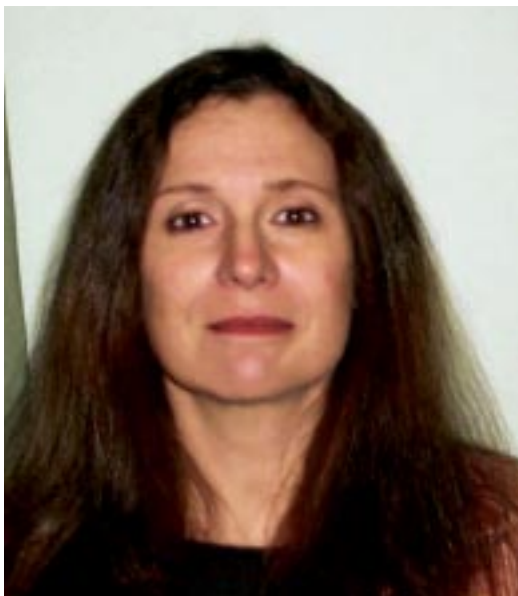


Accountability is the key to  
promoting a culture of healing  
in a post-conflict society



BY ROBERTA MARIA BALDINI

PEACEBUILDING

# international criminal justice,

conflict and its response to gender-based violence

*Since the commencement of the war in Sierra Leone, women have borne the brunt of the atrocities committed by all factions in the war.<sup>1</sup>*

Those who commit gender-based war crimes must be punished.<sup>2</sup> This statement seems obvious until one considers that from the beginning of wars to the present, during each armed conflict, women have suffered violence at increasingly high levels. It is only recently, with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), that such crimes have been prosecuted. After World War II, there was not one indictment that included rape as a crime against humanity at either the Nuremberg Trials or the Tokyo Military Trials.

The need for accountability is paramount.

Countries, states and societies must be accountable to women who suffered gender-based violence during armed conflict. Accountability and not condoning a culture of impunity may promote healing in a war torn society.

Instituting the rule of law and creating the political space for social order adds to the stability of a post-conflict environment. Without these stabilising factors there can be no real peace. On the other hand, granting licence to and legitimising violence and inequality weakens a post-conflict society. Impunity prolongs instability, injustice and the threat of renewed conflict, all of which expose women to violence.<sup>3</sup>

## Background

An independent assessment conducted by UNIFEM



ASP

states that there has been a vast increase in the number of war-affected civilians since the early part of the last century.<sup>4</sup> During the 20th century, the number of civilian casualties has increased, from 5% at the turn of the 20th century, to 15% during World War I, 65% during World War II, and 75% during conflicts fought in the 1990s.<sup>5</sup>

During wars, past and present, both male and female civilians are subject to atrocities, including being shot, beaten, burned, bombarded, tortured and forced into slave labour, to name but a few. Women face additional atrocities generally not faced by men. Both women and children are sexually assaulted with alarming regularity. Those who commit these crimes are enemy combatants, but also enemy civilians, government troops and national civilians, and in some cases even humanitarian aid workers and peacekeepers.<sup>6</sup>

Reports by UN agencies further indicate that the change in the demographics of poor and war-affected societies has created increased numbers of families headed by women or children. A family headed by a woman is more vulnerable than is a male-headed household. Attacks against such women during contemporary wars occur on a greater scale and at a higher level of depravity than seen in previous conflicts.

Depraved acts committed against civilians

cause terror, destroy families, and pull communities apart.<sup>7</sup> Examples include combatants gang raping girls as young as eight, betting on the gender of a pregnant woman's unborn child by slitting her belly open and pulling the child out, or inserting pieces of burning wood into a woman's vagina. The strategy increasingly employed in contemporary conflicts is not only to commit depraved acts, but also to spread word of them, causing a higher level of terror.

