
Women's Tribunals to Counter Impunity and Forgetfulness: Why are They Relevant for International Law?

di

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Abstract: This article is aimed at analysing women's tribunals from an international law perspective. I will first contend that women's tribunals can play the role of *amici curiae* in international or domestic criminal law proceedings, in all cases in which *amici curiae* intervention is admitted by the rules of procedures of international and domestic tribunals. Secondly, I will argue that peoples' and women's tribunals are expression of democracy in international law, where democracy means women's participation in the relevant processes of reconstruction and re-affirmation of social values in a given community. This is a feminist approach to democracy, which goes beyond "quotas" or formal equality, one of the first achievements of feminist movements, to embrace issues of effective participation in decision-making. For this purpose, I will focus on, in chronological order, the first women's tribunal, that is the International Tribunal on Crimes against Women held in Brussels in 1976; on a tribunal whose structure and outcome resemble the one of an international tribunal, namely the Women's International War Crimes Tribunal set in Tokyo in 2000; and on three recent tribunals, the Court of Conscience in Guatemala, held in 2010, the Women's Court in Sarajevo of 2015, and the World Court of Women in Bangalore convened in December 2015.

Introduction

Violations of women's rights occur in every country in the world in times of peace (e.g. domestic violence, rape, sexual harassment), during or after armed conflicts and/or in situations of emergency (natural disasters, refugee flows, etc.), where sexual violence, forced marriages, and rapes have proved to be widespread¹. The reaction of the international community to violence against women both in terms of accountability of private actors and States' responsibility has often been insufficient.

¹ See, for example, the report of the International Independent Commission of Inquiry on Syria. "They came to destroy": ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2, 15 June 2016.

As widely acknowledged, violence against women is a form of gender-based discrimination². Compared to other situations, discrimination on the grounds of sex and gender – and sexual orientation³ – have only recently become high priority at the international level. As posited by Nussbaum, “brutal and oppressive discrimination on grounds of race is taken to be unacceptable in the global community; but brutal and oppressive discrimination on grounds of sex is often taken to be a legitimate expression of cultural differences”⁴. Therefore, the spectre of impunity is haunting where violations of women’s fundamental human rights occur⁵.

International law is equipped with legal instruments to counter violations of human rights and fundamental freedoms, although, as acknowledged by feminist lawyers, it has proved to be extremely male-gendered⁶. In particular, international human rights law, international humanitarian law, and international criminal law are extremely relevant for our purposes. In the words of one of the judges of the International Court of Justice, international human rights law “has been constructed on the basis of the imperatives of protection and the superior interest of human beings, irrespective of nationality or political standing or any other situation or circumstance”⁷. In a situation of armed conflict, international humanitarian law is applicable as a corpus of principles and rules aimed at regulating warfare “both by restraining belligerents in the conduct of armed hostilities and by protecting those who do not take part or no longer take part in hostilities”⁸. In order to suppress international crimes, international criminal law has progressively developed after the Second World War, with the purpose to prevent that “the architects of [...] inhumane policies”⁹ find a “safe haven” moving from one State to another one with the purpose to avoid criminal prosecution. The prohibition of war crimes, crimes against humanity, and genocide – the “most serious crimes” in the Rome Statute establishing the International Criminal Court¹⁰ – is no longer an issue only pertaining to domestic courts, but it has rather become of interest for the entire international community.

² See, for example, *General recommendation no. 19 (1992) Violence against Women*, issued by the Committee on the Elimination of Discrimination against Women.

³ See Article 21 of the Charter of Fundamental Rights of the European Union (2000/C 364/01), which provides for the first time the case of discrimination on the grounds of sexual orientation.

⁴ Martha C. Nussbaum, *Frontiers of Justice*, Belknap Press, Cambridge 2006, p. 260.

⁵ Sara De Vido, *Il tribunale delle donne in Sarajevo: una prospettiva giuridica internazionale tra democrazia e memoria collettiva*, in *Venti anni di pace fredda in Bosnia-Erzegovina*, a cura di Susanna Regazzoni, Silvia Camilotti, Ca’ Foscari, Venezia 2016, pp. 47-70.

⁶ See in that respect, Christine Chinkin, Hilary Charlesworth, *The Boundaries of International Law*, Manchester University Press, Manchester 2000.

⁷ Antonio Augusto Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, Oxford 2011, p. 6.

⁸ Antonio Cassese - Paola Gaeta, *Cassese’s International Criminal Law*, Oxford University Press, Oxford 2013, p. 5.

⁹ Mary Griffin, *Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century*, in “International Review of the Red Cross”, 2000, pp. 369-389.

¹⁰ See Article 7 of the Rome Statute.

Despite the achievements of international criminal tribunals¹¹, which cannot be denied or underestimated, it is true that impunity has not always been averted. The reasons might be of a legal nature, since international tribunals suffer from the limits derived from their founding statute, and of a political nature, in all cases in which impunity is the product of the unwillingness of the international community to “see” and counter severe crimes committed against people and/or against specific segments of populations, such as indigenous people and, for what is relevant for our study, women. Although the majority of peoples’ tribunals have addressed war crimes¹², peoples’ and women’s tribunals have also tackled violations of human rights in times of peace, such as environmental disasters¹³, the impact of new infrastructures on local communities¹⁴, workers’ rights in industry¹⁵, HIV and human trafficking affecting women¹⁶.

The Reasons: Peoples’ and Women’s Tribunals as a Quest for Justice

The need to fight impunity and obtain justice for victims of severe violations of human rights has determined the affirmation of the so-called “peoples’ tribunals”, starting from the famous *Bertrand Russell’s Tribunal*. Their nature is more of councils than courts; they are composed of experts and activists – not necessarily legal scholars or lawyers – whose purpose is to examine facts that have occurred in a given situation and moment of history according to the testimonies provided by the victims, or relatives of direct victims, of severe violations of rights. Among peoples’ tribunals, one should also include women’s tribunals, whose aim is to give voice to victims of abuses which have often not been investigated and prosecuted by the competent (national) authorities. Peoples’ tribunals have only partially been analysed by international legal doctrine, and, when they have, usually to deny that they can achieve concrete results¹⁷. As posited by Carol Smart, the power of law is

¹¹ We are referring here in particular to the International Criminal Court for the former Yugoslavia (ICTY), the International Criminal court for Rwanda (ICTR), and the International Criminal Court (ICC).

¹² Andrew Byrnes - Gabrielle Simm, *People’s Tribunals, International Law and the Use of Force*, in “UNSW Law Journal”, 36, 2013, pp. 711-744. See also Iraq, Chechnya tribunal see Emily Haslam, *Non-Governmental War Crimes Tribunals: A Forgotten Arena of International Criminal Justice?*, in *Essays and Commentary on the European and Conceptual Foundations of Modern International Law*, eds. Christofer Harding - Chin L. Lim, Kluwer, The Hague 1999, pp. 153-187.

¹³ Bhopal, Permanent People’s Tribunal, *Permanent Peoples’ Tribunal on Industrial Hazards and Human Rights, Bhopal I*, Bhopal (October 19-23, 1992); Permanent People’s Tribunal, *Bhopal II*, London (November 28-December 2, 1994).

¹⁴ Permanent People’s Tribunal, Fundamental right, participation of local communities and infrastructures. From the TAV to the global reality, Turin, Italy (5-8 November 2015).

¹⁵ Permanent Peoples’ Tribunal, *Session on Workers’ and Consumers’ Rights in the Garment Industry*, Brussels (April 30-May 5, 1998).

¹⁶ 37th World Court of Women, *Southeast Asia Court of Women on HIV and Human Trafficking*, 6 August 2009 Nusa Dua, Bali.

¹⁷ Robert Cryer, *Prosecuting International Crimes*, Cambridge University Press, Cambridge 2005, p. 51.

“not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences”¹⁸. Non-legal knowledge is considered to be “suspect and/or secondary”¹⁹. This attitude of legal scholarship has proved to be especially true for peoples’ and women’s tribunals. Some legal commentators have however traced the origin of these tribunals, found their legitimacy in a quest for justice coming from unheard voices, and described personal experiences as experts in one of these bodies²⁰.

In this article, I will start from a short analysis of peoples’ tribunals and of the reasons behind their establishment in the 60s. I will agree with the position of a commentator²¹, according to whom it is pointless to debate on their legal nature, since it is evident that these tribunals do not possess the legitimacy of international tribunals – which derives from the will of States or international organisations – but they represent a push from the bottom to pursue justice. Borrowing an analysis related to governments, peoples’ and women’s tribunals, promoted by civil society organisations, have an internal legitimacy – which means how they are perceived by the people subject to it – but not an external legitimacy – which means how they are perceived by other international entities²².

