

Justice Reform and Gender

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Geneva Centre for the
Democratic Control of
Armed Forces (DCAF)

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The Gender and SSR Toolkit

This Tool on Justice Reform and Gender is part of a *Gender and SSR Toolkit*. Designed to provide a practical introduction to gender issues for security sector reform practitioners and policy-makers, the Toolkit includes the following 12 Tools and corresponding Practice Notes:

1. Security Sector Reform and Gender
 2. Police Reform and Gender
 3. Defence Reform and Gender
 4. Justice Reform and Gender
 5. Penal Reform and Gender
 6. Border Management and Gender
 7. Parliamentary Oversight of the Security Sector and Gender
 8. National Security Policy-Making and Gender
 9. Civil Society Oversight of the Security Sector and Gender
 10. Private Military and Security Companies and Gender
 11. SSR Assessment, Monitoring and Evaluation and Gender
 12. Gender Training for Security Sector Personnel
- Annex on International and Regional Laws and Instruments

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DCAF

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) promotes good governance and reform of the security sector. The Centre conducts research on good practices, encourages the development of appropriate norms at the national and international levels, makes policy recommendations and provides in-country advice and assistance programmes. DCAF's partners include governments, parliaments, civil society, international organisations and security sector actors such as police, judiciary, intelligence agencies, border security services and the military.

OSCE/ODIHR

The Office for Democratic Institutions and Human Rights (ODIHR) is the main institution for the OSCE's human dimension of security: a broad concept that includes the protection of human rights; the development of democratic societies, with emphasis on elections, institution-building, and governance; strengthening the rule of law; and promoting genuine respect and mutual understanding among individuals, as well as nations. The ODIHR contributed to the development of the Toolkit.

UN-INSTRAW

The United Nations International Research and Training Institute for the Advancement of Women (UN-INSTRAW) is the only UN entity mandated to develop research programmes that contribute to the empowerment of women and the achievement of gender equality worldwide. Through alliance-building with UN Member States, international organisations, academia, civil society, and other actors, UN-INSTRAW:

- Undertakes action-oriented research from a gender perspective that has a concrete impact on policies, programmes and projects;
- Creates synergies for knowledge management and information exchange;
- Strengthens the capacities of key stakeholders to integrate gender perspectives in policies, programmes and projects.

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ACRONYMS

AWJA	Afghan Women Judges Association
CEDAW	Convention on the Elimination of all Forms of Violence against Women
CSO	Civil Society Organisation
CPCR	Centre for the Protection of Constitutional Rights
CVR	Comisión de la Verdad y Reconciliación
GBV	Gender-Based Violence
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
LGBT	Lesbian, Gay, Bisexual and Transgender
NGO	Non-Governmental Organisation
SOAWR	Solidarity for African Women's Rights
TRC	Truth and Reconciliation Commission
TVPRA	Trafficking Victims Protection Reauthorization Act
UN	United Nations
UNDP	United Nations Development Programme

Justice Reform and Gender

1 Introduction

'Who interprets the law is at least as important as who makes the law, if not more so... I can not 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 the judiciary.'

The Honourable Navanethem Pillay, former President of the International Criminal Tribunal for Rwanda and judge of the International Criminal Court ¹

Justice and security are inextricably linked. A strong justice sector protects and enforces people's rights and deters would-be violators. An independent and effective justice sector is fundamental to security, particularly in post-conflict and transitional environments where opportunities for criminal activities and impunity are rife. Reforming the justice sector is a cornerstone of creating peace, stability and democracy. A country's constitution and laws form the basis for protection of human rights. Critically, policies, procedures and practices within the justice sector determine the equal enjoyment of these rights by all.

Individuals experience security and insecurity in different ways based on, for example, ethnicity, sex, age, sexual orientation, economic status, religion and health. Around the world, women face particular barriers in accessing justice, while men are more likely to be imprisoned. Justice reform requires measures to address the specific needs of different groups, and integrating gender into justice reform is an essential strategy in this endeavour. If the justice sector is to have credibility and legitimacy in the eyes of the community the reform process must include the participation – and address the needs – of all segments of society. This tool focuses on the institutional reform of the judiciary, law reform and access to justice, with specific emphasis on gender equality.

This tool is directed toward the personnel responsible for justice reform within national governments, international and regional organisations and donors. Parliamentarians, law societies and judges networks, civil society organisations and researchers focusing on justice reform may also find it useful. It examines justice reform within the broad and often overlapping contexts of post-conflict, transitional, developing and developed countries. Any justice reform effort is highly context-specific, and no one-fits-all template can be applied to a reform process. This tool provides suggestions and recommendations that can be adapted to the specific reform context within which you are working.

This tool includes:

- An introduction to justice reform
- The rationale for why integrating gender strengthens justice reform processes
- Practical actions to integrate gender into justice reform initiatives
- An overview of particular gender and justice reform issues in post-conflict, transitional, developing and developed country contexts
- Key recommendations
- Additional resources

2 What is justice reform?

'There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.'

Benjamin B. Ferencz, former Nuremberg prosecutor ²

Goals of justice reform

The primary goals of justice reform include:

- Developing a fair and equitable constitution and laws based on international standards and human rights instruments.
- Introducing legislative and enforcement mechanisms to promote and protect human rights and to overcome barriers confronting marginalised and vulnerable groups.
- Developing a credible, effective, impartial and accountable judiciary.
- Developing an integrated approach to criminal justice among the judiciary, prosecution, police, prisons and legal representatives.
- Providing timely, equitable access to justice and effective enforcement of laws, legal rights and judgements ensuring due process.
- Strengthening the linkages and cooperation between and among state and non-state institutions.
- Establishing mechanisms for oversight of the justice system as well as strengthening the role of the judiciary in exercising oversight over other components of the security sector and other branches of the government.³

Justice reform doesn't have a stop date; it is an ongoing process – whether in post-conflict, transitional, developing or developed environments. Justice reform includes not only reform of laws but also the development of policies, procedures and mechanisms that allow for the practical implementation of laws and equal access to the justice

Box 1 Failures in one rule of law area can impact negatively on other areas where progress has been made ⁴

While creating new police forces with little existing basis proved difficult in Haiti, East Timor, Kosovo and Rwanda, it was even harder to get the judiciary functioning at a minimally acceptable level. This created a situation where the gains in policing were undermined by the ongoing difficulties with the rest of the criminal justice system. While after two years the police were arresting people according to the constitution and law, observing their rights and holding them for trial, the courts failed to process the charges expeditiously. As a result, police detention facilities and prisons soon started to overflow with suspects awaiting trial. Prison conditions, which had dramatically improved, soon deteriorated and overcrowding led to increased tension and violence in the prisons. Eventually prisoners started to be released because they had not been formally charged within the constitutionally mandated time limits. This frustrated both the police who had followed all the rules, and the public who saw dangerous people back on the streets. It undermined human rights and the rule of law as individuals took justice into their own hands, summarily executing suspected drug traffickers and leaders of criminal gangs.

system. The process may include institutional reform, policy reform, ongoing training for judicial actors (judges, court clerks and administrators, prosecutors, defence attorneys, police, bar associations, law schools), and public awareness for government and citizens.

Effective justice reform demands collaboration among the national stakeholders, including:

- The judiciary
- Ministry of justice
- Traditional and customary systems
- Parliament
- Prosecution and investigative authorities (including the police)
- Lawyers associations
- Legal aid
- Corrections/prisons
- Other ministries including the ministry of the interior and women's ministries
- Law schools
- Civil society organisations, including women's groups, religious groups and non-governmental organisations (NGOs)

NGOs and civil society groups have been instrumental in effecting judicial reform through lobbying, monitoring and public awareness campaigns. Lasting justice reform must have the political will of the government and the commitment of all actors, both at community and individual levels.

Transformation in the judicial sector must be integrated with broader reform efforts, including those discussed in the other tools in this Toolkit, which focus on police, penal system, border management, parliamentary oversight, national security policy, civil society oversight, and private military and security companies (see Box 1).

The imperative of local ownership

While justice reform often attracts external actors, this process must be locally designed, owned and implemented if it is to be sustainable. It must respond to the unique needs of the local context, and enjoy legitimacy. Thus, where international actors – including the United Nations, donor countries and international NGOs – are involved in justice reform, it is important that national stakeholders are informed, consulted and integrated into the decision-making processes so that they are well trained and prepared to take

ownership of the reform process. The first step in supporting local ownership may be to train national actors and build local capacity to design and oversee reform efforts, ranging from technical expertise to administrative skills. International staff members need to be skilled as mentors, trainers and facilitators.⁵

Challenges to justice reform

- Competing legal frameworks among various systems: formal, traditional and religious systems.
- Exclusion of certain segments of society from the reform process.
- Lack of basic resources, which are needed for judicial actors to carry out their jobs (e.g. paper, pens, law books, transportation, support).
- Lack of, or dilapidated, infrastructure such as courtrooms, interview rooms, holding facilities and separate corrections facilities for men and women.
- Lack of independence of the judiciary resulting from little or no separation of powers, poor oversight and/or general interference by those with power.
- Corruption among judicial actors, including police, judges, prosecutors, court administrators and juries.
- A shortage of qualified judicial actors remaining in the country.
- Cultural attitudes and practices, which result in violations of human rights.
- Lack of training in domestic and international laws, policies and basic administration procedures.
- Slow pace of progress.

3 Why is gender important to justice reform?

'Development assistance provided by the United Nations system needs to focus on decreasing the key structural risk factors that fuel violent conflict, such as inequity – by addressing disparities among identity groups; inequality – by addressing policies and practices that institutionalise discrimination; justice – by promoting the rule of law, effective and fair law enforcement and administration of

justice, and, as appropriate, equitable representation in the institutions that serve the rule of law; and insecurity – by strengthening accountable and transparent governance and human security.’

Kofi Annan, Prevention of Armed Conflict, Report of the Secretary-General ⁶

Gender refers to the particular roles and relationships, personality traits, attitudes, behaviours and values that society ascribes to men and women. ‘Gender’ therefore refers to *learned* differences between men and women, while ‘sex’ refers to the *biological* differences between males and females. Gender roles vary widely within and across cultures, and can change over time. Gender refers not simply to women or men but to the relationship between them.

Gender mainstreaming is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels.⁷

For more information
see Tool on SSR
and Gender

See Annex on International
and Regional Laws and
Instruments

Security, sustainable development, justice and equality are interdependent. Gender equality is both an aim of, and precondition for, sustainable development. Weaving gender issues into the fabric of justice reform at the earliest possible stage will make the reform stronger, more sustainable and responsive to a greater percentage of the population. Further, gender is fundamentally important to any justice reform that aspires to meet international standards on human rights, good governance and democracy.

Gender is important for justice reform to:

- Ensure that States meet their responsibilities under international law.
- Respond to the particular justice needs of all parts of the community.
- Build trust in the justice sector.
- Ensure a representative and legitimate justice sector.
- Reform discriminatory laws and advance protection of human rights.
- End impunity for gender-based violence (GBV).
- Ensure equal access to justice.
- Strengthen oversight and monitoring of the justice sector.

3.1 To ensure that states meet their responsibilities under international law

International conventions and treaties may carry with them certain obligations. States that have both signed and ratified international instruments may be legally bound by their provisions. Relevant international instruments include:

- The *Convention for the Elimination of All Forms of Discrimination against Women* (CEDAW, 1979), a human rights convention, is a binding source of international law for those states that have become parties.