Christiana Thorpe, co-founder of the Forum of African Women Educationalists in Sierra Leone, describes what it was like in Freetown, Sierra Leone during the war. Thorpe tells of hearing the gunshots and the breaking of glass followed by the screams of neighbours, who were under their beds, huddled together. Christiana and her colleagues knew that if the combatants knocked on their door, it meant they would be raped, killed or even burned alive in the house. They were terrified.<sup>8</sup> Many Sierra Leoneans fled the country and were able to find safe haven with friends or relatives, but many more were unable to flee and suffered the effects of the conflict first hand.

Violence against women does not happen randomly or by coincidence. These deliberate plans of terror destroy a society's fabric and devalue what the society holds dear. Child combatants have

raped women who could be their grandmothers, while in Rwanda a mother stands accused of selecting the women her son would rape.<sup>9</sup> During many of these acts the victim's family were forced to watch, helpless to stop the violence.

The international community learned that gender-based violence does not stop or decrease after a declared truce or peace. Rather, gender-based violence increases during the post-conflict period. The reasons for post-conflict violence are postulated in a 1999 study by Medica Zenica, *To Live Without Violence*, conducted in Bosnia.<sup>10</sup> It describes how men experience post-war trauma by resorting to the same violent behaviour learned during combat and how they find it difficult to control their anger after the war. On the other hand, women suffering post-war trauma from rape or other violence are expected to forget the pain and attend to the needs of their children and husbands. For many women in Bosnia and other parts of the world this expectation is not new.<sup>11</sup>

In a post-conflict environment where law enforcement, the justice system and civil society are weak or non-existent, criminal conduct abounds. Women are exposed to both physical and sexual violence whether in the streets, at home, or in refugee or internally displaced persons camps. The perpetrators of this violence can be any man: ex-combatants, family members, neighbours, or strangers. There is no authority to whom to report such violence. It is also possible the authorities may be guilty of these crimes, complicit, or simply too weak to prevent or prosecute on a large scale.

## Accountability for Gender-Based War Crimes

Since the dawn of history, rapes and other forms of sexual assault have been used as weapons of war.<sup>12</sup> While these crimes have gone on for thousands of years, only in the last decade has the international community been willing to pursue these criminals. The international community is now indicting and prosecuting the perpetrators of gender-related war crimes.

During the Nuremberg and Tokyo Trials convened after World War II, gender-based war crimes perpetrated against civilian women were virtually ignored in the face of overwhelming evidence. The evidence documented examples of calculated sexual assault, including rape, forced

prostitution, and forced sterilisation. Such evidence would have supported not only an indictment, but could have proven the charges beyond a reasonable doubt.

### ***Ad Hoc International Tribunals***

The United Nations established *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, to prosecute crimes arising from the conflicts in those countries. Both tribunals have, to some extent, addressed gender-based crimes such as rape, sexual slavery, torture, persecution and other inhumane acts committed against women and girls.

### ***Special Court for Sierra Leone***

The United Nations and Sierra Leonean government established the Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed since 30 November 1996.<sup>13</sup> This mixed body of legislation explicitly articulates gender-based crimes such as rape, torture and sexual slavery as crimes in violation of international humanitarian law. The Statute of the Special Court specifically provides legislation addressing gender-related violence.<sup>14</sup> There is an additional mandate requiring the Office of the Registrar to create and maintain a Victim and Witness Unit.<sup>15</sup> This unit, in consultation with the Office of the Prosecutor (OTP) shall provide protection, security, counselling and other appropriate assistance for witnesses and victims.

The Special Court offers an opportunity to practise lessons learned and ensure greater protection and promotion of women's human rights. However, the international community must ensure that adequate funding is available to support this initiative. At a recent meeting held in New York, the Registrar for the Special Court, Robin Vincent, reported that funding for the court, which is by voluntary contributions by interested member states, was severely limited and may not be sufficient to ensure its operation beyond September 2003. Due to budget constraints, the court is only 50 per cent staffed. When asked

"The international community is now indicting and prosecuting the perpetrators of gender-related war crimes."



whether the victim support programme was in place, the response was that a very competent gender specialist has been hired.

During the course of Mr Vincent's presentation, he also indicated there may not be funding for security sufficient to protect the court should a high profile defendant such as Foday Sankoh<sup>16</sup> or Charles Taylor<sup>17</sup> be brought to Freetown.