In a second part I will delve into women’s tribunals. There have been many women’s tribunals in history, but I have decided to focus on the first, in chronological order, experience, the International Tribunal on Crimes against Women held in Brussels in 1976, on a tribunal whose structure and outcome resemble an international tribunal, the Women’s International War Crimes Tribunal set in Tokyo in 2000, and on three recent tribunals, namely the Court of Conscience in Guatemala, held in 2010, the Women’s Court in Sarajevo of 2015, and the World Court of Women in Bangalore convened in December 2015.

In a third part, I will address the question of whether and to what extent peoples’ and women’s tribunals are relevant for international law. I will first contend that women’s tribunals can play the role of *amici curiae* in international or domes-

¹⁸ Carol Smart, *Feminism and the Power of Law*, Routledge, London 1989, p. 11.

¹⁹ *Ibid.*

²⁰ Richard K. Falk, *Keeping Nuremberg Alive*, in *International Law: A Contemporary Conception*, eds. Richard K. Falk et al., Boulder, Westview 1985; ID, *Searching for a Jurisprudence of the Conscience. International Criminal Liability and Humanitarian Intervention*, in *Human Rights in the World Community*, eds. Burns H. Weston - Anna Grear, Pennsylvania University Press, Philadelphia, Pennsylvania 2016; Arthur W. Blaser, *How to Advance Human Rights Without Really Trying: An Analysis of Nongovernmental Tribunals*, in “Human Rights Quarterly”, 14, 1992, pp. 339-370; Christine Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, in “American Journal of International Law”, 95, 2001, pp. 335-340; Andrew Byrnes - Gabrielle Simm, *International Peoples’ Tribunals in Asia: Political Theatre, Juridical Farce or Meaningful Intervention?*, in “Asian Journal of International Law”, 4, 2014, pp. 103-124; Dianne Otto, *Impunity in a Different Register: People’s Tribunals and Questions of Judgement, Law and Responsibility*, in *Anti Impunity Agenda and Human Rights*, eds. Dennis Davis – Karen Engle – Zinaida Miller, Cambridge University Press, Cambridge 2016 forthcoming.

²¹ See Dianne Otto, *op. cit.*

²² Jean D’Aspremont, Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, in “Fordham International Law Journal”, 34, 2011, pp. 190-235, p. 193.

tic criminal law proceedings, where their intervention is admitted by the rules of procedures of international and domestic tribunals. Secondly, I will argue that women's tribunals are an expression of democracy in international law, where democracy means women's participation in the relevant processes of reconstruction and re-affirmation of social values in a given community. This is a feminist approach to democracy, which goes beyond "quotas" or formal equality, one of the first achievements of feminist movements, to embrace issues of effective participation in decision-making.

"May this Tribunal Prevent the Crime of Silence"²³: The Origins of Peoples' Tribunals

The first peoples' tribunal is considered to be the International War Crimes Tribunal convened in 1966 by the philosophers Bertrand Russell and Jean-Paul Sartre ("Russell Tribunal") with the purpose of investigating alleged violations of international law committed by the United States in Vietnam. The first public session took place in Stockholm, Sweden, from 2 to 10 May 1967. The second was held in Roskilde, Denmark, from 20 November to 1 December 1967. There was a small public hearing in Tokyo, Japan, from 28 to 30 August 1967). In his speech, Russell recognised the limits of the Tribunal:

We do not represent any State power, nor can we compel the policy-makers responsible for crimes against the people of Vietnam to stand accused before us. We lack *force majeure*. The procedures of a trial are impossible to implement²⁴.

The philosopher however considered these elements as points of strength, in particular as elements of independence and impartiality. The Tribunal was formally convened by the Bertrand Russell foundation, hence by a non-governmental organisation. As later confirmed by Sartre in his inaugural speech:

We have not been given a mandate by anyone; but we took the initiative to meet, and we also know that nobody *could* have given us a mandate. It is true that our Tribunal is not an institution. But, it is not a substitute for any institution already in existence: it is, on the contrary, formed out of a void and for a real need [...]. The Russell Tribunal believes, on the contrary, that its legality comes from both its absolute powerlessness and its universality²⁵.

Their words are still valid today. The members of the Tribunal were philosophers, professors of different disciplines, writers, lawyers, pacifists, and activists²⁶.

²³ Speech by Bertrand Russell to the first meeting of members, from *Autobiography* (Allen & Unwin, London 1969), vol. III, pp. 215-16.

²⁴ *Ibid.*

²⁵ <http://raetowest.org/vietnam-war-crimes/russell-vietnam-war-crimes-tribunal-1967.html#v1101-Sartre>.

²⁶ Wolfgang Abendroth, Doctor of Jurisprudence; Professor of Political Science, Marburg University; Gunther Anders, writer and philosopher; Mehmet Ali Aybar, International lawyer; Member of Turkish Parliament; President, Turkish Workers' Party; James Baldwin, Afro-American novelist and essayist; Lelio Basso, international lawyer; Deputy of Italian Parliament and Member of the Commission of Foreign Affairs; Professor, Rome University; Simone de Beauvoir, writer and philosopher; Lazaro Cardenas, Former President of Mexico; Stokely Carmichael, chairman, Student Non-Violent

The report of the Tribunal illustrates the applicable law, and the crimes which the United States was charged with. As for the former, the Tribunal refers to the Nuremberg statutes, the Genocide Convention adopted in 1948, the Hague Convention of 18 October 1907, the Geneva Protocol of 1925 for gases and analogous substances, the Geneva Conventions of 1949²⁷. The United States was charged with crimes against peace and war of aggression, war crimes, crimes against humanity, and genocide. In the final report, presented by Jean-Paul Sartre, the Tribunal continued its analysis under international law and affirmed, by unanimity, that the United States government committed acts of aggression against Vietnam under international law and that it was guilty of the “deliberate, systematic and large-scale bombardment of civilian targets, including civilian populations, dwellings, villages, dams, dikes, medical establishments, leper colonies, school, churches, pagodas, historical and cultural monuments”²⁸. With only one abstention, the government of the United States was found guilty of “repeated violations of the sovereignty, neutrality and territorial integrity of Cambodia, that it is guilty of attacks against the civilian population of a certain number of Cambodian towns and villages”, and Australia, New Zealand and South Korea were judged as accomplices of the United States.

After the death of Bertrand Russell in 1970, Lelio Basso, one of the members of the Tribunal, was asked by Brazilian exiles to establish a new tribunal. The Tribunal was held in two sessions – the first in Rome, from 30 March to 6 April 1974, and the second in Brussels, from 11 to 18 January 1975. The tribunal dealt with repression in Brazil, Chile, and in Latin America. It concluded that Brazilian, Chilean and Bolivian authorities were “guilty of serious, repeated and systematic violations of human rights,” and that those violations constituted crimes against humanity²⁹.

Despite sharp criticism, in particular regarding its legitimacy, the Russell Tribunals paved the way for a new form of justice which derives from the peoples

Coordinating Committee; Lawrence Daly, General Secretary, National Union of Mineworkers; Vladimir Dedijer, M.A. Oxon., Doctor of Jurisprudence; historian; Dave Dellinger, American pacifist, Editor; Isaac Deutscher, historian; Haika Grossman, jurist, liberation fighter; Gisele Halimi, Paris lawyer; attorney for Djamilia Bouhired; author of works on French repression of Algeria; Amado Hernandez, Poet Laureate of the Philippines; chairman, Democratic Labor Party; Melba Hernandez, Chairman, Cuban Committee for Solidarity with Vietnam; Mahmud Ali Kasuri, Senior Advocate, Supreme Court of Pakistan; Sara Lidman, author; Kinju Morikawa, Attorney, Vice-Chairman, Japan Civil Liberties Union; Carl Oglesby, Past President, Students for a Democratic Society; playwright; political essayist; Shoichi Sakata, Professor of Physics, Laurent Schwartz, Professor of Mathematics, Paris University; Peter Weiss, playwright.

²⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948; Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol), 17 June 1925; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

²⁸ *Ibid.*

²⁹ http://dlib.nyu.edu/findingaids/html/tamwag/tam_098/bioghists.html

themselves and not from the governments. A Permanent Peoples' Tribunal was eventually founded in Bologna on 24 June 1979. Its works are guided by a statute, which defines the number of the members of the Tribunal (minimum 35, maximum 75), and some rules for its functioning³⁰. As of August 2016, it has held 42 sessions.

