

ACCESS TO JUSTICE

Violence against Women and Girls (VAW), in all its forms, is a widespread phenomenon. The manifestations of such violence are interrelated and may differ according to the social, economic, cultural and political context. However, VAW, understood as gender-based violence, always has discriminatory causes and consequences¹. The occurrence of armed conflict worsens discrimination that may already exist in peace time. The outbreak of hostilities exposes women and girls to specific and additional risks of violence².

Legislative and practical measures to eradicate VAW take into account the principle of non-discrimination as recognised in international human rights and humanitarian law. In this context, ensuring the right of access to justice constitutes a crucial means not only to guarantee an appropriate treatment for victims in the justice system, but also to prevent future occurrences of gender-based violence.



Access to Justice: State Obligations

Under international law, VAW is a form of discrimination and a violation of a range of women's human rights³. International and regional legal instruments⁴ as well as jurisprudence⁵ establish that States have the duty to prevent, respond to, protect against, and provide remedies for acts of violence against women whether such acts are committed by State or non-State actors, which is known as the 'due diligence standard'. Such responsibility arises not only from State action, but also from omissions and failure to take positive measures to protect women and promote these rights⁶.

The binding non-discrimination principle implies furthermore that States are required to use the same level of commitment in relation to VAW as they do with regard to other forms of violence⁷.

Women also have the fundamental right to effectively enjoy freedom from torture and from cruel, inhumane or degrading treatment or punishment⁸. This right must be ensured at all times and cannot be derogated from, including in public emergencies or in war⁹. During armed conflict, rules of International Humanitarian Law (IHL) become applicable and should be enforced, in addition to the provisions of international human rights law, to prevent the abuse of a State's emergency powers¹⁰.

Recent developments in international criminal law confirm that rape and other forms of VAW can constitute a war crime, a crime against humanity or a constitutive act with respect to genocide¹¹. In recent years, the most significant development in this area has been the adoption of the Rome Statute of the International Criminal Court (ICC). It explicitly prohibits all types of sexual violence during wartime¹² and individuals may now be held directly accountable under international law for such acts.

1. Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 19 (1992) at §6: "[t]he definition of discrimination includes gender-based violence, violence that is directed against a woman because she is a woman" (underlining is ours). VAW has also discriminatory consequences, since it is more often accompanied by a "sense of shame and defilement, and all too often the likely rejection by [the] partner, family and community" (BRUNJICH C., *Integration of gender into the Human Rights Council*, HCR Interactive Panel, 6th session of the Human Rights Council, 20 September 2007).

2. See Secretary General in-depth study on all forms of violence against women, A/61/122/Add.1, 6 July 2006, §§143-146.

3. CEDAW, General Recommendation n° 19, § 7: Gender-based violence (...) impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions (...). These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work.

4. See CEDAW, General Recommendation n° 19, §9. See article 4(c) of the Declaration on the Elimination of Violence against Women, op. cit., and article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) (Convention of Belen do Para), which requires that States "apply due diligence to prevent, investigate and impose penalties for violence against women".

5. See *Velásquez Rodríguez v Honduras* (Judgment of 29 July 1988) the Inter-American Court of Human and ECtHR, *Case of A. v. United Kingdom*, judgment of 23 September 1998, § 21.

6. See CEDAW, article 2 (e).

7. Y. ERTÜRK, *The due diligence standard as a tool for the Elimination of violence against women*, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61, §35.

8. See for example art. 7 of the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), art. 5 of the African Charter on Human and Peoples' Rights, art. 5(2) of the American Convention on Human Rights, art. 3 of the European Convention on Human Rights.

9. See art. 4 of the ICCPR, art. 27(2) of the American Convention, art. 2(2) CAT and art. 15 of the European Convention.

10. Human Rights Committee (HRC), General Comment n° 29 (State of emergency, article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, §3.

11. Jurisprudence of the criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). See *The Prosecutor vs. Dragoljub Kunarac and others*, Case No. IT-96-23-T and IT-96-23/1-T, Chamber I, Decision of 22 February 2001 and *The Prosecutor vs. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Chamber I, Decision of 2 September 1998.

12. See in particular Articles (7) (1) (g) and (h), Article (7) (2) (e) and Article (8) (2) (b) (22).





The Brussels Working Group on Violence against Women in Conflict

How can survivors of gender-based violence gain access to justice?

