMEN PEACEBUILDERS DO?

1. Advocate for women’s participation in transitional justice mechanisms at international, national and local levels.
2. Connect with international women’s gender justice organisations for resources, tools, models, lessons learned and information on international law.
3. Ensure that women are directly involved in the design and establishment of transitional justice mechanisms so that women are represented in their structures and a gender perspective and women’s concerns are reflected in their mandates.
 - With other women’s groups, strategise to determine how women’s needs can best be addressed in transitional justice mechanisms, whether through women-specific components (such as a special hearing) or integrated throughout the program.
4. Inform the public of the importance of transitional justice to society and of the critical role of women in these processes.
 - Provide materials and workshops for judges, prosecutors, advocates, commissioners and other leaders to raise awareness of women’s issues and concerns with regard to transitional justice and about the lessons learned in other cases and models.
 - Engage with the media to disseminate information.
 - Conduct awareness-raising events and call for open hearings to ensure that the public is informed and can engage with the transitional justice process and to ensure that expectations regarding its outcomes are appropriate.
 - Encourage dialogue and public debate on core issues of transitional justice, including amnesty and reparations.
5. Actively participate in transitional justice mechanisms. Engage directly with the process.
 - Gather and disseminate information.
 - Provide testimony, and include direct experiences as well as those of friends and family members.
 - Develop victim support and empowerment measures.
6. Continue participation in transitional justice mechanisms even after an official process concludes.
 - Evaluate its impact.
 - Shift focus to institutional reform of the transitional government agencies.
 - Track implementation of promises, recommendations and progress.
 - Advocate for the adoption of international conventions and customary laws on the prosecution of sexual violence as precedents to be used during national trials.
7. Consider how to supplement the short-term official transitional justice mechanisms with other long-term forms of reconciliation and rehabilitation (i.e. psychosocial counselling, community healing, etc.).

WHERE CAN YOU FIND MORE INFORMATION?

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ACRONYMS

ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
TRC	Truth and Reconciliation Commission
UN	United Nations
UNIFEM	United Nations Development Fund for Women

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