The establishment of these tribunals leaves no doubt as to their legal nature: these entities do not have any kind of legitimacy under international law, and, for the sake of completeness, it should be acknowledged that they do not even claim it. They are composed of experts in different fields, activists, victims; the procedure can be similar to the one used in international or domestic courts, but it can also significantly differ and, for example, place the victims on the same stage as the judges. Decisions are based not only on international law and legal principles, but also on conscience, and they might include recommendations or aspirations. The decision is non-binding, and it does not imply any criminal conviction³¹. Since they respond to a lack of justice, these tribunals are not conceptualised as “alternatives to the official judiciary system but aim to represent a supplement, and are therefore complementary to these official systems”³². They correspond, as stressed by two authors, to a “desire for law”, to a quest for justice by those who did not have the possibility to have their claims listened³³. Therefore, they should be understood as “a form of practice” that potentially contribute to the work of official tribunals, and – most importantly – build solidarity³⁴.

As outlined by Dianne Otto, lawyer and expert in two women's tribunals, “to my mind, they are patently political projects, trying to sway public opinion by filling some of the information gaps and silences in public discourse that serve to deflect disagreement and vilify dissent”³⁵. Otto has also enucleated three categories of legal aspiration. There are tribunals that provide a critical judgment about the failure of international and domestic institution to prosecute crimes; tribunals whose aim is to promote new people's law emerging from marginalisation; and tribunals that promote a transformative change of the entire system of law, encouraging shared responsibility and a politics of listening³⁶. Tribunals often go beyond the law to embrace new ways to conceptualise justice.

Given the above, one might ask whether the fact that these tribunals have not been established by an international treaty or a United Nations Security Council Resolution, and that their decisions are non-binding, prevent these bodies from having an impact on international law. In this article I will argue that they *do* have an impact.

³⁰ <http://tribunalepermanentedepopoli.fondazionebasso.it/tribunale-permanente-dei-popoli/statuto/>

³¹ The Tokyo Tribunal, see *infra*, found the Emperor Hirohito guilty of the crimes committed against “comfort women”.

³² Daša Duhaček, *Women's Court: A Feminist Approach to In/Justice*, in *Women's Court: About the Process*, ed. Staša Zajović, Centre for Women's Studies, Belgrado 2015, p. 69.

³³ Andrew Byrnes – Gabrielle Simm, *Peoples' Tribunals*, *cit.*, p. 743.

³⁴ *Ibid.*

³⁵ Dianne Otto, *op.cit.*

³⁶ *Ibid.*

Women's Tribunals: A Feminist Approach to Justice as of 1976

Women's tribunals respond to violations of women's rights that have occurred during and/or after armed conflicts or in times of peace. Compared to peoples' tribunals, however, women's courts also respond to the exclusion of women from the mechanisms of the peaceful resolution of disputes at the international level³⁷. They constitute a "feminist approach to justice", which allows women to be "agents and interpreters of history"³⁸. In other words, women who have been victims of abuses participate in these tribunals as witnesses, they recount the facts that occurred in a specific moment and place, they also speak about the circumstances and the context of violence, trying to enucleate, thanks also to the support of experts, the causes of violence. Women's tribunals challenge the persistent discrimination against women which is at the very basis of gender-based violence and give women a voice.

The first women's tribunal was the International Tribunal on Crimes against Women, convened in Brussels in 1976 (*Brussels Tribunal*). The Tribunal was recommended during a workshop on international feminist strategy held in August 1974 in Denmark as a critical reaction to the United Nations-declared International Women's Year³⁹. Another international meeting was needed to develop the ideas launched in Denmark. Over 600 women therefore met in Frankfurt at the International Feminist Conference of 15-17 November 1974. In the mind of the organisers, there was the Bertrand Russell Tribunal, although nobody expressly mentioned it: "I believe some of us had assimilated this event into our consciousness", reported Diane Russell⁴⁰. For the purposes of the tribunal, "all man-made forms of women's oppression were seen as crimes against women"⁴¹. The crimes included forced motherhood, compulsory non-motherhood, persecution of non-virgins and unmarried mothers, persecution of lesbians, violence against women (including rape and castration of females), crimes perpetrated by the medical profession, economic crimes, crimes within the patriarchal family (an innovative aspect at that time), oppression of Third World women, of immigrant women, of women from religious minorities, sexual objectification of women. Women from 40 countries in the world testified violations of women's rights. There was no jury and any individual or group was free to make a proposal. The proposals, such as the legalisation of abortion, were presented to the audience but not voted. During the workshops that were organised along with the sessions, several proposals were elaborated alt-

³⁷ Hilary Charlesworth – Christine Chinkin, *op. cit.*, p. 290.

³⁸ Staša Zajović, *The Women's Court – A Feminist Approach to Justice: Review of the Process of Organising of the Women's Court*, in *Women's Court: About the Process*, ed. Staša Zajović, Centre for Women's Studies, Women in Black, Belgrade 2015, p. 40.

³⁹ Diane E.H. Russell - Nicole Van De Ven, *Crimes against Women: Proceedings of the International Tribunal*, Les Femmes, Millbrae 1976, p. 151.

⁴⁰ *Ibid.*

⁴¹ *Ivi*, p. 152.

though unfortunately the proceedings did not include the minutes⁴². However, their conclusions were brought to the plenary session on the fifth and final day in the form of resolutions and proposals for change⁴³. The Tribunal was criticised by the participants themselves: a woman invoked a more theoretical analysis and asked to reconceive the structure of the tribunal, others complained they had not had time enough to present their testimonies. The fact that men were not allowed during the sessions was highly controversial and emphasised by the media.

Despite some weaknesses, the Brussels Tribunal stressed the gravity of several crimes against women, and, for the first time in history, it focused on crimes committed within the family, anticipating a debate which will be high priority in the 90s at the international level. The purpose was very different from the one of the Russell Tribunal: The International Tribunal on Crimes against Women did not assess the responsibility under international law of one State or the other, it did not apply international law, it did not prepare a final decision containing recommendations. Its purpose was not to “judge” but rather to criticise “state-made law”⁴⁴, highly discriminatory against women.

Women’s Tribunals: Following the Path of Remembering

The International Tribunal on Crimes against Women constituted a “model” for subsequent women’s tribunals, having in common the need to hear women whose voices had been silenced or never heard by official institutions.

I will present here some of the tribunals which have marked the evolution of these bodies, and I will proceed trying to answer to the following questions: why was a tribunal necessary? How was the proceeding – similar or different to the one of an international court? Who were the members of the jury? Did they apply international law? Who were the victims? Which crimes were object of the proceeding? What was the outcome of the procedure?

Tokyo Tribunal on Comfort Women

The case of “comfort women” represents one of the “silences” of international law with regard to sexual violence committed against women during armed conflicts. Japanese law prohibited rape committed by the Army and the Navy. During the Meiji period, 1868-1912, the perpetrators could face imprisonment or capital punishment if the conduct resulted in the death of the victim⁴⁵. However, during the Second World War, in particular in the second half of 1937, the violence of the attacks coming from the coastal areas of Shanghai and Hangzhou and directed at

⁴² Diane Russell stressed this point, *op. cit.*, p. 12.

⁴³ *Ivi*, p. 7.

⁴⁴ Dianne Otto, *op.cit.*

⁴⁵ Yuma Totani, *Legal Responses to World War II Sexual Violence: The Japanese Experience*, in *Sexual Violence in Conflict Zones*, ed. Elizabeth Heineman, Philadelphia University Press, Philadelphia 2011, p. 218.

Nanking indirectly allowed the devastation of Chinese villages committed by soldiers⁴⁶.

Whereas the rape of Nanking was prosecuted before the Tokyo tribunal, the crimes against “comfort women”, in Japanese *jūgun ianfu*, women that were recruited, forced to stay in “comfort stations”, and “used” by soldiers during the conflict, went unpunished. Women from Korea mainly, but also from China, other South-Eastern countries, and even from Japan, were recruited to satisfy military sexual desires. It was a system of women trafficking used by the wartime Japanese government to cope “with widespread military disciplinary problems”, and to avoid other cases of mass rape similar to the one in Nanking⁴⁷. The involvement of the government in the commission of rapes and enforced prostitution was clearly assessed by the Tokyo Tribunal⁴⁸, which, however, did not examine the responsibility of the Imperial government⁴⁹.

It was estimated that between 50,000 and 200,000 women had been abused. The crimes committed against them had been ignored until 1990, when some organisations of Korean women presented a request for investigation on the phenomenon to the Japanese parliament. The Japanese government denied its involvement, alleging that the recruitment was organised by private parties⁵⁰.

The Women’s International War Crimes Tribunal held in Tokyo, Japan, in 2000 (*Tokyo Tribunal*), was hence a response to a silence that had lasted for decades. According to Chinkin, a feminist lawyer and one of the experts in the tribunal, the trial before the Women’s Tribunal demonstrated that “[w]hen States fail to exercise their obligations to ensure justice, civil society can and should step in. To ignore violative conduct is to invite its repetition and sustain a culture of impunity”⁵¹.