The meaning and purpose of access to justice

The legal duty to provide effective remedies for persons whose rights have been violated is contained in the core human rights instruments at international and regional levels and is inherent in the general duty to provide effective human rights protection¹³.

In this context, due process as well as the right to access to justice, must be guaranteed to everyone without discrimination of any kind¹⁴. This implies:

- There is a legal obligation to carry out a prompt, effective, thorough, independent and impartial investigation into cases of gender-based violence, the result of which must be made public;
- Effective access to police and complaint mechanisms must be guaranteed in all cases to ensure that no woman is deprived of her right to claim justice¹⁵;
- The case must be heard by a competent, impartial and independent judicial body¹⁶;
- The remedies must be effective and adequate;
- The punishment should be proportionate to the gravity of the violation;
- The remedies must be adequate and duly enforced by the competent authorities¹⁷. Although most international human rights treaties do not specify how a violation of a legal obligation should be remedied, they impose on States the duty to ensure that women obtain effective reparation, including rehabilitation¹⁸; and
- It is in the states' economic interest to redress this type of violence since they indirectly suffer from the cost of VAW¹⁹.

Obstacles to women's access to justice

The obstacles women face in seeking justice are often linked to their general inferior status in many societies²⁰. It is therefore crucial to address this main obstacle in order to avoid re-victimisation and stigmatisation of women survivors of violence. The following non-exhaustive list of more specific factors may impede women from having effective access to justice.



Legal Obstacles

- **Discrimination in the law and existence of legal systems unfairly biased in favour of men:** This includes for instance, in Benin, the absence of prohibition of serious offences such as marital rape²¹. In Darfur when women report acts of violence, including rape, their statements require corroborative testimonies in order to be duly tried²²;
- **Lack of implementation:** Where the laws do exist, they are not implemented on the ground or no one knows that the laws exist;
- **Criminalisation of victims and fear of prosecution:** Victims of rape may be prosecuted for illegal sexual intercourse or adultery²³;
- **The lack of reparation programs:** These programs designed to directly benefit victims of conflict as a measure of transitional justice do not often consider sexual violence as a crime warranting compensation²⁴;

13. See arts. 2(3) and 14 ICCPR, art. 7a) African Charter, art. 25 American Convention and art. 13 European Convention

14. UN Office of the High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence*, *ibid.*, §52. Moreover, article 36 (8) (a) of the Statute calls for a gender balance among the judges and article 36 (8) (b) requires that one of the judges be a specialist in VAW and children.

15. HRC General Comment No. 32, 27 July 2007, §9.

16. HRC, General Comment No. 32, 27 July 2007, §15 ss.

17. See article 2(b) a (c) of CEDAW.

18. See for example Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of VAW.

19. UN General Assembly (2004) *In-depth Study on All Forms of Violence against Women*, Report of Secretary General, A/61/122/Add.1

20. The dominant family structure "serves as the standard against which individual women are judged and, in many cases, demonised for failing to ascribe to moral and legal dictates with respect to family and sexuality". See R. COOMARASWAMY, "Violence against women in the family". Report of the Special Rapporteur on violence against women, its causes and consequences. E/CN.4/1999/68, 10 March 1999, §9.

21. See OMCT report on Benin. *Rapport alternatif sur la mise en œuvre de la Convention contre la Torture et autres peines ou traitements cruels, inhumains ou dégradants*, November 2007, at 23

22. UN Office of the High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence*, *ibid.*, § 50.

23. Article 145 of the Sudan 1991 Criminal Act defines adultery as consensual sexual intercourse between a man and woman who are not married together, punishable by 100 lashes if the offender is not married or death if the offender is married.

24. In Japan in December 2000, women's groups held a Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (Tokyo Tribunal 2000), to highlight the ongoing denial of compensation to the victims of Japan's system of "comfort women" by the Government and the impunity that continues for its perpetrators. See Report of the Special Rapporteur on violence against women, its causes and consequences, *Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)*, E/CN.4/2001/73, 23 January 2001, § 96.