- In the *Beijing Declaration and Platform for Action* (1995), states committed to ‘develop strategies to ensure that the re-victimisation of women victims of violence does not occur because of gender-insensitive laws or judicial or enforcement practices...’⁸
- The *UN Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice* urge states to review, evaluate and revise their criminal procedure to ensure that: ‘Women subjected to violence have an opportunity to testify in court proceedings equal to that of other witnesses and that measures are available to facilitate such testimony and to protect their privacy’.⁹
- *UN Security Council Resolution 1325* (2000) calls on states to ‘respect fully international law applicable to the rights and protection of women and girls’ and to ‘take special measures to protect women and girls from gender-based violence’.

Understanding of state responsibility for human rights violations has significantly widened in recent years to include not only violations of human rights by the state or its agents but also abuses by private actors. States have a positive duty to prevent, investigate and punish crimes associated with GBV and discrimination.¹⁰ If a state fails to act with due diligence to prevent, investigate and punish abuses, including gender-based discrimination and violence, domestic violence and trafficking, it is responsible under international human rights law.

Considerations for determining state compliance with obligations of due diligence regarding GBV and discrimination include:¹¹

- Ratification of international human rights instruments
- Constitutional guarantees of gender equality
- Existence of national legislation and/or administrative sanctions providing adequate redress for victims of GBV
- Policies or plans of action that deal with GBV
- Gender-sensitivity of the criminal justice system and police
- Accessibility and availability of support services
- The existence of measures to raise awareness and modify discriminatory policies in the field of education and the media
- Collection of data and statistics on GBV

3.2 To respond to justice needs

Gender issues impact how individuals – men, women, boys and girls – experience security and enjoy or are denied their basic human rights. It is vital to recognise that communities are heterogeneous; individuals have difference strengths, needs, priorities, resources, networks, etc. Including local voices, particularly those of women and other under-represented groups, throughout the reform process is essential to identify the relevant issues covering all

segments of the population. This enables justice reform to better respond to the specific concerns of all groups.

3.3 To build trust in the justice sector

Collaboration between the justice sector and civil society to identify and address gender issues throughout a reform process can help to establish an environment of mutual trust. The restoration, or creation, of trust in the justice sector is essential if it is to fulfil its functions. If citizens do not have any faith in the justice system they will find other ways to settle their disputes, including taking the law into their own hands.

3.4 To ensure a representative and legitimate justice sector

To have legitimacy in the eyes of the community, the justice sector should reflect the societies they serve. Currently women are under-represented in the judiciary of many countries, and are often found at the lower levels of the judicial organisation, including in family courts. Though global statistics seem unavailable:

- As of 1 April 2007, in the judiciary of England and Wales, women represented 9.26% of High Court Judges and 22.44% of District Judges.¹²
- In 2004, in Indonesia, women represented 15.6% of the judges in the Supreme Court and 16.2% of judges in the General Court.¹³
- In 2004, in Costa Rica, there were 386 male judges and 334 female judges. But a majority of female judges can be found at the lower levels of the judicial organisation pyramid.¹⁴
- Globally, in 2005, women represented 15.8% of Ministers of Justice.¹⁵

Women and other minority groups – acting as judges, prosecutors, defence attorneys and court administrators – strengthen the legitimacy of the judiciary and make the courts more accessible to the communities they serve. Women and minorities in high-level positions in the judicial sector serve not only as role models for the community, but may also champion issues of equality and non-discrimination. Additionally, the participation of women in the judicial sector should be understood as efficient use of human resources. Modern societies cannot afford to lose the intellectual power and energy of half of the population.¹⁶

3.5 To reform discriminatory laws and advance protection of human rights

‘Law is the most formal expression of government policy. Without legal protections, women have no recourse when they face discrimination that affects all aspects of their lives, including security, bodily integrity, family life, community

status, and political, economic and social prospects. Legal reform is needed to realize gender justice.’

Statement of the Honorable Navanethem Pillay, Judge,
International Criminal Court¹⁷

The gap between human rights standards and national law on issues pertaining to gender justice remains wide in many countries. Many countries maintain laws that are overtly discriminatory with regard to land ownership, GBV, marriage, child custody, inheritance, employment and sexual orientation. A number of these examples are discussed in more detail in Section 4.4. The problem is particularly complex to unravel when codified laws that espouse equality coexist with other laws, formal or customary, that are discriminatory.

3.6 To end impunity for gender-based violence

‘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 security which have ignored, silenced or otherwise failed to respond appropriately to gender-based crimes.’

Dr. Kelly Dawn Askin¹⁸

Many societies tend to blame the victim of GBV, especially sexual violence. As a result of the fear of stigma, most victims never report the incident. This is more so for males (who may be ashamed) and lesbian, gay, bisexual or transgender (LGBT) victims of GBV, who may be subject to additional harassment/violence due to their sexual orientation.

Community attitudes of blaming the victim are often reflected in the courts. Police, prosecutors and judges often consider domestic violence a ‘private’ matter beyond the reach of the law. Women and men who report crimes of sexual violence often face a secondary victimisation in the justice system, beginning with the police and continuing on through the court process. Many sexual and gender-based crimes are dismissed, or guilty perpetrators are given light sentences. In some countries, the punishment meted out to perpetrators constitutes another violation of the victim’s rights and freedoms, as when they are forced to marry the perpetrator.¹⁹

Patricia Ntahorubuze of the Bujumbura-based Association of Women Lawyers, discussing the willingness of the judicial system to address sexual crimes, states: ‘It is a problem because there is a tendency to treat these incidents as lesser crimes. This is a sin because many who are brought to court on rape charges are immediately released’ Many victims don’t bother seeking prosecution because they know nothing will be done. Often, crimes of sexual violence in Burundi are resolved in a ‘friendship way’ with an exchange of cows or cash.²⁰

Box 2 The nine Ps of gender and justice reform

Planning – including local stakeholders and gender perspectives at the earliest strategy stages and throughout the reform process.

Partnership – collaboration and cooperation between and among the various national stakeholders: judiciary, police, prosecution, lawyer's associations, law schools, civil society, women's networks and international stakeholders (the UN, donor states, international NGOs).

Participation – promote participation of men and women, from the various segments of society, as actors within the justice sector: judges, prosecutors, lawyers, and court administrators.

Prevention – prevention of gender-based discrimination and GBV through law reform, policies and procedures within security and justice sectors, both internally, within judicial and security institutions, and externally in the community.

Procedure – development of procedures, policies and practices that promote equal access to justice for men and women in formal, transitional, informal and alternative systems.

Protection – protection for victims and witnesses of gender based discrimination and GBV: security, safe houses, legal aid and reparations.

Prosecution/punishment – prosecuting perpetrators of violations – no impunity, internally within the judicial institutions and externally within the community.

Public Awareness – campaigns to inform the public of laws that prohibit acts of gender-based discrimination and violence and the policies and practices that implement those laws.

Performance – oversight, internally within judicial sector and externally by other branches of government; monitoring of progress of justice reform.

As a consequence of the failure of the justice system to punish perpetrators of GBV, as well as the lack of adequate medical and psychological support, survivors may become deeply depressed, even to the point of suicide. In Afghanistan, the silence of the courts on the widespread violations of women's rights results in many self-immolations and other forms of suicide among women.²¹

Crimes that go unpunished feed a culture of impunity and lawlessness. Impunity weakens the foundation of societies emerging from conflict by legitimising violence. It prolongs instability and exposes women to the threat of renewed conflict.²² The rule of law is a crucial aspect of good governance, peace and sustainable development. Further, high rates of sexual and GBV result in higher rates of HIV/AIDS – one of the greatest threats to sustainable development and security.

3.7 To ensure equal access to justice

Peace and reconciliation are enhanced when women and men can turn to the courts, mediation or traditional mechanisms to resolve disputes and hold criminals accountable. Access to justice can be blocked for many reasons, many of which particularly affect women, victims of GBV and people from minority groups:

- **Knowledge:** many women and men do not know their legal rights or how they can assert these rights to get redress for criminal and civil wrongs.
- **Resources:** many victims of violence, discrimination or harassment do not have the financial resources to take the matter to court and therefore remain silent. Many inequalities in access to justice result from the fact that men can often better afford to hire competent counsel. In cases of gender discrimination or domestic violence, the accused typically has legal representation but the victim does not, because she cannot afford it.

- **Fear:** many victims and witnesses are afraid to testify, especially regarding crimes of GBV. There is a general lack of security for witnesses and victims in the courtroom and few safe houses. Victims and witnesses of GBV are often in need of protective orders, which are rarely available outside of developed countries.
- **Corruption:** corrupt judicial procedures make it, in many cases, impossible for women to win legal battles in a transparent and open way. Court rulings that favour the highest bidder are generally against women.
- **Transportation:** it can be difficult and expensive to travel to courtrooms, often only located in cities.
- **Child care:** the majority of victims of GBV are women; many of whom have small children to care for. It can be difficult for them to arrange child care during the court case period.
- **Language:** there may be several dialects and traditional languages spoken, particularly in rural areas. Trials may be conducted in a language the victim does not understand.
- **Discrimination:** discriminatory practices of judicial personnel against women, minorities and particular ethnic groups.

Effective justice reform must include policy and practices that ensure gender sensitivity and non-discrimination in practice within the justice system, as well as concrete steps to ensure access to justice for all.

3.8 To strengthen oversight and monitoring of the justice sector

NGOs and civil society play an important role by monitoring trials, sentences and other aspects of the justice system, and by keeping the public informed on justice matters.

Oversight and monitoring mechanisms are vital to ensuring an effective reform process. Oversight within the judiciary to

Box 3 Women's network urges African States to sign protocol on African women's rights

Solidarity for African Women's Rights (SOAWR), an umbrella group representing 19 women's rights groups in several countries across Africa, publicly issued red cards to the leaders of 12 African countries at the African Union Summit for not signing the African Union *Protocol on the Rights Of Women in Africa*. The red card read: 'You have received a red card by the Solidarity for African Women's Rights, a coalition of organisations campaigning for the ratification of the Protocol on the Rights of Women. SOAWR did this to urge African states to ratify the charter which covers a broad range of human rights issues and is a comprehensive legal framework for protecting women's rights.'²³

ensure compliance with non-discriminatory policies and procedures can be very helpful in highlighting the early warning signs of problems. Similarly, civilian oversight of the security sector can identify issues as they arise so that they can be dealt with before they become security threats.

4 How can gender be integrated into justice reform?

Any justice reform process is extremely context specific. Taking time to identify the specific conditions, needs, challenges, gaps and opportunities in a particular situation will make processes more likely to be successful and sustainable, in turn strengthening stability and security.

As gender considerations are integral to effective justice reform, they should be woven into the overall plan. Factors in addition to gender that can influence issues of inequality, violence and discrimination, such as race, ethnicity, class, religion, education, economic status, sexual orientation, health, language and geographical location, should also be taken into account wherever possible. Understanding the root causes and effects of gender-based discrimination, violence and conflict is critical to shaping an approach that addresses gender inequities.

Key stakeholders from the judiciary, prosecution authority, law associations, police, prisons and civil society should be involved at the earliest planning stages to clearly determine and state the objectives of the reform process. Early

cooperation and collaboration between and among the various national and international stakeholders will lead to a more coordinated approach to justice reform. NGOs have for long been advocates of women's equality: monitoring government activities, reporting violations, campaigning for change and providing assistance directly to women. Collaboration with women's networks, as well as lawyers' associations, and LGBT groups, for example, can be crucial to understanding the realities of gender justice issues, as well as for building legitimacy for the reform process.

4.1 Gender-sensitive assessment of the justice sector

The reform process should include a gender-sensitive assessment of the justice sector.