The composition of the jury – all judges or lawyers⁵² – might explain why the tribunal did resemble a formal court. The case was presented by the “prosecution”,

⁴⁶ *Ivi*, p. 219.

⁴⁷ Yuma Totani, *op. cit.*, p. 220. Rosa Caroli, *Comfort Women. Una lettura di genere*, in “DEP. Deportate, esuli, profughe. Rivista telematica di studi sulla memoria femminile”, 10, 2009, pp. 132-143; p. 133.

⁴⁸ International Military Tribunal for the Far East, judgment of 4 November 1948, p. 499: “During the period of Japanese occupation of Kweilin, they committed all kinds of atrocities such as rape and plunder. They recruited women labor on the pretext of establishing factories. They forced the women thus recruited into prostitution with Japanese troops”.

⁴⁹ Yuma Totani, *op. cit.*, p. 222. See also on the “transformative power of law as a site of memory contestation”, Nicola Henry, *Memory of an Injustice: The “Comfort Women” and the Legacy of the Tokyo Trial*, in “Asian Studies Review”, 37, 2013, pp. 362-380.

⁵⁰ Rosa Caroli, *op. cit.*, p. 134. Ten cases, starting from 1991, were brought before Japanese courts. The plaintiffs were women from different countries, including the Netherlands, alleging the responsibility of the Japanese government and asking for damages. All cases were dismissed. It was only the Tokyo District Court, in April 2003, that urged – without however condemning – the Japanese government to initiate dialogues to provide reparation to victims. The decision was eventually overruled by the High Court in 2005 (Yuma Totani, *op. cit.*, p. 224).

⁵¹ Christine Chinkin, *Women's International Tribunal*, *op. cit.*, p. 339.

⁵² Judges were Gabrielle Kirk McDonald, former president of the International Criminal Tribunal for the Former Yugoslavia; Carmen Maria Argibay, a criminal law judge in Argentina and president of

composed by teams of different countries, to the judges. Thirty-five survivors gave their testimony in Tokyo during the four-day trial, along with the testimony of several experts and two former Japanese soldiers, who spoke in front of an audience of almost one thousand people. The Japanese government was invited but it did not respond. Comfort women came from North and South Korea, the Philippines, China, Taiwan, Indonesia, East Timor, Malaysia, including Japan, and the crimes committed against women included systematic and widespread rape, sexual slavery, forced abortion, sexual violence, enforced sterilisation and child rape, committed by the Japanese Imperial soldiers against the former “comfort women” during the Second World War.

The case was presented in the official way *plaintiff v. respondent*: “in the matter of the Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan”⁵³. The “others” were organs of the Japanese government, such as the War Minister, the Governor General of Taiwan, officers of the army. The tribunal applied several international conventions, including the 1907 Hague Convention, the 1926 Slavery Convention and the 1930 International Labour Organisation Convention on Forced Labour⁵⁴, along with general principles of international law.

The final decision was called “judgment”, it was structured like a formal decision taken by an international jurisdiction – with an introduction, the list of the accused, the narrative of the facts, the merits – and ended with recommendations and reparations. The Tribunal declared to sit “as it were a continuation of the International Military Tribunal for the Far East”, established soon after the Second World War⁵⁵. The Tribunal found both that Japan was responsible for violations of international law (of the *jus in bello* and of conventions against forced labour and slavery), and that Emperor Hirohito was “guilty of responsibility for rape and sexual slavery as a crime against humanity, under Counts 1-2 of the Common Indictment, and guilty of rape as a crime against humanity under Count 3 of the Common Indictment”⁵⁶. Therefore, the Tribunal investigated individual and State responsibility at the same time: in that respect, it showed a significant difference with international tribunals⁵⁷. The jury also dealt with the issue of immunity of heads of States and high-ranking officials: it rejected immunity, arguing that the Nuremberg Tribunal did so even for head of States and that the International Military Tribunal for

the International Association of Women Jurists; Dr. Willy Mutunga, a human rights lawyer from Kenya; and Christine Chinkin, international lawyer.

⁵³ Judgment of the Women’s International War Crimes Tribunal available at <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/summary.html>

⁵⁴ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907. Convention to Suppress the Slave Trade and Slavery, 25 September 1926. Convention concerning Forced or Compulsory Labour, 28 June 1930.

⁵⁵ Judgment of the Women’s International War Crimes Tribunal, para.15.

⁵⁶ *Ibid.* Emperor Hirohito died in 1989.

⁵⁷ International criminal tribunals assess individual criminal responsibility, whereas other international courts, such as the International Court of Justice, investigate international State responsibility.

the Far East granted immunity “because it was decided to shield the Emperor from liability”⁵⁸.

The judgment clearly had no legal effect⁵⁹. The Tribunal recommended that the Japanese government made a “full and frank” apology, provided compensation to the surviving victims, and established “a mechanism for the thorough investigation into the system of military sexual slavery, for public access and historical preservation of the materials”⁶⁰. It is interesting that the jury also recommended the establishment of a Truth and Reconciliation Commission “that [would] create a historical record of the gender based crimes committed during the war, transition and occupation”⁶¹. The Tribunal demonstrated the possibility to act as a promoting force for change; it built the framework that could have been used for further action to “break the history of silence”⁶².

Despite its formalism, the Tribunal was also characterised by displays of paintings by victims, messages for peace, photographs of the victims, and was followed by a demonstration in the streets of Tokyo⁶³. Furthermore, even though it applied international law, the judges identified “the principles of law, human conscience, humanity and gender justice” as providing guidance for the Tribunal’s deliberations⁶⁴.

Court of Conscience in Guatemala

In Guatemala, hundreds of women suffered from severe abuses during the conflict which lasted almost 40 years, from 1960 to 1996. Discrimination against them intersected with discrimination on the ground of ethnic minority. At the end of the conflict, the Historical Clarification Commission was established⁶⁵. Although the mandate did not clearly include violence against women, the Commission did deal

⁵⁸ Judgment of the Women’s International War Crimes Tribunal, para. 73.

⁵⁹ See also Sara De Vido, *Collective Memory of Rape*, in “Sociologia del diritto”, forthcoming. The US District court for the District of Columbia also analysed the case of fifteen women under the Alien Tort Claims Act (*Hwang v. Japan*, 172 F. Supp. 2d). However, the then Bush administration supported the Japanese motion to dismiss, alleging that the political question underlying the case precluded adjudication. Fifteen years later than the judgment of the women’s tribunal in Tokyo, the Japanese Prime Minister, Shinzo Abe, offered his apologies to the women in a statement issued in Seoul by his foreign minister Fumio Kishida. Japan and South Korea have recently reached an agreement according to which Japan will offer to set up a 1 billion yen fund, with the money divided among the 46 former comfort women still alive, and South Korea in turn will refrain from any further protests at the international level. The agreement, not devoid of criticism for women’s associations not being involved in the decision, has at least formally recognised the harm committed against comfort women during the Second World War.

⁶⁰ Judgment of the Women’s International War Crimes Tribunal, para. 147.

⁶¹ *Ibidem*.

⁶² Judgment of the Women’s International War Crimes Tribunal, para. 1.

⁶³ Rumi Sakamoto, *The Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery: A Legal and Feminist Approach to the ‘Comfort Women’ Issue*, in “New Zealand Journal of Asian Studies” 3, 2001, pp. 49-58, p. 50.

⁶⁴ Dianne Otto, *op. cit.*

⁶⁵ Agreement on the establishment of the Commission to clarify past Human Rights violations and acts of violence that have caused the Guatemalan population to suffer, 23 June 1994.

with gender-based crimes and its final report showed that approximately a quarter of the direct victims of human rights violations and acts of violence were women: “They were killed, tortured and raped, sometimes because of their ideals and political or social participation, sometimes in massacres or other indiscriminate actions”⁶⁶. Rape was also considered a “common practice”⁶⁷. Nonetheless, the assessment of the Commission was not sufficient to end impunity. Truth and reconciliation commissions are extremely useful tools of transitional justice⁶⁸, generally established soon after the conflict by the government itself. Their decisions are non-binding. And indeed, of the 1,456 instances of sexual violence registered, only 285 reached the Guatemalan court system⁶⁹. In 99 per cent of the cases, violence was directed against women and 80 per cent of them were indigenous.