## Addressing Gender-Based War Crimes

During a recent visit to the ICTR, a young attorney asked whether the prosecutor should require a traumatised, unwilling victim to testify about her rape in order to develop the law or whether it was better to simply forget the rape and ask her to testify about the genocide she had witnessed. The question describes the dilemma, faced by every prosecutor, of whether to

ask a witness to expose herself to the court, the defendant and the defence attorney's cross-examination, in the interests of proving rape as an element of genocide or crime against humanity and thereby developing case law in the process.

Currently, the international criminal justice system does not provide a safe, supportive environment for women to voluntarily come forward to report or testify about the atrocities they have experi-

enced. Convening an international tribunal does not diminish the cultural, historical or societal prohibitions against revealing a sexual violation.

Preparing the victim or witness to testify before the tribunal requires care and a great deal of time. It is emotionally intense for both the victim and the prosecutor. All of these preparations require skill and training, which in turn require adequate funding.

Prosecutors are generally overworked and under-resourced. Asking a prosecutor to undertake what appears to be an additional responsibility is usually met with resistance. Therefore, it is important to make clear that this approach to prosecuting gender-based violence can lead to more effective prosecutions.

The witness preparation in a case in which rape

or sexual assault is charged as a crime against humanity has many similarities to preparing any witness for trial, but also unique differences. Testifying about gender-based war crimes is qualitatively different from testifying about a destruction of historic sites or bombardment of hospitals, both in the magnitude and intensity of the crimes, as well as with respect to the effect on the victims and their social network. Thus, a prosecutor must be ever mindful that these victims may be unwilling or unable to speak out, due to post-traumatic stress disorder, avoidance, shame, guilt, fear of reprisals or a feeling of the futility of coming forward, given the lack of legal redress for such violations.<sup>18</sup> It is also particularly difficult for the victim or witness to talk repeatedly about intimate body parts, acts of depravity and societal taboos, all of which are rarely the subject of public discourse.<sup>19</sup>

There needs to be a shift in approach. The question is how the international criminal justice community can eradicate these barriers.

The international community has the opportunity, in the creation of the International Criminal Court (ICC), and through the ICC's Office of the Prosecutor (OTP) to develop a best practice protocol regarding the handling of cases where gender-based violence has been charged against the defendant. The international community must create a criminal justice response to gender-based violence that allows victims to feel safe and supported in coming forward first to report, then to testify about such crimes. The ICC and the OTP have an opportunity to learn valuable lessons from the *ad hoc* tribunals and the Special Court regarding their successes and failures. The ICC may also wish to look at progressive criminal justice response protocols established in various nations.

It seems obvious to state that establishing a best practice protocol requires a serious commitment on the part of the international community, to adequately fund and implement these practices, provide training and bring women into the decision-making process. Without these components in place the statutes and diplomatic promises are empty.

It must be stated in the strongest possible terms, that an adequate criminal justice response to gender-based violence requires all of the representatives of the international criminal justice system to be held accountable. The judges and the prose-

"The international community must create a criminal justice response to gender-based violence that allows victims to feel safe and supported in coming forward first to report, then to testify about such crimes."

cutors are only two sets of actors in this system. The others are law enforcement, prosecution and defence investigators, court personnel, clerics, registrar staff and virtually anyone who comes into contact with a victim or witness.

Successful prosecution of gender-based war crimes entails supporting the victim or witness prior to, throughout and beyond the trial. Prosecution of gender-based crimes cannot be presented without the cooperation and testimony of the victims or witnesses. It is not surprising they may not be willing: requiring the victim or witness to testify exacts a heavy toll on them when they most likely want to forget about the events.

The prosecutor's job can be made easier by learning how to build bridges and trust between him or herself and the women who will provide evidence before the tribunal. Building trust and supporting the victim is difficult without a strong Victim Support Unit or Victim/Witness Protection Unit.<sup>20</sup> These units must be staffed with social workers and psychologists and other personnel trained and experienced in treating survivors of gender-based violence and other traumatic events, such as genocide, who may suffer from acute stress disorder and post-traumatic stress disorder.