Checklist for gender-sensitive assessment (non exhaustive):

- ✓ Identify which international and regional human rights instruments have been ratified by the state.
- ✓ Review the constitution and national laws for conformity with international and regional human rights obligations, including as regards gender equality.
- ✓ Review traditional and religious laws and customs for discriminatory practices, in light of national and international human rights standards.
- ✓ Assess whether there are adequate laws to prevent discrimination, for example: laws that prohibit discrimination against women and men with HIV/AIDS,

Box 4 East Timor – civil society influencing the content of the constitution

A working group on Women and the Constitution, composed of several civil society organisations, was formed and, in consultation with the Gender Affairs Unit, organised consultations with women's groups all over the country on basic issues affecting women in East Timor. At the end of this process a Women's Charter of Rights in East Timor was agreed upon, with eight thousand signatures collected, mostly from women, supporting the Charter. The Charter was then presented to the Members of the Constituent Assembly. This raising of public consciousness around the issues of gender equality and non-discrimination resulted in The Constitution of East Timor. The Constitution includes the following provisions:

- One of the fundamental objectives of the state is to *promote and guarantee the effective equality of opportunities between women and men and non-discrimination on grounds of gender.*
- *Women and men shall have the same rights and duties in all areas of family life and political, economic, social, and] cultural [areas].*
- *Marriage shall be based upon free consent by the parties and on terms of full equality of rights between spouses.*
- Women are entitled to maternity leave *without loss of remuneration or any other benefits.*²⁴

discrimination on the basis of pregnancy, maternity or marriage; sexual harassment in the workplace.

- ✓ Assess, through interviews with various people representing a broad cross-section of society, how the legal system works 'in practice' for both women and men, including alternatives to the formal justice system. Pay particular attention to procedures, rules and practices that affect access to justice.
- ✓ Review statistical databases, court and other institutional records, if available, to assess who is utilising the court system and for what types of claims, and with what outcomes. Are women and other particular social groups failing to bring cases to court? If so, why?
- ✓ Review what types of punishments are used for perpetrators, with particular attention to punishment for GBV crimes and those affecting marginalised social groups.
- ✓ Conduct a gender analysis of the justice sector budget – how are resources being directed at men and women?
- ✓ Assess the participation of women in the legal education system, legal profession and judiciary.

4.2 Law reform

Transition periods and post-conflict situations can offer brief windows of opportunity to revise and redraft constitutions and legislation, which have long-term repercussions for peace, security and the status of different groups within society, including women.

International and regional treaties and human rights instruments

States should, at a minimum, accede to and ratify international and regional human rights treaties and conventions, without reservations, and comply with all international human rights instruments.

See Annex on
International and Regional
Laws and Instruments

Civil society can be effective in lobbying governments to ratify treaties (see Box 3).

Box 5

Addressing women's land ownership in Rwanda

After the Rwandan genocide, the Government needed to deal with the staggering number of landless female heads of households. A gender desk was established in Parliament and reviewed laws that discriminated against women. The desk successfully argued that women should be given the right to inherit property from their parents or husbands, and widows should be able to reclaim property from male relatives of their deceased husbands. While the process was successful in institutionalising support for women's rights, the new law granting property rights to women has been difficult to implement at the local level. Traditionalists are loath to alter centuries-old customs, and Rwandan women's rights activists warn that, without nationwide education about their new rights, the law will not be implemented.²⁵

Constitutional reform

The constitution can be critical to achieving gender equality and prohibiting gender based discrimination and violence. Constitutional reform is often part of the post-conflict and transitional process, and provides the foundation upon which justice reform is based. A constitution can, for example, affirm that human rights are to be enjoyed by all persons, regardless of gender or sexual orientation, or establish that international and regional instruments, once ratified, are automatically applicable under domestic law. Civil society and NGOs can be very effective in demanding that such issues are included in the constitution (see Box 4).

National legislation

National legislation should reflect, at a minimum, the definitions and standards in international and regional human rights instruments. Existing laws should be reviewed and new laws enacted, if necessary, to specifically prohibit all forms of GBV and discrimination. The effective development of such laws requires a process that is consultative and incorporates the opinions of victims/survivors and women's NGOs, in dialogue with practitioners who will apply and enforce the laws.

Land ownership

Land disputes are one of the major threats to security, especially during fragile post-conflict and transitional periods. After a conflict, parties often return to their homes only to find them occupied. The current occupants may have

Box 6

Using international law to overcome discrimination in inheritance practices in Kenya²⁶

Re Wachokire, Succession Cause No. 192 of 2000, Chief Magistrate's Court at Thika, August 19, 2002

Jane Watiri petitioned the court to award her one half of a parcel of land that belonged to her deceased father on which she lived with her four children. Her brother objected, arguing that he had cultivated a larger portion of the land during his father's lifetime than his sister and therefore was entitled to that larger portion. Senior Principal Magistrate H. A. Omondi found that under Kikuyu customary law, an unmarried woman like Watiri lacked equal inheritance rights because of the expectation that she would get married. Magistrate Omondi held that this customary provision discriminated against women in violation of Section 82(1) of the Kenyan Constitution, which prohibits discrimination on the basis of sex. It also violated Article 18(3) of the Banjul Charter and Article 15(1)-(3) of the Convention on the Elimination of All Forms of Discrimination Against Women, which provide for legal equality between men and women. Consequently, Magistrate Omondi awarded Watiri and her brother each an equal share of their father's property.

Box 7

Best practices in the legal definition of and criminalisation of rape

The Raoul Wallenberg Institute identified the following as best practices in the legal definition of and criminalisation of rape:

- Legal definitions of rape and other sexual offences are gender neutral.
- Sexual offences are treated equally whether occurring with or outside a sentimental relationship.
- Rape, as well as other sexual offences, are public offences.
- The definitions of sexual offences are, directly or indirectly, based on the lack of consent.
- Consent is not implied by lack of resistance.
- Corroborating evidence is not required for conviction.
- The sexual act is defined broadly and penetration is not a prerequisite.
- Specific age limits, under which consent is presumed to be lacking, to protect young persons.

The report further identifies policies that allow for effective implementation of the law. These include:

- Specialised police, including female officers, to handle sexual offence cases.
- Guidelines that detail how receiving police officers shall proceed in sexual offence cases.
- Survivors are able to report a sexual offence in their own language.
- The possibility to file an anonymous complaint for police records.
- A national database of sex offenders.
- Sexual offences units established within the national prosecuting authority.
- All judges are trained on the nature and implications of sexual offences.
- Specialised court sections to deal adequately with sexual offences.
- Evidentiary rules that generally bar evidence on the survivor's sexual history and reputation.
- Protective measures, such as use of screens and closed doors, to ensure that the survivor is protected against secondary victimisation while testifying.
- The age of the witness is taken into account in the enactment of protective measures.
- Assistance is provided to victims including multi-disciplinary support centres.
- Specialised sections within the national health care system.
- Survivors of sexual abuse always examined by health care staff of their own sex.
- Free emergency contraception, antiretroviral treatment and antibiotics against sexually transmitted diseases.
- National protocols for collection of evidence and psychological treatment.
- Availability of sexual assault evidence kits and free legal assistance.
- Financial costs arising out of the crime are reimbursed by the state.
- 24-hour crisis lines for information and advice concerning sexual offences.
- Information and education easily available to rape survivors in various languages.
- Public awareness-raising campaigns in various media formats and languages.
- A policy framework that includes national action plans and policies dealing with violence against women and/or crime prevention that addresses rape and other sexual offences.

fled from other places or been responsible for the eviction of the former owners. Legal procedures to deal with land disputes must be clear and accessible.

In many countries women do not have the right to own or inherit property. This is particularly problematic in post-conflict environments where many women may find themselves widowed and heads of household but unable to own the land where they have lived. They may be displaced from their land, without means to grow food for income or consumption (see Boxes 5, 6).

Gender-based violence

GBV is a highly prevalent and largely unpunished crime. It is often surrounded by a culture of silence, and certain types of

GBV are often not appropriately criminalised in national legislation. For example:

- *Domestic violence*: Studies show between 25% and 50% of all women in the world have been abused by intimate partners. Approximately 95% of victims of domestic violence are women. In most countries, legislation classifies domestic violence as a misdemeanour rather than as a serious crime, and does not explicitly protect women from marital rape and stalking. But there has been progress: marital rape is now recognised as a crime in at least 50 countries.²⁷
- *Honour crimes*: Crimes against women committed in the name of 'honour' may occur within the family or within the community. It is estimated that 5,000 women are murdered by family members each year in 'honour' killings around the world. In courts of law, the 'honour defence' is

institutionalised in some Middle Eastern and Latin American countries, allowing fathers, brothers or husbands to walk away from murder. In 12 Latin American countries, exoneration of a rapist is possible if he offers to marry the victim and she accepts. The family of the victim frequently pressures her to marry the rapist, which they believe restores the family's honour.

When allowed to continue unchecked, GBV contributes to a culture of impunity, which in turn undermines peace and security.

Sexual violence

In many countries, national legislation fails to provide a legal framework that recognises all forms of sexual violence as crimes. For example, legislation may require the use of force in an act of sexual violence, rather than the lack of consent. Some legislation only recognises rape and not other forms of sexual violence, and/or limits rape to penetration of the vagina. Often sexual violence against men and boys is not included. In some countries, shortcomings in the law regarding sexual violence stem from evidentiary standards and procedural rules. For example, in many Muslim countries following shari'a, two men must have witnessed the act of violence.²⁸

The Raoul Wallenberg Institute for Human Rights and Humanitarian Law has compiled best practices in four areas of law of particular importance in relation to gender: domestic violence/rape; determination of paternity; customary unions; and termination of pregnancy.²⁹ The best practices contained in the report are comprised of three components: law, policy and reality. A law cannot stand on its own as a best practice but must be accompanied by government or state policies for implementation. Another factor vital to the success of a legal reform is the context in which it operates. What is working in one country may fail to work in another setting, due to, for example, cultural differences, the structure of the society and the availability of resources. Likewise, a practice that works well for one particular group may not work at all for other groups.³⁰ Box 7 gives an example of best practices in relation to rape.

Sexual orientation

Human rights violations targeted against persons because of their actual or perceived sexual orientation or gender identity constitute an entrenched global pattern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities and serious discrimination in relation to the enjoyment of other human rights.

Box 8 Civil society's role in lobbying for law reform

Civil society can be extremely effective in lobbying for law reform. One of the key enabling factors in the following examples was the proactive, non-compromising stand of women's groups. These groups took action at a very early stage, formulated their demands as concrete amendments, and stood firm despite conservative reactions or political instabilities and changes. They also succeeded in setting up broad and inclusive coalitions, partnering with other movements and ensuring nationwide representation to avoid being labelled as 'marginal' or 'driven by western values'. Furthermore, the groups employed professional campaigning strategies, combining a variety of methods including extensive use of the media, close monitoring of and advocacy with the parliament, public demonstrations, awareness-raising activities, and meetings and seminars. In each case, the groups recognised and made effective use of the window of opportunity provided by the political or social contexts. Through the campaigns and reforms, the underlying philosophy of legislation has been transformed, thereby providing new grounds to realise women's rights.