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The Brussels Working Group on Violence against Women in Conflict

- **Lack of consent as an element of proof in cases of rape:** This is a particularly difficult barrier to justice in conflict situations such as the one in Darfur, where rape can be committed without the application of physical force, i.e. under the threat of the use of force or otherwise coercive circumstances deriving from the conflict²⁵;
- **Legally sanctioned impunity:** The alleged perpetrators of acts of VAW can be exempted from responsibility: in peacetime, through amicable settlements (financial agreement or marriage) provided for in the law²⁶, or in conflict situations through amnesty²⁷. In addition, the lack of implementation of international legal standards furthers the feeling of untouchability for a number of offenders and therefore fails to deter them from re-offending²⁸; and
- **Disproportionate and non-detering penalties:** In countries like Burundi, minimum penalties for rape are lower than those for theft, which contributes to the trivialisation of sexual offences and the handing down of non-dissuasive, lenient penalties²⁹.

Practical Obstacles

Women can also face practical obstacles to access to justice, both at the level of access to remedies as well as their effectiveness.

Accessibility

- **Pressure within family and society:** In south-Kivu and Ituri (Democratic Republic of Congo), women who suffered sexual violence are deemed to have brought shame on their family and consequently often face rejection by their partner, family and community³⁰;
- **Fear of police:** Police officers can be involved in violence against women themselves, or can harass and intimidate women after they have reported a sexual offence;
- **Lack of support:** There is a fear no one will believe her or support her to take the case to the courts;
- **Lack of protection and shelter:** In India, women may be dissuaded from reporting abuse when they have no guarantee that they will be protected from reprisals³¹;
- **Lack of financial autonomy:** In Kenya, for those women who depend economically on husband or family, the lack of legal and financial autonomy represents a serious obstacle to accessing justice because they cannot pay for the medical exam, the legal fees or even transportation to go back and forth to the courthouse³²;
- **Lack of physical access:** In Fataborno, North Darfur, victims must walk 20 Km over difficult terrain to the Kutum town police³³;
- **Lack of qualified staff, logistical support and efficient organisation of judicial system:** Military and civilian prosecutors in eastern Congo lack vehicles and money to pay for travel to conduct proper investigations³⁴;
- **Lack of effective access to medical assistance:** In Sierra Leone, the unavailability of medical services, their inaccessibility through high costs or delays to obtain a medical examination, and certificate needed for a legal procedure represent serious obstacles to obtaining justice³⁵; and
- **Unawareness of their rights:** In Afghanistan, for example, illiteracy as a result of lack of education and discrimination against girls in access to education hinders women's capacity to claim their rights³⁶.

Effectiveness

- **Criminal justice** processes are often lengthy, complicated, re-traumatizing, and expensive. These processes often leave aside the restoration of dignity, the guarantee of safety, and the wellbeing of the victims, which should go beyond the conviction of the perpetrators;
- **Discriminatory attitudes** of law enforcement and judicial authorities: Law enforcement officials fail to investigate complaints effectively and gather sufficient information to build a case.

25. UN Office of the High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence, Report of the United Nations High Commissioner for Human Rights*, 29 July 2005, § 37.

26. See the Tunisian Criminal Code, article 227 bis, in OMCT, *La situation des Droits de l'Homme en Tunisie, Rapport alternatif au Comité des Droits de l'Homme*, Mars 2008.

27. For example the Lomé Peace Accord granted a general amnesty for all crimes committed during the conflict, including sexual violence. As stated by the Human Rights Committee, in presence of armed conflicts, "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future". General Comment n° 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment, HRI/GEN/1/Rev.7, 10 March 1992, § 15.

28. Global Rights (2005) *SOS Justice : Quelle justice pour les populations vulnérables à l'Est de la RDC?* Rapport d'évaluation du secteur de la justice au Nord et Sud Kivu, Maniema et Nord Katanga.

29. OMCT, *Les violences contre les femmes au Burundi*. Rapport alternatif soumis au CEDAW, Janvier 2008.

30. Report of the Special Rapporteur on violence against women, its causes and consequences, addendum: mission to the Democratic Republic of Congo, A/HRC/7/6/Add.4, 28 February 2008, §61.

31. Report of the Special Rapporteur on violence against women, its causes and consequences, Cultural practices in the family that are violent towards women, E/CN.4/2002/83, 31 January 2002, §54.

32. See OMCT, Addressing the economic, social and cultural root causes of torture in Kenya. An alternative report to the Committee Against Torture, November 2007, p. 26.