The Victim/Witness Unit can assist the prosecution in preparing a witness for trial, provide psychological support and help to explain the justice system and trial process. These are some examples of how such a unit can assist both the victim or witness and the prosecutor. Eliciting facts from the victim of gender-based violence may be difficult. Victims who disclose 'peace time' crimes, other than sexual assaults, are usually eager to give the prosecutor full details of the crime. Occasionally they may feel foolish for having exposed themselves to danger and modify the facts in the retelling. They do not, however, often attempt to sanitise the facts to make themselves more likable or paint the facts in a more favourable light. By contrast, the rape victim who was abducted or coerced into joining an armed faction as a combatant or 'rebel wife', or who may not have resisted to preserve her life or a relative's life, may do precisely that.<sup>21</sup> In these cases, the prosecutor must, in effect, cross-examine the victim or witness or get to the reality of her experience, all the while trying not to traumatise or alienate her.

When a woman is willing to testify before the

tribunal, it will often be the first time she has appeared before a judicial body. The stress of testifying in this artificial environment, not only before the judges, but also the defendant and defence counsel, may overwhelm her. Here again a support team is critical. At the ICTR, for example, witnesses have collapsed on the witness stand from the stress of testifying. No one had prepared them for what would happen during the proceedings.

Investigators working for the ICTR prosecutor have gone under cover of darkness to the homes of witnesses. They would ask the victim or witness to make a statement on her rape or on how she watched as her family and neighbours were slaughtered. When she was finished giving her statement the investigators would thank her and leave. No one was with the victim or witness to support her after the investigators left her village. Everyone in the neighbourhood recognised the UN trucks and knew why they were there. No one offered protection or anonymity to the witness. This case demonstrates the importance of training the investigators and establishing a support network for the witness. With a strong Victim/Witness Unit and training such challenges can be overcome.

Care must always be given to preserving the quality of the evidence/testimony presented at trial. Prosecutors, in particular, must be careful that the support provided does not have the appearance of buying a witness' testimony. Such an appearance would hurt the case, tainting the evidence as bias and raising ethical questions.

The solution arrived at by the *ad hoc* tribunals and the Special Court is that the Victim/Witness Unit is under the aegis of the Registrar. The Registrar's office is charged with the operation of the tribunal, the OTP and the Office of Defence Counsel and is therefore seen as a neutral party.

## Recommendations and Conclusion

The international criminal justice system is moving toward greater awareness that gender-based crimes may be elements of genocide and crimes against

"The international criminal justice system is moving toward greater awareness that gender based-based crimes may be elements of genocide and crimes against humanity."

humanity. The international criminal justice system must now understand that prosecuting these cases is different than prosecuting other crimes which are not layered with social taboo, gender stereotyping and the myth that women could have prevented what happened to them. Prosecuting these cases requires a serious commitment to funding; establishing a best practice protocol; training all representatives of the criminal justice system in best practices; making a genuine commitment to increasing women's representation in policy, legislation and decision-making and in the criminal justice system itself; as well as creating strong Victim/Witness Units.

The question of whether the international community is serious in addressing the climate of impunity regarding gender-based violence can only be answered by what actions it takes. If the international community continues to put pen to paper, drafting legislation that on its face appears to address such impunity, but then does not enable such legislation to be effected, the answer is a loud, No.