In 2010, a Court of Conscience took place in Guatemala City, on 4-5 March. The quest for the end of impunity was clear: it affirmed a desire for justice. Indigenous women witnessed all the abuses they suffered during the conflict, including rape, sexual slavery, torture, forced pregnancy, forced marriage with the soldiers that raped them, forced sterilisations, forced abortions, and mutilation. The conflict ended but that was not the end of violence, since in Guatemala women have continued to be subjected to physical, psychological, and sexual violence⁷⁰. Ninety eight per cent of femicide cases in Guatemala remain today in impunity. The Court was promoted by several non-governmental organisations: the National Union of Guatemalan Women (UNAMG), the Community Studies and Psychosocial Action Team (ECAP), the National Widows’ Coordinator of Guatemala (CONAVIGUA), “Women Transforming the World” (MTM) and La Cuerda, with the support of various embassies in Guatemala, including those of Costa Rica, France, Germany, Norway, Spain and Sweden, as well as United Nations agencies, including the United Nations Development Fund for Women (UNIFEM), the United Nations Population Fund (UNFPA), the United Nations Development Fund (UNDP) office in Guatemala and the Office of the United Nations High Commissioner for Human Rights (UNHCHR).

The first day, nine women gave their testimonies behind curtains to hide their identities; the second day, experts intervened on the causes and effects of violence. The “judges of conscience” then issued a statement, which was later signed by honoured witnesses. The non-binding statement was divided into three parts: a pre-

⁶⁶ Guatemala Memory of Silence, Report of the Historical Clarification Commission and Concluding Observations, 1996, para. 29. https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf

⁶⁷ *Ivi*, para. 91.

⁶⁸ With the term “transitional justice”, we identify “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”. See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, 23 August 2004, S/2004/616, para. 8.

⁶⁹ <http://www.peacewomen.org/content/guatemala-court-conscience-against-sexual-violence-during-internal-armed-conflict>

⁷⁰ *Ibidem*.

amble, the ruling, and recommendations. In the preamble, the judges acknowledged that gender-based violence, and in particular sexual violence and violence against women and girls, was used as a weapon of war, had reached alarming and unacceptable proportions “para la conciencia humana apegada al ideal de los derechos de la humanidad”⁷¹. In the decision, the Court declared to be guided by conscience, although it referred to domestic law, in particular the Guatemalan criminal code, and to international law. It posited that the insurgents violated international humanitarian law, and international human rights law. The State of Guatemala was found in violation of its due diligence obligations to investigate, prevent and prosecute crimes, contributing to the creation of a climate of impunity⁷². The causes of violence during armed conflict could be traced back to the persistent inequality between women and men, girls and boys, which anticipated the conflict; the violence occurred during the conflict, in turn, worsened the discriminatory situation against women and girls in the post-conflict period⁷³. In the statement, with regard to sexual violence committed by members of security forces combined with police and military forces during the process of eviction from the occupied territories, the judges posited that it amounted to torture according to the Guatemalan criminal code⁷⁴.

Women’s Court in Sarajevo: A Feminist Approach to Justice

At the end of 2010, women from almost all countries of the Former Yugoslavia started the initiative for the organisation of the Women’s Court, which was held in Sarajevo from 7 to 10 May 2015, after dozens of events involving women of different origins.

With regard to the Women’s Court in Sarajevo, at first sight, one might ask: What are the reasons underlying the establishment of the tribunal? Compared to other situations and conflicts that have occurred at the international level – such as the case of “comfort women”⁷⁵ – the conflict in the former Yugoslavia has been object of analysis by several international bodies, which have addressed issues both of individual criminal responsibility and of State responsibility⁷⁶.

And yet, women coming from different parts of the Former Yugoslavia felt the need to tell what had not been heard elsewhere. One of the reasons concerns the limited participation of women in international fora, where the future of the Former Yugoslavia was about to be decided. Hence, for example, during the negotiations

⁷¹ *Pronunciamento final. Tribunal de conciencia contra la violencia sexual hacia las mujeres durante el conflicto armado interno en Guatemala*, 5 March 2010, http://www.ghrc-usa.org/Resources/2010/tribunal_de_conciencia.htm#pronunciamento, preamble.

⁷² *Ivi*, para. 7.

⁷³ *Ivi*, para. 8.

⁷⁴ *Ivi*, para. 10-11.

⁷⁵ One author talked about “stealth conflicts”. Virgil Hawkins, *Stealth Conflicts*, Ashgate, Aldershot 2008, p. 187. The author considers that most conflicts remain “undetected”; in other words, these conflicts are absent “from the consciousness of the actors”, such as media, academia, politicians, etc.

⁷⁶ International Court of Justice, judgment of 26 February 2007, *Bosnia c. Serbia*, ICJ Reports 2007, p. 43.

for the Dayton Accords in November 1995, women from Bosnia and Herzegovina did not participate; and this occurred notwithstanding the fact that they were used as instruments of war with the purpose to humiliate an entire ethnic group through acts of violence against its women⁷⁷. Sexual abuses were hence based both on gender and on ethnicity⁷⁸. The Dayton Accords, as acknowledged by Charlesworth and Chinkin⁷⁹, did not request the authorities representing the different entities from Bosnia and Herzegovina to address the abuses suffered from women and to provide adequate compensation. The agreement did not even contemplate any role for women in post-conflict reconstruction.

Shifting to international criminal justice, it should be first observed that the International Criminal Tribunal for the Former Yugoslavia was established by the United Nations Security Council two years before the Dayton Accords with the purpose of criminally prosecuting alleged authors of severe violations of international humanitarian law and of genocide⁸⁰. In the Statute of the Tribunal, rape is considered as a crime against humanity, not as a war crime or genocide. However, the jurisprudence of the tribunal, along with the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), has contributed to the definition of the elements of the offences of rape and sexual abuse. Hence, for example, in *Akayesu*, an international tribunal – the ICTR – has acknowledged that rape was an element of the crime of genocide, according to the Convention for the Prevention and Punishment of the Crime of Genocide adopted in 1948⁸¹. The International Criminal Tribunal for the Former Yugoslavia has examined several cases of sexual violence and rape: in the *Furundžija* judgment, for example, judges accepted the testimony of a sexually abused victim who suffered from post-traumatic stress disorder⁸². However, not all women had the possibilities to receive justice, to get compensation for the abuses suffered during the years of the conflict, and *after* the end of the hostilities as well. Indeed, in the years that preceded the establishment of the Women's Court, women who participated at the several meetings and events organised in every region of the Former Yugoslavia stressed that “the Hague Tribunal is the only institution that deals with war crimes committed in the region of the former Yu-

⁷⁷ Kelly D. Askin, *War Crimes against Women*, Kluwer, The Hague 1997, p. 264.

⁷⁸ Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, in “UCLA Women's Law Journal”, 4, 1992, pp. 59-86, p. 65.

⁷⁹ Hilary Charlesworth - Christine Chinkin, *op. cit.*, p. 291

⁸⁰ UN Security Council Resolution no. 827 (1993), establishing the International Criminal Tribunal for the Former Yugoslavia. See also Rhonda Copelon, *Toward Accountability for Violence Against Women in War: Progress and Challenges*, in *Sexual Violence in Conflict Zones*, ed. Elizabeth Heine-man, Philadelphia: University Press of Pennsylvania, Philadelphia 2011, p. 242. Sharon A. Healey, *Prosecuting Rape under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, in “Brooklyn Journal of International Law”, 21, 1995, pp. 327-383., p. 327.

⁸¹ International Criminal Tribunal for Rwanda, Trial Chamber, 2 September 1998, *Prosecutor v. Akayesu*, case n. 96-4-T.

⁸² International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, 10 December 1998, *Prosecutor v. Furundžija*, case no. IT-95-17/1-T, para. 109. For a detailed analysis of cases of violence against women analysed by the Tribunal, Nicola Henry *War and Rape. Law, Memory and Justice*, Routledge, London 2011.

goslavia and that it is often the only instrument that serves justice”⁸³. Furthermore, female victims of violence highlighted that, in the case of the most recent verdicts passed by the Hague Tribunal, “the State that had organised the crime (Serbia) has been granted amnesty”⁸⁴. The recent *Seselj* case, which ended in March 2016 with the acquittal of the accused⁸⁵ – charged, among others, with sexual violence – has reinforced distrust towards the ICTY.

Among the reasons for organising the Women’s Court in Sarajevo, women mentioned “to make the continuity of violence against women committed in peace and in war visible”, “to give voice to individual experiences of women and to include women’s experience in public memory”, and to acknowledge the victims’ sufferings, to establish the facts and “to put pressure on community and the institutional system”, but also to empower women and to create a network of international women’s solidarity, and to prevent future crimes in order to create the conditions for peace for future generations⁸⁶.