The **Mongolian** Domestic Violence Law, enacted in May 2004, was the result of collaboration between two prominent Mongolian women's NGOs and a parliamentary domestic violence legislative taskforce.³⁵

In **Morocco**, the reform of the family code in February 2004 abolished the supremacy of men in marriage, defining husband and wife as equal partners within the family institution. This was a groundbreaking step for Moroccan women. The reformed family code gives women equal rights to men in matters of divorce and raises the age of marriage for women from 15 to 18 years; grants women property rights; takes measures to limit polygamy (even though it is not completely outlawed) and recognises children's rights. An extensive campaign by Moroccan women's groups, led by *Association Démocratique des femmes du Maroc*, was the driving force for the reform.³⁶

The 2004 **Spanish** Protection from Violence Act was developed with strong involvement from women's organisations and contains a wide definition of violence, including psychological forms of violence, such as sexual aggression, threat, compulsion, coercion and deprivation of free will. The law covers preventive and educational measures, as well as protection and assistance for victims and new sanctions against perpetrators.³⁷

A new **Turkish** Penal Code was accepted in the Turkish Parliament in September 2004. The new code introduced progressive definitions and higher sentences for sexual crimes; criminalised marital rape; brought measures to prevent sentence reductions granted to perpetrators of 'honour' killings; eliminated all references to patriarchal concepts like chastity, honour, morality, shame or indecent behaviour; abolished previously existing discrimination against non-virgin and unmarried women; abolished provisions granting sentence reductions in rape and abduction cases; criminalised sexual harassment at the workplace and considers sexual assaults by security forces as aggravated offences. The reform was the result of the intensive three-year campaign by a platform of 27 Turkish NGOs.³⁸

In **Burundi**, women's rights activists are calling for nationwide legal and social reforms to address the countless crimes of sexual violence committed during the war and to reform the country's legal treatment of rape. The Bujumbura-based Association of Women Lawyers in Burundi has joined other women's organisations to petition the government to revise and strengthen the laws around sexual violence and is advising a special judicial review committee convened by concerned activists.³⁹

Laws can be enacted that prohibit discrimination or GBV based on sexual orientation or sexual identity. South Africa's Constitution was the first in the world to prohibit unfair discrimination on the grounds of sexual orientation. In December 2005, a South African Constitutional Court ruling granted equality in civil marriage for gay and lesbian couples for the first time on the African continent. Several other countries have made progress in combating rights abuses based on sexual orientation or gender identity:

- **Fiji**, where in August 2005 the High Court ruled that the country's sodomy law was unconstitutional, holding that, 'What the constitution requires is that the law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are'.
- **Romania**, where a decade of domestic and international pressure led to the repeal of a sodomy law and to the passage of broad anti-discrimination legislation.³¹

In April 2007, the European Parliament passed a resolution addressing discrimination on the basis of sexual orientation in Europe:³²

Art (3) Reiterates its request to the Commission to ensure that discrimination on the basis of sexual orientation in all sectors is prohibited by completing the anti-discrimination package based on Article 13 of the EC Treaty, without which lesbians, gays, bisexuals and other individuals facing multiple discrimination continue to be at risk of discrimination; calls for a worldwide decriminalisation of homosexuality;

Art (8) Reiterates its invitation to all Member States to propose legislation to overcome the discrimination experienced by same-sex couples, and asks the Commission to make proposals to ensure that the mutual recognition principle is applied in this field also, in order to ensure the freedom of movement for all persons in the EU without discrimination...

Laws discriminating against men and boys

Men and boys are also affected by discriminatory laws and practices. For example, a South African court found that a statute which required, for adoption of an illegitimate child, the consent of the mother but not the father, was unconstitutional on the ground of gender discrimination and discrimination on the basis of marital status.³³

De facto discrimination

Even where laws prohibit discrimination and embody special measures to advance women, discrimination against women and certain groups of men remains widespread in practice ('*de facto*'). De facto discrimination encompasses, for instance, banking practices requiring the husband to sign for his wife's contracts; lack of implementation of land law norms mandating joint titling for couples; and violations of equal opportunity legislation. Discriminatory cultural attitudes, illiteracy, lack of legal awareness, lack of resources to enforce rights and difficulties in accessing courts located in urban areas are major factors contributing to *de facto* discrimination.³⁴

4.3 Judicial procedures and practices to address gender-based violence

Even where adequate legislation is in place, procedures and practices within the justice system often discriminate against particular groups, including victims of domestic and sexual violence. Procedural barriers can include fees required to lodge complaints, or the physical inaccessibility and the limited opening hours of government offices (see Box 9). More specifically, courts often lack the infrastructure, capacity and expertise to prosecute crimes of GBV. Legal procedures for conducting sexual violence trials often re-victimise survivors, subjecting them to humiliation during interviews, when testifying and after the trial.

All judicial practices and procedures should be scrutinised to ensure that they do not improperly discriminate against women or any other group in society. Preventing discrimination will in many cases require special measures. Examples of special measures adopted in various countries in relation to sexual and domestic violence, and protection of victims and witnesses are discussed below.

Sexual violence

Some States have developed special mechanisms for sexual violence matters to ensure that rules of evidence and procedure are not based on harmful stereotypes of women, and avoid 're-victimisation' of survivors.⁴¹

The International Criminal Court's Rules of Procedure and Evidence are considered good practice for victim protection.⁴² Rule 70 provides that in cases involving sexual

Box 9 Rape victims in Russia must have injuries documented by forensics experts

In Russia, law enforcement fails to prevent, investigate and punish domestic violence, due to such factors as entrenched prejudice, lack of training on the issue and the fact that the State has not made addressing violence against women a priority. The police do not operate specialised units to respond to domestic violence, and none are planned. Neither the Ministry of Internal Affairs, nor law schools provide instruction related to violence against women. Nor has the State instituted any gender-sensitive training for law enforcement aimed at eliminating attitudes and practices that perpetuate domestic violence.

To proceed with any criminal case, a victim's injuries must be documented by a forensic medical expert. Other types of physicians cannot issue an opinion that can be used in court. Victims must have referrals from a law enforcement organ to a forensic expert for an official opinion, and must pay for the documentation of their injuries. This process of accessing forensic expertise can itself be difficult for victims of violence, especially considering the need to have a police referral, the distance to forensic medical offices and the working hours.⁴⁰

violence, the Court shall be guided by and apply the following principles:

- (a) *Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;*
- (b) *Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;*
- (c) *Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;*
- (d) *Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.*

Rule 71 prevents the International Criminal Court from admitting 'evidence of the prior or subsequent sexual conduct of a victim or witness'.

- In response to low conviction rates, **South Africa** introduced Sexual Offences Courts and Thuthuzela centres. Sexual Offences Courts are specialised courts designed to streamline the process of handling and prosecuting cases of sexual abuse; the personnel have all been specifically trained to deal with sexual offences. Thuthuzela, or comfort, centres are attached to these courts and serve as a one-stop service for rape victims. A centre is manned by a project manager and provides police services, health care, counselling and legal services, all under one roof and allowing for improved management of rape cases. Conviction rates have increased to 75 – 95% and the typical case is now resolved within 6 months from the date of the first report. Prior to these centres, case resolution took on average 18 months to 2 years.⁴³

Domestic violence

- In 2005, **Spain** began to set up Courts on Violence against Women, which have jurisdiction to deal with both the penal and civil aspects of such violence. This promising practice is meant to facilitate access for victims and to prevent contradictory judgements (e.g. if a divorce is granted due to violence, but the perpetrator is acquitted in the criminal trial).
- In **Ecuador and Peru**, courts receive technical assistance and advisory support from women's NGOs that specialise in dealing with family violence. An assessment of the programme in Ecuador shows that the percentage of abusers convicted has increased, that many couples have received counselling that has improved their relationship, and that women who have turned to the courts say that they have seen positive effects in their lives.⁴⁴
- In **Bangladesh**, a special Cell Against Violence Against Women has been established in the Department of Women's Affairs. It provides legal counselling and assistance in civil and criminal cases related to violence against women, including cases of acid throwing, rape, physical assault, trafficking, dowry disputes and cases of procurement of women for illicit reasons.⁴⁵
- To address the issue of domestic violence and provide assistance to victims, the **US** has established Family

Justice Centers in a number of cities. The goals of the Family Justice Centers are to make a victim's search for help and justice more efficient and effective by bringing professionals who provide an array of services together under one roof: advocates from non-profit groups, victim services organisations, law enforcement officers, probation officers, governmental victim assistants, forensic medical professionals, attorneys, chaplains and representatives from community-based organisations. Since the introduction of the Family Justice Centers, the following best practices have been identified:⁴⁶

- Co-located, multi-disciplinary services for victims of family violence and their children increase safety and support.
- Pro-arrest/mandatory arrest policies increase accountability for offenders.
- Policies incidental to arrest/enforcement (e.g. related to restraining orders, charging costs to victims for restraining orders or related services) reduce re-victimisation of victims.
- Victim safety/advocacy must be the highest priority.
- Victim confidentiality must be a priority.
- Offenders must be prohibited from on-site services at centres (off-site services to offenders should be central to any response to domestic violence; but no domestic violence offenders should be offered services on-site at a family justice centre).
- Domestic violence specialisation amongst service providers increases success.
- Strong support from local elected officials and other local and state government policymakers increases effectiveness and sustainability.
- Strategic planning is critical to short-term and long-term success.
- Strong/diverse community support increases resources for victims and their children

Witness and victim protection

Effective witness and victim protection programmes are particularly important in cases involving GBV and human trafficking. Witness and victim protection should include safe houses and temporary shelters, and protective orders. Protective orders can include:

- Restraining orders - the abuser must not come near the victim or abuse him/her again.
- Vacate orders - the abuser must move out of the shared residence.
- Custody orders - the victim will receive temporary custody of his/her children.
- Restitution orders - an abuser to compensate the victim for lost wages, medical expenses, or other costs and damages.

Many countries have established national plans of action to address GBV and/or gender equality (see Box 10). Justice issues should be integrated into these plans, and the plans themselves developed and implemented in collaboration with the Ministry of Justice and judicial groups.

Box 10 Liberian National Gender-Based Violence Plan of Action

Liberia's *National Plan of Action for the Prevention and Management of Gender Based Violence* is the result of multiple comprehensive consultations and participatory exercises by the Ministries of Justice, Health and Internal Affairs, international and national NGOs and the UN, under the leadership of the Ministry of Gender and Development.

The process began with a series of assessments to determine and analyse the GBV situation, identify the gaps in prevention and response, and develop strategies to fill those gaps. In the box below is a sample of two objectives under the legal section.⁴⁷

Activities	Indicator	MOV	Timeline	Target	Inputs	Outcome
Train judicial/law enforcement and correctional centres personnel on international human rights standards and applicable national laws.	# of training conducted. # of judicial and law enforcement personnel trained.	Training reports pre and post test records. Follow up reports. Training modules.	July 2006 – ongoing Ongoing activity.	Judicial officers, and law enforcement personnel. Staff of rehabilitation centres, Government and stakeholders at the community level.	Human and financial resources.	Fast track court for GBV cases established at national and regional levels. Trained judicial/law enforcement personnel on international human rights standards and applicable national laws.
Establish free legal services for vulnerable women. Conduct sensitisation campaigns to increase community awareness about the legal system.	# of functioning free legal clinics. # of GBV cases reported. # of sensitisation campaigns conducted.	Case reports. Field reports. Sensitisation reports.	Ongoing activity.	Vulnerable women. Required government institutions. Donors. Perpetrators.	Human and financial resources.	Established and equipped systems for free legal services for vulnerable women.

4.4 Access to justice

Judicial systems in conflict-affected and developing environments are often complex, with numerous technical requirements and little empathy from the police or courts for the injured party. Many women and men have no confidence in the judicial system and do not even attempt to access it. For others, it is entirely inaccessible because of their lack of resources or lack of knowledge of their rights.

Efforts to improve access to justice - equally for men, women and all groups within society - should be threaded through all aspects of justice reform. Some specific initiatives that can promote access to justice include:

Using paralegals to promote legal literacy and access

All individuals, especially vulnerable women and men, must be informed of their rights and how, practically, to assert those rights. Para-legal personnel can be instrumental in building legal literacy, including teaching people how to access the judicial system, informing people of the resources that are available and how to utilise them. They may use innovative measures, such as radio, dramatic presentations and pictures, to effectively communicate legal rights and mechanisms.

In some countries, paralegals have worked with individuals and traditional elders in rural areas. Paralegals have a role in helping traditional elders understand the practical impact of constitutional and law reforms and international obligations, especially when they may be in conflict with traditional laws and/or practices.