33. Human Rights Watch, 'Five Years On: No Justice for Sexual Violence in Darfur' April 2008, at 17.

34. Human Rights Watch, 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War' March 2005, at 43.

35. Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum Mission to Sierra Leone, 21-29 August 2001, E/CN.4/2002/83/Add.2, 11 February 2001, §62.

36. Report of the Special Rapporteur on violence against women, its causes and consequences, addendum: mission to Pakistan and Afghanistan, 1-13 September 1999, E/CN.4/2000/68/Add.4, 31 January 2002, §13.

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The Brussels Working Group on Violence against Women in Conflict

- **Discriminatory practices** on the part of law enforcement officials and the judiciary include:
 - ◊ Consideration of domestic violence as a private matter;
 - ◊ Encouragement of amicable settlements in rape cases, either by financial arrangements or through the marriage of the perpetrator with the victim; and
 - ◊ Consideration of a woman's word as less trustworthy than a man's.
- **Lack of political will:** For example, in southern Côte d'Ivoire, cases of sexual violence are rarely investigated and the main reason is lack of will to take action³⁷; and
- **Corruption in the judicial system:** This may hinder investigations and the processing and serving of arrest warrants for alleged perpetrators or enforcement of sentences for convicted perpetrators.

Recommendations

The EU and its Member States, pursuant to the EU guidelines on violence against women and the elimination of all forms of discrimination against them,³⁸ should support and call on third states to:

- Guarantee VAW constitutes a **crime punishable under criminal law** and that it is investigated swiftly, thoroughly, impartially, independently and effectively;
- Combat **stereotypical attitudes and discriminatory practices** of law enforcement and judicial authorities involved in the investigation, prosecution and punishment of gender-based violence through mandatory training programs;
- Ensure **reparation programs** are designed to provide compensation and reintegration, and are crafted with gender-aware forethought and care. These programs must aim towards reinsertion, and the guarantee of non-recurrence³⁹;
- Ensure the criminal justice system, in particular the rules of procedure and evidence, works in a way that will **encourage women to give evidence and guarantee their protection**;
- Adopt **positive measures** such as the gender-sensitive training of law enforcement officers, the availability of free legal counselling for marginalised women, proper protection of victims and witnesses (including through the running of shelters) and creating conditions where victims are not economically dependent on perpetrators;
- Ensure that **re-victimization** of female survivors does not occur because of gender-insensitive laws and practices by judicial and law-enforcement officials. Prosecutors must ensure that investigators have expertise in dealing with such cases and that investigations are conducted in a manner which does not cause additional trauma to the victims and their families and upholds international standards for working with survivors of violence against women;
- **Recognise the competence of United Nations Treaty Bodies** (particularly, the Convention on the Elimination of all forms of Discrimination Against Women, Convention Against Torture and the International Covenant on Civil and Political Rights), as well as Regional Courts, to receive individual complaints and ratify the Rome Statute; and
- **No Peace Agreement** should ever include amnesty for the crimes that involve gender-based violence.

Key documents

- CEDAW, General Recommendation n° 19, Violence against Women (1992), A/47/38.
- UN General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993.
- Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007 (http://www.womensrightscoalition.org/site/reparation/signature_en.php).
- UN Office of the High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence, Report of the United Nations High Commissioner for Human Rights*, 29 July 2005.
- UN Secretary General In-Depth study on all forms of violence against women, A/61/122/Add.1, 6 July 2006.
- Yakin ERTÜRK, *The due diligence standard as a tool for the elimination of violence against women*, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61, 20 January 2006.
- United Nations Security Council Resolution 1325 on Women, Peace and Security and 1820 to End Sexual Violence in Conflict.

The Brussels Ad hoc Working Group includes:

CARE International, Cordaid, International Rescue Committee, Justitia et Pax, Marie Stopes International, Pax Christi International, EurAC Network, Fédération Internationale des Ligues des Droits de l'Homme, World Organization Against Torture - OMCT and PLAN International.

The observers to this group are:

The Brussels Offices of UNHCR, UNFPA, UNICEF, UNIFEM; Human Rights Watch, ISIS Europe and Médecins Sans Frontières Belgium.

37. Human Rights Watch, 'My Heart is Cut: Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire' August 2007, at 108-110.

38. Adopted November 2008, available at <http://consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf>

39. Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, § 3) (A).

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