The Women’s Court was held in Sarajevo, Bosnia and Herzegovina, from 7 to 10 May 2015. Organised by the Mothers of the Enclaves of Srebrenica and Zepa Foundation, Centre for Women’s Studies, Centre for Women War Victims, Kosovo Women’s Network, National Council for Gender Equality, Anima, Women’s Lobby, Women’s Studies and Women in Black⁸⁷, the Court was more a process than a proceeding in the sense that it was anticipated by dozens of activities organised in different parts of the former Yugoslavia to raise awareness of the importance of such an experience for women.

The judges of the World Court heard witnesses regarding ethnic-based violence, which includes institutional violence (such as expulsion from work because of minority ethnic background, and forced identity changes based on ethnically motivated hate), repression of the society, in particular the rejection and the harassment of ethnically mixed families or marriages; “militaristic violence”, which means the war against civilians and repression because of the resistance to the forced mobilisation; the continuity of gender-based violence, which encompasses war crimes of rape, male violence against women, and political repression of female human rights defenders; economic violence against women, such as privatisation as crime against women, and living in a situation of constant economic crisis⁸⁸. It is clear that these categories do not correspond to the usual ones used in international criminal law, and, in this sense, they go beyond international law as it conceived to

⁸³ Staša Zajović, *The Women’s Court – A Feminist Approach to Justice: Review of the Process of Organizing of the Women’s Court*, in *Women’s Court: About the Process*, eds. Staša Zajović et al., Centre for Women’s Studies, Women in Black, Belgrade 2015, p. 23.

⁸⁴ Staša Zajović, *op. cit.*, p. 24.

⁸⁵ International Criminal Tribunal for the Former Yugoslavia, 31 March 2016, *Le procureur c. Seselj*, case no. IT-03-67-T. “A comprehensively bad judgment”, according to one scholar. (<http://www.ejiltalk.org/the-sorry-acquittal-of-vojislav-seselj/#more-14187>).

⁸⁶ Stasa Zajovic, *op. cit.*, pp. 26-27.

⁸⁷ Women in black coordinated the entire project. On the experience of Women in Black in Belgrad, see Silvia Camilotti, *Le Donne in Nero si raccontano. Scritti di Marianita De Ambrogio, Staša Zajović e Lepa Mladjenović*, in “Deportate, esuli, profughe”, 15, 2001, pp. 261-292.

⁸⁸ <http://www.zenskisud.org/en/o-zenskom-sudu.html>

break the walls – which are limitations established in order to protect legal principles such as the rule of law and the *nullum crimen, nulla poena sine praevia lege poenali* – that prevent international bodies from investigating all possible abuses against women

The World Court was structured into two bodies: the first one was the *judicial council*, composed of seven female members⁸⁹; the second body had a consultative role⁹⁰. The Court was supported by experts who provided the social and historic framework in which the crimes had been committed. The session was held in a theatre with more than 600 people attending; on the stage, there were, on one side, the witnesses (36 in total), on the other one, the experts. People talked to the audience from a lectern. There were no accused to judge.

After listening to the testimonies of the witnesses participating to the proceedings for two days, on 10 May the judicial council adopted some preliminary decisions and recommendations⁹¹, waiting for a more “comprehensive and conclusive judgment” which is not available at the time of writing⁹². In the preliminary decision, the members of the judicial council reported the crimes against women committed during and after the conflict in the Former Yugoslavia. They were divided into five thematic crimes: the crime against the civilian population, the crime of using women’s bodies as battlefield, the crime of militaristic violence, the crime of persecution of those who are different in war and in peace, the crime of social and economic violence. The members then affirmed that:

All these acts are crimes against peace and violations of human rights, in and of themselves. Many of these acts also constitute the crime of genocide perpetrated by Serbia against the non-Serb populations. Further, the acts are also evidence of crimes against humanity committed by all parties to the conflict, including militias⁹³.

The important contribution given by international law scholars, Dianne Otto and Kristen Campbell, is clearly detectable in these sentences, where the council posited that the acts reported by the witnesses amounted to crimes against peace, a violation of human rights, genocide, crimes against peace. The judicial council found that “all participants to the conflict” were responsible for the abuses suffered by women during and after the conflict in the former Yugoslavia, including “all the States in the Balkan region”, religious institutions, war profiteers, but also – and

⁸⁹ Vesna Rakic-Vodinelic (Belgrade, Serbia); Charlotte Bunch (Centre for Women’s Global Leadership, Rutgers university, USA); Kirsten Campbell (Goldsmiths college, London, UK); Gorana Mlinarevic (activist and feminist researcher, Sarajevo); Dianne Otto (Melbourne Law School); Latinka Perovic (Institute for the history of Serbia); Vesna Terselic (Documenta, Zagreb, Croatia).

⁹⁰ Marta Drury, nominated as one of the 1000 Women for Peace for the Nobel Peace Prize; Monika Hauser (Switzerland, Germany), physician gynecologist and humanitarian; Mariemme H. Lucas, Algerian sociologist living in France.

⁹¹ Judicial Council, *Preliminary Decisions and Recommendations*, available in English here <https://research.gold.ac.uk/17965/1/Women's%20Court%20Preliminary%20Decision%20Judicial%20Council%2009%2005%202015.pdf>

⁹² Judicial Council, *Preliminary Decisions and Recommendations*, p. 1.

⁹³ *Ibidem*.

this is highly significant – “the international community which failed to protect those under its care”⁹⁴.

The report concludes with some recommendations, including a call for the publication and dissemination of the history that was presented by the witnesses and of the five years of preparation for the Women’s Court. One can also find some interesting elements of international law. First, in the report, States are required to “respect, protect and fulfil” – according to a well-known formula in international human rights law⁹⁵ – the human rights of women, “including the right to work, to equal and regular pay, to paid maternity and parental leave, to adequate housing, social security and health care, including reproductive and sexual rights. The particular impact on women of unpaid and invisible care work should be recognised and remunerated”⁹⁶. Secondly, States “have a due diligence responsibility for providing women with justice and working to end all forms of violence against women and human rights abuses in war, as well as ‘peace time’”⁹⁷. Thirdly, States must guarantee compensation and redress, in particular “transformative reparations”, to ensure more than simple monetary support⁹⁸. Fourthly, States and other social institutions, both private and public, which include schools, media, families, religious entities, “all share in responsibility for ending the patriarchal, heteronormative and militaristic attitudes that perpetuate and feed all forms of violence and discrimination against women”⁹⁹.

The judicial council has thus reiterated international legal obligations deriving from treaty law and international customs.

A World Court of Women “against War, for Peace”

The World Courts of Women started in 1992 as an initiative promoted by two non-governmental organisations networks, the Asian Women’s Rights Association and El Taller international. The two founder were Corinne Kumar (India) and Nelia Sanchez (Philippines). Over 40 Courts have been established in Asia, the Middle East, South-Eastern Europe, Africa, Latin America and the US¹⁰⁰. The goals are similar to the ones pursued by the International Tribunal on Crimes against Women, in the sense that they “protest violence against women, not as an individual crime, but as embedded in other systemic forms of violence”¹⁰¹. World courts of women focus on “testimonies of protest and survival, not just suffering and pain, which are linked to a politics of collective responsibility”¹⁰². Accordingly, they

⁹⁴ *Ibidem*.

⁹⁵ See, among others, Olivier De Schutter, *International human rights law*, 2nd ed. Cambridge University Press, Cambridge 2014, p. 280.

⁹⁶ Judicial Council, *Preliminary Decisions and Recommendations*, p. 7, para. 3.

⁹⁷ *Ivi*, para. 5.

⁹⁸ *Ivi*, para. 6.

⁹⁹ *Ivi*, para. 7.

¹⁰⁰ See, recently, the World Court of Women on Poverty in the US, summer 2012, <https://worldcourtsofwomen.wordpress.com/>

¹⁰¹ Dianne Otto, *op. cit.*

¹⁰² *Ibidem*.

might not even refer to specific episodes in history, and they can address violence that has occurred in different countries of the world. In the words of Rebecca Johnson, one of the experts in the World Court of Women held in Bangalore (India): “The World Courts of Women are important platforms for restoring and amplifying voices that have been silenced by oppression, poverty, violence and denial of human rights and education”¹⁰³.