While paralegals cannot replace lawyers they can offer valuable assistance and help prepare the background material for cases. Paralegals are often mediators, as well, who may provide help to resolve cases outside the courts. Training and support for paralegals can be a very effective way of reaching more vulnerable men and women, especially in rural areas.

Improving access to justice in rural areas

Courts and magistrates should take steps to reach beyond the cities to rural areas. Outreach measures such as travelling courts should be explored.

Providing legal aid

National and international bar associations should encourage pro-bono (free or discounted) representation of clients in need. One effective mechanism is to require a certain number of pro-bono hours to renew a license to

practice law. Law school can also provide legal aid through clinics and cooperation with bar associations and NGOs.

Supporting civil society and NGOs improving access to justice

Civil society organisations (CSOs) and NGOs can be a critical link between the justice system and communities, offering services to facilitate access to justice. Justice reform initiatives should include support to such organisations, and establishment of mechanisms to ensure regular dialogue and coordination.

In **Tajikistan**, INIS, an independent local NGO, operates women's legal advocacy centres, as well as providing consultations to women through a network of existing crisis centres, shelters, health care facilities, and community and women's centres.⁴⁸

In **Georgia**, the Women's Rights Advocacy Centre run by the Centre for the Protection of Constitutional Rights (CPCR), provides legal counselling and court representation to women on labour law, family law, domestic violence and bride kidnapping. The Centre also operates a hotline to provide women with anonymous counselling and distributes information on women's rights. CPCR has also conducted a series of workshops on women's rights to reach women in the various regions of Georgia.⁴⁹

In **Ireland**, the Gay and Lesbian Equality Network partnered with the Irish police (*An Garda Síochána*) to address hate-motivated incidents and crimes against LGBT people. The 'Be Proud, Be Safe campaign' includes specially trained Garda gay Liaison Officers who work with LGBT people who have been victims of hate-motivated incidents, during a weekly 'drop in' session in the Dublin-based gay community centre. The Liaison Officers inform members of the LGBT community of their rights and encourage victims to report crimes so that perpetrators can be brought to the courts.⁵⁰

4.5 Traditional justice mechanisms

'If we know how to take advantage of the positive aspects of traditional justice and to identify its weaknesses as a mechanism and... its values, traditional justice (in other words, 'Community-applied Justice') will play an important role in preventing minor problems from dragging on and becoming major conflicts, inducing families or even entire hamlets against each other.'

Xanana Gusmao, President of Timor-Leste⁵¹

In many developing countries, the lack of access to a well-functioning court system means that the primary sources of justice are the informal or traditional dispute-resolution mechanisms. For women, traditional mechanisms have advantages and disadvantages. On the one hand, compared to courts, traditional/customary institutions may provide more easily accessible (both geographically and economically) and speedier forums of dispute resolution; and decisions may enjoy greater social legitimacy in local communities.⁵² On the other hand, while their nature varies considerably from place to place, traditional mechanisms often reinforce traditional gender roles and ignore the voices and rights of women. In most places, they are constituted by

male elders, and apply a male-biased interpretation of customary law.⁵³

Disputes involving sexual and gender-based crimes are generally outside the legal jurisdiction of traditional mechanisms, but in post-conflict, transitional and developing countries these crimes are in reality often dealt with by traditional mechanisms. Research on traditional dispute-resolution systems operating in refugee camps in Bangladesh, Côte d'Ivoire, Ethiopia, Guinea, Kenya, Mexico, Nepal, Pakistan, Sierra Leone, Tanzania, Thailand, Yemen and Zambia found that in all of these countries, across all refugee cultures, women lacked representation, influence and decision-making power in these systems. The punishments imposed on rapists by refugee-dispute resolution systems are generally insignificant: 'a rapist might simply be absolved if he marries the survivor, or if the case involves a minor, might be imposed a small fine or a minimal length of detention'.⁵⁴ Furthermore, such fines are more often given to the family than the survivor.⁵⁵

There is thus a danger that traditional justice mechanisms reproduce gender inequalities, and reinforce the lack of justice for victims of GBV. Justice reform efforts should also engage with traditional leaders and traditional justice systems, to endeavour to ensure that they are not ignored in the quest for gender justice.

The following provide some examples of positive engagement with traditional justice mechanisms to ensure they uphold basic human rights standards, including with regards to women's rights:

- The Improving Women's Access to Justice programme of the NGO Nagorik Uddyog (NU) in **Bangladesh** recognises the potential of the indigenous mediation system and works towards its transformation. Nagorik Uddyog applies a two-pronged strategy to reaching the objective that *shalish* rulings are consistent with state laws. First, Nagorik Uddyog assists in the formation of alternative *shalish* committees, in which one third of the members are women. Second, *shalish* committee members are provided with intensive workshops on a broad spectrum of laws related to subjects that account for the majority of disputes at the local level.⁵⁶
- Centro Feto, a local NGO in Oecusse, **East Timor**, works with informal systems on 'finding good solutions for women'. It conducts education campaigns in the villages on issues such as rape, domestic violence and marriage. The group also lobbies for compensation through informal systems that is paid in relation to sexual crimes and domestic violence directly to the victims instead of to their families.⁵⁷
- In **Somalia**, the Danish Refugee Council held a series of dialogues with over 100 elders and community leaders from five different clans living in the region. The dialogues focused on aspects of traditional *xeer* that were perceived as ineffective in conflict management and contradictory to basic concepts of justice and fairness, as enshrined in both *sharia* and international human rights standards. Community interests expressed during the dialogue included: ensuring the protection of the accused; fair treatment of women, orphans and minority groups; and problems associated with *diya* payment, collective punishment and property rights. The participants issued a declaration modifying the local *xeer* and traveled

throughout the region to disseminate the new laws. The declaration made particularly important changes to the *xeer* governing revenge killing and forced marriages of a widow to her dead husband's brother.⁵⁸

4.6 Addressing discrimination by judges and other judicial staff

Gender bias in the courtroom can take many forms and often includes stereotyped thinking that leads to discriminatory treatment. For example:

- Fathers denied custody because judges do not believe men can, or should, be primary care-givers.
- Mothers denied custody because they work outside the home.
- Male criminal defendants given stiffer sentences than female criminal defendants for the same crime.
- Women seated at counsel table presumed to be legal assistants or secretaries rather than attorneys.
- Undervaluing the work women perform as homemakers and care-givers for children and the elderly in civil damage suits and property division upon divorce.
- Credibility accorded litigants, witnesses and lawyers solely on the basis of their sex.

Task force to examine gender bias in the courts

A task force to review gender bias in the courts can be established by the judiciary, civilian oversight machinery or an NGO. An excellent guide is the Foundation for Women Judges' *Operating a Task Force on Gender Bias in the Courts: A Manual for Action*.⁵⁹ The manual presents a format to operate a task force on gender bias in court systems, including information on the start-up process, data collection, formulating findings after results are tabulated and implementing reforms. A Task Force can:

- Enhance public perception of the court system's commitment to equal justice under law.
- Legitimate the problem of gender bias in the courts as worthy of judicial investigation and reform.
- Help to eliminate gender bias in the courts by establishing strong norms and sanctions against gender bias and making specific proposals for reform.
- Increase the sensitivity of bench and bar and the public to the incidence and consequences of gender bias in the courts.
- Improve professional relationships among male and female judges, lawyers and court personnel.

Before establishing a Task Force it is important to have the following in place:

- A group of individuals knowledgeable about local problems of gender bias and committed to reform.
- Adequate resources (budget and staff).
- A number of male judges, lawyers or judicial educators concerned about the problem and willing to participate.

It is important to gauge the state's receptiveness to a gender bias inquiry. A Task Force will be most effective when there

is interest and receptivity in the community and among leading members of the judiciary.

Training and capacity building

All actors within the judicial sector – judges, prosecutors, defence council, private lawyers, court personnel, police, paralegals, etc. – should receive training on women's rights (deriving from national, regional and international laws and obligations), the gender impact of the legal and judicial system and the legal procedures for crimes of GBV.

See Tool on Gender Training for Security Sector Personnel

- Specific training on investigation methods and requirements and interviewing methods for crimes of sexual violence should be provided to staff that interact with survivors and/or work on prosecuting sexual violence cases.
- Training opportunities for all those involved in the administration of justice should be institutionalised.
- Judges, prosecutors, law enforcement personnel, forensic doctors and other state agents involved in the prosecution of crimes should receive this training before they are licensed to practice.
- Professional, technical and academic institutions should revise curricula and ensure that discussions of gender inequality are part of the training provided for all professionals. This training should be required as continuing legal education for all legal practitioners.⁶⁰

In **Nepal**, the Governing Council of the National Judicial Academy has adopted a resolution for mainstreaming gender issues in its policy and practice, as part of the legal reforms in the country. Gender issues are now part of standard training for lawyers and judges. With support from UNDP, the National Judicial Academy has developed a gender-training tool to provide judicial personnel with the skills to analyse the legal provisions related to gender issues, and to become familiar with international human rights and women's rights instruments.⁶¹

4.7 Increasing women's participation in the justice sector

Where women or other groups have historically suffered discrimination or lack of participation, laws promoting gender equality may not be enough. Temporary special measures, or 'affirmative actions', may be required to accelerate equality. Special measures to promote women's participation in the judiciary are needed in almost every country. These can include programmes that encourage women and minorities to study law, pursue qualifications as a lawyer or judge, or otherwise work in the judicial sector. Such programmes might be undertaken by regulatory bodies, bar associations, law schools and authorities that appoint judges.

Some initiatives to promote equal representation of men and women in the judiciary include:

- The **European Parliamentary Assembly** in its Resolution 1366 (2004) decided that it would no longer

consider lists of candidates for the European Court of Human Rights that did not include at least one candidate of each sex. This rule was changed a year later to allow for unisex candidate lists, provided they were from the under-represented sex on the Court (currently women). When this measure was decided upon, there were 11 female judges to 32 male judges: women made up only 26% of the Court's composition. As of April 2007, the situation had improved, albeit slightly, there were 14 female judges to 32 male judges; women making up 30% of the Court's composition.

- In **Afghanistan**, the Afghan Women Judges Association (AWJA) is working with the International Association of Women Judges to promote Afghan women's access to justice, and to promote the appointment of female judges. Of the 1,547 sitting judges in Afghanistan only 62 are women, and no women sit on the Supreme Court. AWJA proposes to the Government, parliamentarians, and UN system officials the names of qualified women judges to sit on the Afghan Supreme Court.⁶²
- **Tunisia** has taken measures to increase women's participation in the judiciary, with the appointment of more women magistrates to various courts, and the appointment of women to the positions of Chief Justice of the Tunis Court of Appeals, Director-General of the Centre for Legal Studies, Director of Civil Affairs and Director of Criminal Affairs in the Ministry of Justice. Women fill about 25% of Tunisia's judicial magistrate positions.⁶³

4.8 Oversight and monitoring of gender issues in justice reform

National and international oversight and monitoring mechanisms by both the government and civil society are a critical component to gender-sensitive reform of the judicial sector. Actors must be held accountable, and statistics play an important role in identifying discrimination in practice.