The international community, the international criminal justice system and the prosecutors in all of the *ad hoc* tribunals and the ICC must be made aware that the women of the world are watching. 🗿

*Roberta Maria Baldinini is a legal consultant on issues related to gender-based violence and domestic violence. She conducted training on trial and witness preparation for the prosecutors of the International Criminal Tribunal for Rwanda. Roberta has served as an Assistant District Attorney, Bronx District Attorney's Office and as a Project Attorney funded by the US Department of Justice. This article reflects the views of the author and does not necessarily represent the views of any organisation. Copyright is held by the author.*

## Endnotes

- 1 Zninab Bangura, *Truth and Reconciliation in Sierra Leone*, VI: Raising Their Voices: Women and the Truth and Reconciliation Commission in Sierra Leone, [www.sierra-leone.org](http://www.sierra-leone.org) (visited 13 April 2002).
- 2 Gender-based violence is a term used to encompass all forms of sexual violence as well as to make the reader aware of societal roles, attitudes, the interaction of men and women and how these work to the detriment of women.
- 3 E. Rehn and E. Johnson Sirleaf, *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building*, Geneva: UNIFEM, 2002.
- 4 In October 2000, the UN Security Council's Resolution on Women

and Peace and Security 1325 (Res. 1325) was unanimously passed. This watershed resolution established a new political framework, which makes women's and gender perspectives pertinent to negotiating peace agreements, planning refugee camps and peacekeeping operations, and rebuilding and reshaping the post-conflict environment. Furthermore, Res. 1325 makes achieving gender equality a relevant goal in every Security Council action. The study was conducted in response to Res. 1325 (see footnote 4).

- 5 Secretary-General's report to the Security Council on the protection of civilians in armed conflict. (S/2000/331), 30 March 2001, <http://www.un.org>.
- 6 Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 654 fn5 (1996).
- 7 Rehn and Johnson Sirleaf, 2002; Jeanne Ward, *If Not Now, When? Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-conflict Settings*, New York: Reproductive Health for Refugees Consortium, 2002.
- 8 Told to the author by C. Thorpe, New York, 12 December 2002. Ms Thorpe repeated the story during a UNIFEM Executive Director's Brown Bag Lunch later that same day.
- 9 The *Butare Trial* is underway at the ICTR. Two of the defendants in this case are Pauline Nyiramasuhuko, former national minister of family and women's affairs, and her son Arsène Shalom Ntahobali.
- 10 Medica Zenica, *To Live Without Violence*, Bosnia-Herzegovina: Zenica, 1999.
- 11 Cheywa Spindel *et al.*, *With An End in Sight: Strategies from the UNIFEM Trust Fund to Eliminate Violence Against Women*, Geneva: UNIFEM, 2000, p 90.
- 12 The word 'war' acknowledges that there are international, internal and regional armed conflicts. Therefore, rape and sexual assault committed during any type of armed conflict may be viewed as a crime against humanity and/or genocide.
- 13 Statute of the Special Court for Sierra Leone, Article 1, para. 1.
- 14 Article 2 titled *Crimes Against Humanity*; Article 3 titled *Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II*; and Article 5 titled *Crimes Under Sierra Leonean Law* all have provisions to deal with rape and other gender-based crimes.
- 15 Article 16, sec. 4.
- 16 An indictment was filed for the former head of the Revolutionary United Front, who has since died.
- 17 An indictment has been filed for the former President of Liberia.
- 18 Bangura, 2002.
- 19 Conciliation Resources, *Gender and Conflict in Sierra Leone*, London: Conciliation Resources, 1997; Human Rights Watch, *Sexual Violence within the Sierra Leone Conflict*, London: HRW, [www.hrw.org/background/africa/sl-back0226.htm](http://www.hrw.org/background/africa/sl-back0226.htm) (visited 11 March 2002); Radio Netherlands, *War, Rape and Sexual Assault*, 6 March 2000, [www.rnw.nl/humanrights](http://www.rnw.nl/humanrights) (visited 14 March 2002).
- 20 These units are named differently depending on the tribunal or court. I will refer to them as Victim/Witness Units, as this title includes victims and witnesses without regard to gender.
- 21 Khadija Alia Bah, *Rural Women and Girls in the War in Sierra Leone*, London: Conciliation Resources, 2001; Christiana Thorpe, 'The Safety of Girls In Conflict Situations: The Sierra Leone Experience', *FAWE Newsletter*, vol 7, no 3, [www.fawe.org/Contents/newslet73b.html](http://www.fawe.org/Contents/newslet73b.html) (visited 14 March 2002); Bangura, 2002.