The World Court of Women in Bangalore (*Court in Bangalore*) was convened in November 2015 under the title “against War, for Peace”. It was hosted by the Mount Carmel College and Vimochana Women’s Rights Forum, and held in conjunction with the global conference of the Women in Black, an international network founded in Jerusalem in 1987. The jury, which defined itself as the “Council of Wise Women”, was composed of eight experts¹⁰⁴, who heard the testimonies of dozens of women coming from different parts of the world. As reported by Johnson, some witnesses decided to reveal their identity, other preferred anonymity; they talked about painful experiences, the struggle for survival, and the injustices suffered. Hence, for example, Radha Paudel, gave testimony about the efforts of the Madhes movement to create a dialogue with the government in order to counter human rights abuses and corrupt practices; whereas an Iraqi scholar, Eman Khammas, spoke about survival during Saddam Hussein’s dictatorship and then the US-UK invasion of 2003¹⁰⁵. Sessions in Bangalore were held all day long; they included oral witnesses along with dance, poetry and short films. The final session focused on building resistance, peace and justice in a “gathering of spirit”. Violations of women’s rights ranged from cultural and ethnic genocide to mass unemployment and eradication of livelihoods, but also daily violence on the margins of society.

The jury prepared an oral response, which was read in Bangalore on 16 November 2015. The report draws its conclusions from the testimonies heard over several days. As for the perpetrators of violence, the report included several actors, such as international institutions (the World Bank, the International Monetary Fund, the United Nations), and economic and military structures (stock-markets, banks and the economic system, the “military-industrial systems and alliances, dominated by the US and NATO”), but also “men hiding behind progressive organisations, political parties and NGOs”¹⁰⁶. With regard to the UN, the witnesses blamed “impunity for officials and military forces who harass and violate women, including so-called “peace-keepers”. This is an extremely sensitive issue; despite the adoption of UN Security Council Resolution no. 1325 (2000), which emphasised the role of women as agents of change and peace and the impact of conflicts on women and girls, violence is still widespread. In a recent report published by

¹⁰³ Rebecca Johnson, *World Courts of Women: Against War, for Peace*, 25 January 2016, <https://www.opendemocracy.net/5050/rebecca-johnson/courts-of-women-resisting-violence-and-war>

¹⁰⁴ Rebecca Johnson (UK), Kamla Bhasin (India), Ritu Dewan (India), Marguerite Waller (USA), Luisa Morgantini (Italy), Rose Dzuvichu (India), Elahe Amani (Iran/USA), Lisa Suhair Majaj (Palestine).

¹⁰⁵ Rebecca Johnson, *op. cit.*

¹⁰⁶ *Ibidem.*

UN Women, guided by the then Special Rapporteur on Violence against Women, Radhira Coomaraswamy, experts acknowledged that:

perpetrators must be held accountable and justice must be transformative. Perpetrators of grave crimes against women should be held accountable for their actions so that women receive justice and future crimes are deterred. At the same time, justice in conflict and post-conflict settings must be transformative in nature, addressing not only the singular violation experienced by women, but also the underlying inequalities which render women and girls vulnerable during times of conflict and which inform the consequences of the human rights violations they experience. The Global Study explores both the importance of fighting impunity for crimes against women through criminal justice proceedings, while also recognising the central role played by reparations, truth and reconciliation processes and in ensuring that victims and their communities heal and recover together¹⁰⁷.

According to the Court in Bangalore, the origins of historical, futuristic, economic, state, political and military violence must be traced in “dominant patriarchal, colonialist, neo-liberal institutions, mindsets and practices”; in other words, it is a form of violence well eradicated in society.

The decision of the jury generally referred to rape and crimes against humanity and genocide, but without mentioning the relevant legal instruments; furthermore, it did not assess individual criminal responsibility. It is evident that, when the tribunal concludes “from women’s perspective, when we see hundreds of thousands of refugees desperately fleeing out of Syria, Iraq, Afghanistan, and many other conflict-torn countries we understand this too as genocide”, this *not* a legal analysis. The purpose of the Court was not to delve into international criminal law, indeed, but rather to share responsibility, through the testimonies heard during the proceedings, “for stopping these genocides and crimes against humanity”¹⁰⁸. The experts sitting in the Court in Bangalore were convinced of the fact that “oppressive national and globalised systems of patriarchal beliefs and practices must be dismantled, abandoned and destroyed”¹⁰⁹.

The recommendations of the jury were aspirational and inspiring, but highly improbable, at least legally speaking, in particular where the jury demanded “that we go to the roots. And that we all hold accountable those who own, control, run, enable, govern, manage, implement and benefit from all forms of violence”, and where it considered that the best way to bring justice is “to build a powerful global women’s movement to transform this world into one that is more just, peaceful, sustainable and secure”¹¹⁰. As correctly said:

their aspirations are avowedly utopian, working towards the transformation of the entire system of law as we know it, which is seen as deeply complicit in maintaining injustice. At the heart of their transformative vision is the idea that we, the people, share the responsibility for injustice and need to find ways to acknowledge and act on it¹¹¹.

¹⁰⁷ UN Women, *Preventing Conflicts, Transforming Justice, Securing Peace*, 2015, pp. 148-149. <http://wps.unwomen.org/~media/files/un%20women/wps/highlights/unw-global-study-1325-2015.pdf>

¹⁰⁸ *Ivi.*

¹⁰⁹ *Ivi.*

¹¹⁰ *Ivi.*

¹¹¹ Dianne Otto, *op. cit.*

Why are These Tribunals Relevant for International Law?

From the above analysis, we can draw some conclusions. In terms of structure, women's courts differ a lot. The use of words is indicative of the functions and the purpose of the tribunals. The Women's Military Tribunal established in Tokyo in 2001 used, for example, the word "military" to address the failure of the Military Tribunals established soon after the Second World War to investigate sexual slavery and rape committed against women. The Court of Conscience evokes the way to reach a judgment: not only by applying law – in that case the Guatemalan criminal code – but also by following conscience.

As for applicable law, the courts applied international law, along with principles deriving from a common sense of justice. Even the Charter of the Women's Military Tribunal established in Tokyo, the most legalistic of the five examples, identified "the principles of law, human conscience, humanity and gender justice" as providing guidance for the Tribunal's deliberations and it ultimately highlighted the question of the international community's moral responsibility for the abuses suffered by women. The courts examined in the previous pages aimed to fight impunity, to assess individual criminal and State responsibility, to share responsibility and to go beyond the law. They shared a common belief, that something could have been done beyond the action of governments and international organisations, and that something could have changed.

It should be acknowledged that these tribunals had never had immediate concrete consequences¹¹². Nonetheless, the situation both in Tokyo and in Guatemala changed some years after the decisions of the tribunals. As for the situation of comfort women, fifteen years after the judgment, the Japanese Prime Minister, Shinzo Abe, offered his apologies to the women in a statement issued in Seoul by his foreign minister Fumio Kishida. Japan and South Korea have recently reached an agreement according to which Japan will offer to set up a 1 billion yen fund, with the money divided among the 46 former comfort women still alive, and South Korea in turn will refrain from any further protests at the international level¹¹³. The agreement, not devoid of criticism in the opinion of women's associations who were not involved in the decision, has at least formally recognised the harm committed against comfort women during the Second World War.

As for Guatemala, on 26 February 2016, the Supreme Court sentenced two former military members, former Lieutenant Colonel Esteelmer Reyes and former Military Commissioner Heriberto Valdez Asij, to prison terms of 120 and 240 years, respectively, for crimes against humanity. They were charged with sexual slavery against fifteen Indigenous Q'eqchi' Mayan women of Sepur Zarco, who were forced to become sex slaves for members of Guatemala's military during the country's long civil war¹¹⁴. It was the first time that a Guatemalan court had prosecuted a case of sexual violence related to the internal armed conflict of that country

¹¹² Robert Cryer, *op. cit.*, p. 51.

¹¹³ <http://www.theguardian.com/world/2015/dec/28/korean-comfort-women-agreement-triumph-japan-united-states-second-world-war> (last accessed on 10 October 2016).

¹¹⁴ <http://nacla.org/news/2016/03/11/justice-women-sepur-zarco>

and it was also the first time that a case of wartime domestic and sexual slavery had been prosecuted before a domestic court¹¹⁵.

A cause-and-effect relationship cannot be proved. I am not arguing that these women's tribunals did directly determine a change, that they induced States to negotiate, or that they convinced national judges to prosecute alleged perpetrators. Nonetheless, the women's tribunals convened in Guatemala and in Tokyo contributed to recording testimonies and to fighting silence and forgetfulness.

If we look at the experience of women's tribunals from an international law perspective, one might ask: Why are they relevant then? Their judgments are non-binding, governments – and international organisations – barely acknowledge their existence. These tribunals created by civil society cannot sentence the accused or oblige a State to compensate the victims¹¹⁶.