An appropriate institutional framework is essential to ensure that gender (and other) commitments in justice reform are fully implemented. Many countries have created specialised national machinery to improve the status of women that can play a role in this regard. These institutions have proven to be most successful if they are situated at a central position in the governmental hierarchy and headed by a person at a cabinet-level rank. National machineries need to be provided with the mandate and sufficient resources to effectively monitor and coordinate gender equality measures in all sectors and state apparatuses.⁶⁴

- **India's** National Commission for Women was set up as a statutory body in January 1992 to review the Constitutional and Legal safeguards for women; recommend remedial legislative measures; facilitate redress of grievances; and advise the Government on all policy matters affecting women. The Commission's activities include: state assessment of gender justice, child marriage etc.; legal awareness programmes; and review of laws such as the Dowry Prohibition Act, Penal Code and the National Commission for Women Act to make them more effective in promoting women's rights.⁶⁵

- The independent **Indonesian** National Commission on Violence Against Women (*Komnas Perempuan*) was established in response to public demand for state accountability on the mass rapes which occurred during the 1998 riots. *Komnas Perempuan* compiles yearly data on violence against women cases handled by government (e.g. police, attorney general, courts, hospitals) and NGOs around the country. As a result, it is able to gauge annual trends in violence against women, including estimates on the number of cases per year. The annual reports are made public and allow government agencies, civil society and the public in general to keep track of progress as well as setbacks, year by year.⁶⁶
- **South Africa's** Commission for Gender Equality is an independent body, whose mandate, to promote the protection of gender equality and monitor and evaluate organs of state, is taken directly from the equality clause in the Constitution. The Commission for Gender Equality has the power to subpoena and serve documents and is accountable to the National Assembly. It has a public education and awareness unit and an office in each province.⁶⁷
- **Sweden's** Office of the Equal Opportunities Ombudsman ensures compliance with the Equal Opportunities Act. The purpose of the Act is to promote the equal rights of women and men with regard to work, employment conditions as well as other working conditions, and scope for professional development.

Civil society oversight can take many forms. Civil society can be officially represented on oversight bodies, or invited to make submissions to inquiries and review boards. In many countries, CSOs prepare shadow reports to the CEDAW Committee (see Box 11).

4.9 Public awareness

Justice reform should include increasing public awareness of human rights, and of the laws and mechanisms to protect them. Individuals, for example, must be informed not only about their rights but how, in the most practical and basic terms, to assert their rights and seek access to justice when those rights are violated. Public outreach campaigns must also reach community leaders, men and government functionaries. Messages should be delivered in a manner that is both relevant to, and easily understood by the recipient. This is particularly important in rural areas where literacy rates can be low and many dialects spoken.

Few women are aware of their rights or how, in the most basic ways, these rights affect them on a daily basis or how, in practical terms, they can assert their rights or seek redress for abuses suffered. Education and media programmes are needed to address attitudes and cultural practices that discriminate against women, in a manner that overcomes challenges of remote locations, languages and literacy.

Programmes and strategies to empower women, by raising their awareness of rights and enhancing their capacity to claim such rights have been developed in many countries, mostly by NGOs. Such programmes can also contribute to

Box 11 International oversight of gender justice

The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) is mandated to monitor progress for women made in the 185 countries that are States Parties to CEDAW. Twice annually, the Committee reviews national reports submitted by States parties. These reports, which cover national action taken to improve the situation of women, are presented to the Committee by government representatives. In discussions with these officials, the CEDAW experts can comment on the report and obtain additional information. The Committee also makes recommendations on any issue affecting women to which it believes the States parties should devote more attention.

For example, at the 1989 session, the Committee discussed the high incidence of violence against women, requesting information on this problem from all countries. In 1992, the Committee adopted general recommendation 19, which requires national reports to the Committee to include statistical data on the incidence of violence against women, information on the provision of services for victims, and legislative and other measures taken to protect women against violence in their everyday lives such as harassment at the workplace, abuse in the family and sexual violence. As of July 2005, the Committee had made 25 general recommendations.

The ABA Rule of Law Initiative assisted NGOs in preparing shadow reports to the CEDAW Committee in Armenia, Belarus, Georgia, and Kyrgyzstan, using the CEDAW Assessment Tool process.⁶⁸

See Annex on International and Regional Laws and Instruments

increased reporting of human rights violations. To have any sustainable impact, public awareness campaigns concerning gender justice must be constant and unremitting.

- In 2004, the Afghan Women's Resource Centre trained more than 500 women in a remote area of Afghanistan about their basic rights, violence against women and forced marriages.⁶⁹
- In Timor-Leste, Fokupers, an NGO, provides accessible legal aid services for women victims and raises public awareness of domestic violence and women's legal rights. Its information brochures are distributed to service providers, religious institutions, government agencies and lawmakers.⁷⁰
- In 2006, the MTV Europe Foundation launched a series of new initiatives to draw attention to human trafficking. Some of these include short films and features produced by MTV and a music tour through Europe. All of the film material produced from this project is available to other European TV channels at no cost.⁷¹

Focusing prevention and response strategies only on women ignores the fact that men perpetrate most incidents of sexual and GBV. Men must therefore be part of the solution to the problem. In the last few years, there have been a growing number of creative public information and behaviour change campaigns with messages specifically targeting men and boys about gender equality. Soul City and Sonke Gender Justice in South Africa, Sexto Sentido in Nicaragua, the 'Together for a Happy Family' campaign in Jordan, the Suami Siaga (or 'I'm an Alert Husband') campaign in Indonesia and the Coaching Boys to Men in the US are just a few examples. Effective campaigns and community outreach interventions often identify groups of men or individual men who influence the behaviour of other men, including coaches, fathers and religious leaders. Evidence suggests that such campaigns – when well designed – can lead to attitude and behaviour change on the part of men.⁷²

Justice reform programmes should endeavour to establish and support groups of men who are committed to ending sexual and GBV in their community. These groups can reinforce the idea that sexual and GBV are not only 'women's issues'.

5 Integrating gender into justice reform in specific contexts

This section attempts to address judicial reform – as it applies to the judiciary, law reform and access to justice – in four contexts: post-conflict, transitional, developing and developed countries. These are extremely broad categories with more than a minimal amount of overlap. As noted at the outset, any justice reform effort is unique and there is no one-fits-all template which applies to all circumstances. However, the following discusses some of the opportunities and challenges for integrating gender into justice reform that tend to be present in particular types of contexts.

5.1 Post-conflict countries

'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.'

Isha Dyfan, a lawyer and activist for peace and women's issues and a survivor of Sierra Leone's civil war ⁷³

Post-conflict environments present numerous challenges to justice reform. The rule of law has almost certainly broken down or is non-existent; the judiciary is dysfunctional, independence has been compromised and corruption is rife. Buildings have been destroyed and offices looted of anything of value. Most qualified personnel have either left the country or are discredited in the eyes of the public. The police have often been part of the problem. Prisons are overcrowded with people that have languished in them for years without charge or trial. Civil society has no confidence in the judicial system, and may itself be in tatters and lack resources of all kinds.

At the same time, there have been countless atrocities committed during the conflict, which now need to be dealt with. Violence and insecurity will increase if the rule of law is not established and the issue of accountability addressed. Many conflicts include massive sexual violence against women and girls, and also men and boys, which needs to be specifically addressed in post-conflict justice reform.⁷⁴ Sexual violence and domestic violence often continue at elevated rates after conflict; justice mechanisms that address GBV are an urgent priority.

Despite these challenges, the post-conflict period presents a unique opportunity to adopt strategies for the re-establishment of the rule of law and the promotion of gender equality within the justice sector, as well as the direct participation of women throughout the justice reform process. The peace process and transition from conflict are strategic entry points to promote accountability for GBV and discrimination. Transitional justice initiatives are often important factors in this endeavour.

Transitional Justice

'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... many of these people are in exile. It is as if they are being rewarded for the crimes they committed. 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.'

Young Rwandan woman ⁷⁵

Transitional justice refers to a range of approaches that societies undertake to deal with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law and respect for individual and collective rights.

Approaches to transitional justice include: domestic, hybrid and international prosecutions of perpetrators of human rights abuses; truth-telling initiatives; providing reparations to victims; institutional reform; and taking into account gendered patterns of abuse to enhance justice for female victims.⁷⁶ Addressing sexual and GBV is increasingly understood as a critical priority in transitional justice, for reconciliation and the healing process, as well as to deter reoccurrence.

Ad hoc criminal tribunals

In a number of cases special tribunals have been established with the involvement of the international community to try individuals who committed crimes during a conflict. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) broke new ground in securing the first convictions for rape and other forms of sexual violence as war crimes, crimes against humanity and acts of genocide. These tribunals were followed by the establishment of 'hybrid' courts in Cambodia, East Timor and Sierra Leone, based on a different model, which are part of the national judicial system but supported by the international community. Box 12 describes some of the measures taken by the Special Court for Sierra Leone to address gender dimensions in its work.

! Tips for ad hoc criminal tribunals

Best practice for investigating and prosecuting international crimes of sexual violence (which could also serve as a model for national justice mechanisms) includes the following key elements:

- Political will on the part of the prosecutor to prosecute crimes of sexual violence.
- Designing a prosecution strategy for sexual violence at the outset.

Box 12 The Special Court for Sierra Leone

The Special Court for Sierra Leone started operations in 2002, and continues today. It is mandated to try 'persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.'⁷⁷ The Special Court differs from the two *ad hoc* tribunals for the former Yugoslavia and Rwanda in a number of important ways, including that it is seated in Sierra Leone itself, and consists of international and Sierra Leonean judges and staff.

Although sexual violence constituted a crime in Sierra Leone, only the rape of a virgin was generally perceived as a serious crime.⁷⁸ In contrast, the Statute of the Special Court adopted a broad definition of sexual violence, including 'rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'. The Statute explicitly calls for the appointment of gender-sensitive staff to deal with crimes of sexual violence.⁷⁹

The Special Court has made considerable efforts to prosecute crimes of sexual violence, despite relatively low levels of resources and staff at its disposal (as compared with the International Centre for Transitional Justice and the ICTR). Strong political will, particularly on behalf of the prosecutor, to address sexual violence has been critical. The Court adopted a prosecution strategy that incorporated crimes of sexual violence from the outset, and a trial attorney was specifically tasked with the prosecution plan for sexual violence crimes. Two experienced women investigators (out of the team of ten) were assigned to investigate crimes of sexual violence. They adopted a gender-sensitive interviewing method to ensure that victims of sexual violence felt comfortable reporting crimes. Witness preparation was emphasised, to ensure witnesses understood the implications of testifying.⁸⁰

The first judgements of the Special Court, delivered on 20 June 2007, included convictions for rape as a crime against humanity and outrages upon personal dignity (sexual slavery) as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (as well as the first convictions in an international tribunal for the recruitment and use of child soldiers).

- Training for all staff to develop skills in sexual violence investigations and jurisprudence.
- A dedicated team of sexual assault investigators and prosecutors.
- Care for the well-being, safety and dignity of victims of sexual violence, including the provision of information, support and protection services and witness preparation.
- An enabling courtroom environment, where rape victims are treated with sensitivity, respect and care when they come forward to testify.⁸¹

Truth and Reconciliation Commissions

Truth and Reconciliation Commissions (TRCs) often emerge in the aftermath of conflicts, attempting to overcome the inflexibility and formality of criminal legal processes in establishing accountability for human rights violations. TRCs aim to provide a space for victims to tell their stories by officially recognising and condemning the wrongdoings, and to prevent abuses from reoccurring by confronting impunity. Often, TRCs also make recommendations for reparations programmes and institutional reforms.

A number of recent TRCs, including those in Colombia, East Timor, Peru, Sierra Leone and South Africa have taken steps to internalise a gender dimension in their work. Thematic hearings dedicated to women 'have offered wonderful opportunities to give women voice, but also to ensure that this voice transcends and reaches the public... and to render women's sexual violence explicit'.⁸² Other mechanisms used to activate gender mainstreaming in TRC work include: the formation of special research teams dedicated to women (as in East Timor); the dedication of some of the chapters in the final reports of commissions to recording violence against women and its diverse impact on their lives (such as in Peru, Sierra Leone and South Africa); or the explicit attempt to mainstream gender throughout the entire TRC report (as in East Timor).⁸³



Tips for truth and reconciliation commissions

For TRCs to adequately address sexual violence and other gender issues:

- Gender justice should be explicitly included in the human rights violations within their mandate. The mandate of the TRC for Sierra Leone, for example, included that that it

should 'work to help restore the human dignity of victims... giving special attention to the subject of sexual abuses'.⁸⁴

- They should adopt an inclusive definition of sexual violence.
- They should have a balanced composition of men and women as commissioners, staff and interviewers.
- Commissioners, staff and interviewers should have specialised training on gender issues, including investigatory training for interviewing victims of sexual and GBV.
- Attention should also be given to the particular support and protection needs of victims of sexual violence when they give testimony. In Sierra Leone, for example, victims of sexual violence were only interviewed by female commissioners and could decide whether they wanted to testify in closed hearings before the commission or in public hearings, and whether their statements should be regarded as confidential. Witnesses who appeared during the closed hearings were provided with food, drink and medical assistance, with transport to and from the hearing venues and, where necessary, overnight accommodation.⁸⁵

Reparations programmes

Reparations programmes are generally established by governments, sometimes on the recommendation of courts or TRCs. They aim to 'compensate in some way a large universe of victims of human rights violations'.⁸⁷



Tips for reparations programmes

To ensure that all victims are included in reparations programmes, and that the reparations offered are appropriate to their needs:

- Gender dimensions must be considered throughout programme planning and implementation.
- Women and women's groups should participate in all stages of reparations programmes.
- Sexual violence should be included in the list of violations that trigger reparations and should be broadly defined. The material dimension of the harm endured by victims of sexual violence should be brought to the fore and compensated for, and psychosocial and medical services should be explicitly included.
- Procedural and evidentiary aspects (such as the evidentiary standards to qualify as a victim) should be defined taking into account the nature of the crimes.

Box 13

The gender programme in the Peruvian Comisión de la Verdad y Reconciliación

Recognising the importance of documenting women's experiences, the Peruvian *Comisión de la Verdad y Reconciliación* (CVR) established a Gender Programme to raise awareness of gender issues in the work of the Commission's interviewers and officials.

The Gender Programme:

- Developed a series of training documents that included communication strategies, suggestions for how to run investigations in the country's provinces and guidelines for interviewers.
- Provided educational materials such as flyers and cartoons..
- Ran workshops to promote gender analysis in CVR areas such as communications, disappeared persons and volunteering.
- Created Gender Programme Links, a working group made up of representatives from each of the CVR's regional headquarters, tasked to work actively in the community to ensure information on gender concerns was being shared.⁸⁶

- Mechanisms should exist allowing victims who do not want to expose themselves publicly to qualify as beneficiaries.⁸⁸

The greatest shortcoming of reparations programmes is that they are often not implemented. Whilst recent reparations programmes, such as those in East Timor, Guatemala, Peru and Sierra Leone, have been sensitive to sexual violence and other gender issues, implementation is very weak or totally absent.

Tips and recommendations for post-conflict justice reform

- States should ratify or accede to international and regional human rights instruments, including CEDAW, and meet all relevant obligations.
- International legal and policy frameworks should be used as standards for action by States to prevent and eliminate violence and discrimination against women.
- In re-establishing judicial bodies and training and qualification of lawyers and judges, States should strive for an equal balance of men and women in all roles at all levels.
- Women's groups should be included as key partners in transitional justice and justice reform processes, and supported by State agencies and international partners.
- Justice bodies should work with local and international women's organisations and UN and other international agencies to ensure that all staff, including judges, prosecutors and court employees, are trained on gender issues.
- Women's groups should make efforts to highlight human rights abuses and the enabling conditions of gendered violations, provide fora for victims and survivors, recommend reparations that redress injustices, and help ensure that justice reform and transitional justice are responsive to women's and men's needs and experiences.

5.2 Transitional countries

Many transitional countries have the same weak structures of democratic governance and similar needs as post-conflict countries. While the international community may still be involved there are generally fewer resources. Other challenges facing many transitional environments are corruption, interference with the judiciary and an overall lack of transparency.

Nevertheless, when elections are held and the government systems, institutions and legislations reformed, there is a crucial opportunity to enhance women's rights in society, and increase the responsiveness of the justice system to gender. Promotion of equality between men and women, a prohibition on discrimination, and protection against GBV should be manifested in any new constitution and legislation, including as regards access to land and property, marriage, divorce, custody, inheritance and citizenship laws.

Obligations of or aspirations for membership of regional organisations can provide incentives for gender-responsive justice reform. Many transitional countries are members, or want to become members, of regional organisations, such as the African Union, the European Union and the

Organization of American States. These unions usually promote ratification and implementation of international and regional conventions concerning human rights and gender equality. The standards and recommendations of regional organisations can provide a benchmark for addressing gender issues in justice reform processes.

- In 2000, the European Union adopted two Directives (Directive 2000/43/EC and Directive 2000/78/EC) prohibiting direct or indirect discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation. These texts contain precise definitions of direct and indirect discrimination and of harassment. In addition, a Community action programme against discrimination provides for back-up measures (dissemination of information, awareness-raising, the sharing of experiences, training, access to justice, etc.) to help ensure the application of and effective compliance with anti-discrimination legislation.⁸⁹

Tips and recommendations for justice reform

- States should ratify international and regional human rights instruments, including CEDAW, and meet all obligations of such instruments.
- Women's rights should be enshrined in constitutional and legislative reforms.
- Regional organisations, such as the African Union and the European Union should utilise the opportunity of accession negotiations with new members to strengthen gender-based rights and access to justice in all member States.

5.3 Developing countries

Developing countries face many of the same challenges as post-conflict and transitional countries, however with still fewer resources. Huge segments of the population may be living in poverty in rural areas with little to no access to the formal justice system. Traditional practices violating human rights of women and men are often practiced with impunity.

Tips and recommendations for justice reform

- States should ratify international and regional human rights instruments, including CEDAW, and meet all relevant obligations.
- Access to justice in rural areas, especially for women, should be addressed through education, public awareness campaigns and legal literacy programmes.
- Statutory recognition of traditional justice mechanisms should be qualified by respect for human rights laws and principles. Efforts should be made to engage with traditional justice mechanisms to modify practices that violate human rights, paying particular attention to how matters concerning gender-based violence, women's land ownership and marriage are dealt with.
- Parliament and the courts should ensure that 'honour' killings and dowry deaths are criminalised and perpetrators punished for murder.

5.4 Developed countries

Most developed countries are also in the process of addressing issues of gender equality, sexual harassment, discrimination and GBV in and through their justice systems. The Council of Europe, for example, has documented how over the last thirty years, the legal status of women in Europe has undoubtedly improved, but effective equality is far from being a reality. Women are still marginalised in political and public lives, paid less than men for work of equal value, find themselves victims of poverty and unemployment more often than men and are more frequently subjected to violence. Women remain a significant minority of judges in most countries.

It is critical that relevant national machinery and NGOs continue to monitor the progress of gender equality and hold governments accountable. Capacity and funding are often available to gather statistics and carry out research with regard to human rights violations as well as to develop and fund programmes to address such violations.

- In 2005 **Canada** became the fourth country in the world, joining Belgium, the Netherlands and Spain, to legalise same-sex marriage.⁹⁰
- **Portugal's** 2006 Criminal Code pays particular attention to the crime of domestic violence, altering the nature of the offence. The code now includes ill-treatment involving former spouses, people (of the same or opposite sex) having lived in spouse-like situations and people in spouse-like relationships who do not live together. It also deems there to have been an offence following the occurrence of a single serious act of ill-treatment, whereas the previous legislation only did so following repeated ill-treatment.⁹¹
- In 2006 the **US** passed into law the Trafficking Victims Protection Reauthorization Act (TVPRA). The TVPRA holds US citizens accountable for acts of human trafficking, including buying commercial sex or utilising child labour while engaged in a peacekeeping mission or federally funded contract abroad. Notably, the TVPRA shifts the focus of concern from solely transnational victims to include US nationals who are victimised within the borders of the US, and provides grants to local governments and NGOs to improve services to trafficking victims.⁹²

! Tips and recommendations for justice reform

- States should ratify international and regional human rights instruments, including CEDAW, and meet all relevant obligations.
- Constitutions and legislation should be reviewed on an ongoing basis for compliance with treaty obligations and human rights instruments.
- Strong institutional mechanisms should be in place, to monitor and guide progress towards gender equality, including within the justice system and the judiciary.
- Measures should be instituted to increase representation of women in high-level positions within the judicial sector, including as judges and prosecutors.
- Developed countries can fund gender justice programmes in post-conflict and transitional countries.

6 Key recommendations

1. **Planning:** International and national actors should promote partnership among all justice reform stakeholders (judiciary, police, corrections, prosecution, lawyers associations, women's groups and civil society) to design a justice reform strategy and assessment plan that addresses gender issues. To be sustainable, the justice reform process, from planning and assessment through to implementation and evaluation, must be locally owned.
2. **Assessment:** A thorough assessment of the justice sector should include women and men's differential experiences with access to and participation in the justice system. The assessment should be led by local actors, although international actors can provide valuable support and technical assistance. Participation by a wide range of stakeholders, including women's groups, is critical to identifying and understanding challenges specific to the situation, including cultural practices, attitudes and behaviours that may affect how justice is accessed.
3. **International and regional human rights conventions,** including the Convention on the Elimination of All Forms of Violence against Women (CEDAW) should be acceded to (without reservations), ratified and implemented.
4. **Reform laws and policies** to ensure that principles of non-discrimination, gender equality and affirmative action are enshrined. Special attention should be paid to laws concerning family, marriage, employment, land ownership and inheritance, sexual orientation and gender-based violence.
5. **Gender-based violence:** Ensure that the justice system prohibits, penalises and provides remedies for all forms of gender-based violence, in a manner that protects and promotes the rights of victims. Rules of evidence and procedure should be reviewed to ensure that they are not based on harmful stereotypes, or lead to 're-victimisation' of survivors. Consider special measures to deal with sexual and domestic violence, such as: special courts and investigation teams; centres that bring all the relevant personnel (police, prosecutors, health specialists, counsellors etc.) to one place; and victim and witness protection measures.
6. **Access to justice** should be increased through legal literacy programmes, use of paralegals where appropriate, and legal aid. Programmes should pay particular attention to the barriers to justice for women, people in rural areas, illiterate people, minorities and the socially marginalised.
7. **Traditional justice mechanisms** should be included in justice reform measures, and scrutinised to understand how they may impact men and women differently. Interventions should be made to address human rights abuses, including discrimination against women.
8. **Gender bias in the judiciary:** Measures should be implemented to identify and counter gender bias, including by judges, prosecutors and staff. All judicial system actors (judges, prosecutors, staff, Truth and Reconciliation Commissions, traditional elders etc.) should be educated in gender issues, laws, regional and international obligations, and where relevant, specialised training on handling crimes of sexual and domestic violence.
9. **Reform the judiciary** so that it is more representative of the society it serves. Women and minorities in high-level positions will give the justice system added legitimacy and credibility in the eyes of the community, and special measures should be implemented to promote their inclusion.
10. **Strengthen oversight and monitoring** of how the justice system addresses gender issues, and how gender justice reforms are implemented.
11. **Public education** campaigns to change social attitudes that perpetrate violence against women and discrimination can be part of programmes to educate communities about their rights and increase access to justice.
12. **Civil society, including women's organisations,** should be supported as partners in the justice system and in justice reform. Civil society plays important roles in lobbying for law, policy and procedural reforms, providing legal services and promoting access to justice, as well as in monitoring the justice system. Funding and support to civil society actors as well as ongoing training to build capacity can be an extremely effective and efficient method of supporting justice reform efforts.

7 Additional resources

Useful websites

US National Center for State Courts (provides links to numerous tools, guidelines and handbooks to address gender fairness in the courts as well as how to create gender-neutral courtroom procedures) - <http://www.ncsconline.org/>

Council of Europe, Stop Violence Against Women Website http://www.coe.int/t/dg2/equality/domesticviolencecampaign/default_en.asp

International Legal Assistance Consortium – <http://www.ilac.se>

UN Division for the Advancement of Women CEDAW website, including country reports and reporting guidelines - <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

Practical guides and handbooks

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Justice Reform and Gender

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There is strong recognition that security sector reform (SSR) should meet the different security needs of men, women, boys and girls. The integration of gender issues is also key to the effectiveness and accountability of the security sector, and to local ownership and legitimacy of SSR processes.

This Practice Note provides a short introduction to the benefits of integrating gender issues into justice reform, as well as practical information on doing so.

This Practice Note is based on a longer Tool, and both are part of the **Gender and SSR Toolkit**. Designed to provide an introduction to gender issues for SSR practitioners and policymakers, the Toolkit includes 12 Tools with corresponding Practice Notes – see *More information*.

Why is gender important to justice reform?

Justice reform includes not only reform of laws but also the development of policies, procedures and mechanisms that allow for the practical implementation of laws and equal access to the justice system. The goals of justice reform include developing: a constitution and laws based on international standards and human rights instruments; an effective, impartial and accountable judiciary; an integrated approach to criminal justice; and mechanisms for oversight of the justice system.¹

Gender refers to the roles and relationships, personality traits, attitudes, behaviours and values that society ascribes to men and women. 'Gender' therefore refers to *learned* differences between men and women, while 'sex' refers to the *biological* differences between males and females. Gender roles vary widely within and across cultures, and can change over time. Gender refers not simply to women or men but also to the relationship between them.

Reform discriminatory laws and promote human rights

- Many countries maintain laws that are overtly discriminatory with regard to land ownership, inheritance (see Box 1), gender-based violence (GBV), child custody, employment and other issues. Discriminatory laws and regulations need to be reformed in compliance with international human rights law.

Effective, non-discriminatory delivery of justice services

- Stereotypes, discriminatory attitudes and procedural barriers should not undermine the delivery of justice services. All judicial personnel should receive training on gender issues, including appropriate responses to domestic violence and discrimination on the basis of sex or sexual orientation.
- In order to end impunity for GBV, the judiciary needs to be trained in international and national legislation on gender issues.

Ensure equal access to justice

- Men and women have the right to be afforded equal access to justice systems, including through the courts, transitional justice mechanisms, traditional/customary systems and alternative dispute resolution. However, there are many obstacles to women's access to justice including: lack of knowledge about legal rights, corruption, fear of testifying, lack of resources, language barriers and lack of child care.



Geneva Centre for the Democratic Control of Armed Forces (DCAF)

Jane Watiri petitioned the court to award her one half of a parcel of land that belonged to her deceased father on which she lived with her four children. Her brother objected, arguing that he had cultivated a larger portion of the land during his father's lifetime than his sister and therefore was entitled to that larger portion.

Senior Principal Magistrate H. A. Omondi found that under Kikuyu customary law, an unmarried woman like Watiri lacked equal inheritance rights because of the expectation that she would get married. Magistrate Omondi held that this customary provision discriminated against women in violation of Section 82(1) of the Kenyan Constitution, which prohibits discrimination on the basis of sex. It also violated Article 18(3) of the Banjul Charter and Article 15(1)-(3) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which provide for legal equality between men and women. Consequently, Magistrate Omondi awarded Watiri and her brother each an equal share of their father's property.²

Representative and legitimate justice sector

- If the justice sector is to gain credibility and trust in the eyes of the community, the reform process must include the participation, and address the needs, of all members of society including women.
- To increase legitimacy, justice sector personnel should be representative of the population they serve. Currently women are largely under-represented at most levels in the judicial system, including as judges and lawyers.

Compliance with obligations under international laws and instruments

Taking the initiative to integrate gender issues into justice reform is not only a matter of operational effectiveness; it is also necessary to comply with international and regional laws, instruments and norms concerning security and gender. Key instruments include:

- *The Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, 1979)
- *United Nations General Assembly Resolution 52/86 on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women* (1998)

For more information, please see the Toolkit's Annex on International and Regional Laws and Instruments.

How can gender be integrated into justice reform?

Gender-responsive law reform

- Accede to and ratify international and regional human rights treaties and conventions.
- Reform the constitution so that it guarantees the equal enjoyment of human rights and gender equality, and prohibits gender-based discrimination and violence.
- Review existing national legislation and enact new laws to prohibit gender-based discrimination and violence.
- Engage with traditional justice mechanisms to ensure that they uphold basic human rights, including women's rights.

Non-discriminatory procedures and practices

- Scrutinise judicial procedures and practices to ensure that they do not improperly discriminate against women or other groups in society.

Special measures to address GBV

- Establish special measures in relation to sexual and domestic violence for the protection of witnesses and victims and to increase the number of cases going to trial. Special measures can include gender-sensitive roles of evidence and procedures that are not based on harmful stereotypes and that avoid the 're-victimisation' of survivors (see Box 2).

Gender training

- Deliver training on women's rights (derived from national, regional and international laws and obligations), legal procedures for GBV and the 'gendered' impact of the judicial system to all actors within the judicial sector, including: judges, prosecutors, defence counsel, private lawyers, court personnel, police and paralegals.

Access to justice

- Employ paralegals to build legal literacy of the general population through teaching people how to access the justice system, what their legal rights are and how to utilise available legal resources.
- Provide legal aid to marginalised populations, including women.
- Support civil society organisations (CSOs), including women's organisations, that facilitate access to justice (see Box 3).

In response to low conviction rates, South Africa introduced Sexual Offences Courts and Thuthuzela centres. Sexual Offences Courts are specialised courts designed to streamline the handling and prosecuting cases of sexual abuse; the personnel have all been specifically trained to deal with sexual offences. Thuthuzela, or comfort, centres are attached to these courts and serve as a one-stop service for rape victims. A centre is manned by a project manager and provides police services, health care, counselling and legal services all under one roof, allowing for improved management of rape cases. Conviction rates have increased to 75–95% and the typical case is now resolved within 6 months from the date of the first report. Prior to these centres, case resolution took on average 18 months to 2 years.³

Representative judicial sector

- Promote the equal representation of women and men in the justice system through initiatives to increase female recruitment, retention and advancement. Temporary special measures, or affirmative actions, such as law scholarships or quotas may be required to speed progress towards parity (see Box 4).

Oversight and monitoring

- Include key stakeholders from the judiciary, prosecution authority, law associations, police, prisons, civil society, women's networks and NGOs in justice reform processes.
- Strengthen gender-responsive international, national and civil society oversight and monitoring mechanisms. For instance, the national women's machinery or a task force on gender bias in the courts can work to hold the justice system accountable for the elimination of gender bias in the courts, discrimination on the bench, or improper prosecution of GBV cases.

Also available in Tool 4...

- 'Nine Ps of Gender and Justice Reform'
- Best practices in the legal definition and criminalisation of rape
- Tips on establishing a task force on gender bias in the courts
- Good practices for engagement with traditional justice mechanisms
- Tips for the integration of gender into Truth and Reconciliation Commissions

Post-conflict challenges and opportunities

The post-conflict period presents a unique opportunity to adopt strategies for the re-establishment of the rule of law and the promotion of gender equality within the justice sector, as well as the direct participation of women throughout the justice reform process. The peace process and transition from conflict are strategic entry points to promote accountability for GBV and discrimination. Transitional justice mechanisms, such as ad hoc criminal tribunals, truth and reconciliation commissions and reparations programmes, are often important factors in this endeavour.

Box 3

Increasing public access and awareness in Timor Leste

In Timor-Leste, Fokupers, a non-governmental organisation, provides accessible legal aid services for female victims and raises public awareness of domestic violence and women's legal rights. Its information brochures are distributed to service providers, religious institutions, government agencies and lawmakers.⁴

Challenges for the integration of gender issues

- The judiciary is often dysfunctional, its independence compromised and corruption rife.
- Many conflicts include massive sexual violence against women and girls, and also against men and boys, which needs to be specifically addressed in post-conflict justice reform.⁶ Sexual and domestic violence often continue at elevated rates after conflict; justice mechanisms to address GBV are an urgent priority.
- The police and penal system are part of the problem: police not having the capacity or will to effectively respond to GBV cases and prisons being overcrowded and rife with abuse.
- The general public, especially women, often have no confidence in the judicial system.

Opportunities for the integration of gender issues

- There may be more political will of the international community, international organisations and newly-established governments to invest in gender-responsive justice reform processes.
- The peace-building process can create entry points for the direct participation of women and other key stakeholders in the justice reform process, giving them the opportunity to express their needs and priorities.
- Justice reform processes open up the opportunity to provide gender training and recruit more women and other under-represented groups.
- There may be widespread support for the establishment of transitional justice mechanisms, which provide an opportunity to incorporate gender issues, including the effective prosecution of GBV.

Box 4

More female judges in the European Court of Human Rights

The European Parliamentary Assembly in its Resolution 1366 (2004) decided that it would no longer consider lists of candidates for the European Court of Human Rights that did not include at least one candidate of each sex. This rule was changed a year later to allow for unisex candidate lists, provided they were from the under-represented sex on the Court (currently women). When this measure was decided upon, there were 11 female judges to 32 male judges: women made up only 26% of the Court's composition. As of April 2007, the situation had improved, although only slightly: there were 14 female judges to 32 male judges; women making up 30% of the Court's composition.⁵

? Questions for justice reform

One of the best ways to identify entry points, strengths and weaknesses for incorporating gender perspectives into justice reform is to conduct an assessment. Below are some sample questions on gender issues that could help to make judicial assessment, monitoring and evaluation more complete.

- Which international and regional human rights instruments have been ratified?
- Do the constitution and national laws conform to international and regional human rights obligations, including with regard to gender equality and GBV?
- Do traditional and religious laws and customs include discriminatory practices?
- Are adequate laws in place to prevent discrimination – e.g. laws that prohibit: discrimination against women and men with HIV/AIDS; discrimination or dismissal on the grounds of pregnancy, maternity leave or marriage; and sexual harassment in the workplace?
- Is there de facto and/or de jure discrimination in the laws or the way they are applied?
- Do women and men, in both rural and urban settings, have full and equal access to the justice system?
- Are gender-responsive legal literacy programmes in place?
- Are cases of GBV adequately processed and sanctioned? Are special mechanisms in place to protect and support witnesses and victims?
- Have all justice sector personnel received adequate gender training?
- Do female offenders have equal access to alternatives to imprisonment?
- Is the justice sector budget gender-responsive, such as including funding for gender training or legal aid for women?
- Are policies and procedures in place to increase the equal representation of men and women in the justice system?
- Are CSOs, including women's groups, fully included in justice reform processes and oversight and monitoring bodies?

More information

Resources

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UNDOC – *Criminal Justice Assessment Toolkit*, 2006.

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Organisations

International Legal Assistance Consortium – www.ilac.se

ICTJ – www.ictj.org

Gender and SSR Toolkit

1. Security Sector Reform and Gender
2. Police Reform and Gender
3. Defence Reform and Gender
4. Justice Reform and Gender
5. Penal Reform and Gender
6. Border Management and Gender
7. Parliamentary Oversight of the Security Sector and Gender
8. National Security Policy-Making and Gender
9. Civil Society Oversight of the Security Sector and Gender
10. Private Military and Security Companies and Gender
11. SSR Assessment, Monitoring and Evaluation and Gender
12. Gender Training for Security Sector Personnel
Annex on International and Regional Laws and Instruments

Each of these Tools and Practice Notes are available from: www.dcaf.ch, www.un-instraw.org and www.osce.org/odhr.

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