Furthermore, it can be counter-argued that the experience of Truth and Reconciliation Commissions shares some common elements with peoples' and women's tribunals, and that there is no need to establish other bodies at the international level. However, at a closer look, Truth and Reconciliation Commissions only share some common elements with peoples' tribunals with regard to the outcome, that is a non-binding judgment, and to the fact that they focus on victims rather than on alleged perpetrators. Truth and Reconciliation Commissions are, in the words of an author:

ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorised by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.¹¹⁷

Truth and Reconciliation Commissions examine in detail “the context, causes and consequences of mass violence” and constitute a process of “justice from below”¹¹⁸. They are in themselves the expression of the will to look at the past to build a future based on transparency and the rule of law. Furthermore, victims can report violence without appearing as witnesses during a process¹¹⁹. However, the

¹¹⁵ International Justice Monitor, <http://www.ijmonitor.org/guatemala-trials-timeline/>

¹¹⁶ Richard K. Falk, *(Re)imaging Humane Global Governance*, Routledge, Abington 2014, p. 76.

¹¹⁷ Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge University Press, New York 2006, p. 18. Using Freeman's definition, three authors have recorded 33 truth commissions worldwide: cfr. Elin Skaar – Camila Gianella Malca – Triner Eide, *Towards a Framework for Impact Assessment*, in *After Violence. Transitional Justice, Peace, and Democracy*, eds. Elin Skaar – Camila Gianella Malca – Triner Eide, Routledge, London 2015, p. 37. Eduardo Gonzales, *Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict, Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?*, Kofi Annan Foundation, 2014, p. 1, <https://www.ictj.org/challenging-conventional-truth-commissions-peace/docs/ICTJ-Report-KAF-TruthCommPeace-2014.pdf>. See also Susanne Buckley-Zistel, *Narrative Truths*, in *Transitional Justice Theories*, ed. Susanne Buckley-Zistel, Routledge, London 2015, p. 144

¹¹⁸ Luke Moffet, *Justice for Victims before the International Criminal Court*, Routledge, London 2014, p. 47.

¹¹⁹ During criminal trials, defense lawyers usually try to discredit witnesses' testimony. See Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Routledge, London 2011, p. 147.

establishment of truth commissions has not proven to be the magic formula capable of healing all the wounds created by a conflict.¹²⁰ As a matter of fact, being a political construction, transitional justice may focus on interests of stability, peace, and reconciliation while postponing “the issue of justice for victims until a more politically acceptable time in the future”¹²¹.

Peoples’ and women’s tribunals are neither political projects nor international jurisdictions. They “morally” condemn, they raise awareness of crimes that have almost been forgotten, they break the wall of silence and they, most importantly, let witnesses speak and be heard.

From an international law perspective, I will analyse the experience of women’s tribunals from two different points of view: first, I will argue that they can play the role of *amici curiae* before international courts and tribunals; secondly, I will contend that people’s tribunals constitute expression of democracy in international law¹²².

Women’s Tribunals as amici curiae

When we talk about women’s tribunals, the focus is on remembering wrongdoing, which is essential to justice”¹²³. Tribunals convened by non-governmental organisations can act beyond the law, and reach the minds and the hearts of those who listen to the proceedings. An author interestingly talked about the “politics of listening”¹²⁴. The Brussels Tribunal and the Court in Bangalore did not deal with a specific situation, and they did not investigate a specific conflict; they rather addressed the abuses suffered from women in different parts of the world. The Women’s Court in Sarajevo was capable of going beyond international justice in order to investigate crimes that had been committed before and after the conflict. Perhaps the Tokyo Tribunal tried to be as similar as possible to an international tribunal, although it also pushed the boundaries of law in rejecting the principle of immunity with regard to the Japanese emperor and in judging using both law and conscience.

Listening is, however, only a part of the process. When the audience and the jury listen, they also share the events and the feelings of the witnesses. With regard to all the tribunals we focused on in the previous pages, the purpose was also to promote “shared responsibility of the people to struggle against injustice”. In the words of Otto, who was one of the panel members in the Asia-Pacific Regional Women’s Hearing on Gender-Based Violence in Conflict, held in December 2012 in Phnom Penh (Cambodia):

¹²⁰ See the remarks by Kofi Annan in *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?*, 2013, <http://www.kofiannanfoundation.org/speeches/can-truth-commissions-effectively-strengthen-peace-processes%E2%80%9D/>

¹²¹ Luke Moffett, *op.cit.*, p. 48.

¹²² These arguments were first introduced in Sara De Vido, *Il Tribunale delle donne*, *cit.*, and here further developed.

¹²³ Sue Campbell, *Memory, Reparation, and Relation*, in *Our Faithfulness to the Past. The Ethics and Politics of Memory*, ed. Sue Campbell, Oxford University Press, Oxford 2014, p. 105.

¹²⁴ Dianne Otto, *op. cit.*

My responsibility did not end with fulfilling the specific tasks I had assumed as a Panel Member in Phnom Penh, which included taking responsibility for the Panel Statement of findings and recommendations. Acquitting these responsibilities was only a start. My location in the legal academy gives me particular powers of influence through my teaching and research, grants me a privileged platform for dissemination of ideas about justice and the law, and enables me to tap into many formal networks of power. My personal situation as a feminist and queer activist strongly informs my interest in and commitment to change, and links me into more marginalised community networks and forms of solidarity. Young's model of social connectedness suggests many ways that I can and must take responsibility for my part in the failure to recognise and redress the testimonies of injustice that I witnessed in Phnom Penh. Participating in this collection, as part of a critical re-examination of contemporary anti-impunity discourse and practice, is but one contribution that I am able to make¹²⁵.

The decisions taken by people's tribunals are rarely mentioned by the press, and almost never taken into consideration by States. Analysing these bodies from an international law perspective, it can be said that women's tribunals are capable of building a memory, which might be useful for further proceedings at both the international and domestic level. As we saw, a tribunal in Guatemala finally judged the alleged perpetrators of crimes committed against indigenous women. Even though the Court of conscience in Guatemala might not have been the reason for which a domestic court started the proceedings, it might have helped in remembering and in promoting a desire for law and justice. One of the non-governmental organisations which promoted the Court of Conscience, the *Unión Nacional de Mujeres Guatemaltecas*, was also active during the proceedings before the national court, and it hence built a bridge between the two experiences.

In particular, I am arguing that peoples' and women's tribunals can play the role of *amici curiae*, of "friends of the court", before international courts and tribunals. An *amicus curiae* is, according to the definition given by an International Centre for the Settlement of Investment Disputes Tribunal in 2005:

As the Latin words indicate, a "friend of the court", and is not a party to the proceeding. Its role in other *fora* and systems has traditionally been that of a non-party. [...] [Its] traditional role [...] is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. [...] [A]n offer of assistance – an offer that the decision maker is free to accept or reject¹²⁶.

A broad definition can also be used. As suggested by an author, we can refer to *amicus curiae* as to "any entity (including States, organs of States and of international organisations, and private entities) interested in a trial *but not party to it*, to submit an *unsolicited* written brief or make an oral statement on a point of *law, fact, or value* before an international court or tribunal"¹²⁷. We can add that the in-

¹²⁵ Dianne Otto, *op. cit.*, p. 43.

¹²⁶ ICSID Tribunal, *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae of 17 March 2006, para. 13. See Philippe J. Sands – Ruth Mackenzie, *International Courts and Tribunals, Amicus Curiae*, Max Planck Encyclopedia of Public International Law, 2008, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e8>.

¹²⁷ Luigi Crema, *Amici Curiae in International Law: Rules and Practice*, in "Italian Yearbook of International Law", 22, 2012, pp. 91-132, p. 94. See, for the role of *amici curiae* in international investment arbitration, Karia Fach Gómez, *Rethinking the Role of Amicus Curiae in International In-*

tervention by an *amicus curiae* is not necessarily unsolicited, but can also be requested by the international tribunal itself.

The rules of procedure of international tribunals usually determine methods and forms of submission by *amici curiae*. For example, a Chamber of the International Criminal Court may, at any stage of the proceedings, “invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate” (rules 103). These observations can be submitted in writing or orally. A written observation submitted must be filed with the Registrar, who then will provide copies to the Prosecutor and the defence (rule 103, para. 3).

Many non-governmental organisations have submitted reports and briefs to international courts and they have contributed to shaping international criminal law¹²⁸, although many *amici curiae*, as pointed out by a commentator, “have tended to be advocates for one side or another rather than neutral and independent friends of the court”¹²⁹.

It does not seem thus improbable, that international, regional, and domestic courts – if the participation of *amici curiae* is possible according to their own rules of procedures – accept and even request *amici curiae* briefs from peoples’ and women’s tribunals, or, better, from the organisations that have promoted the establishment of the tribunals themselves. The use of such reports would not overcome the lack of external legitimacy (as defined in the introductory paragraph) of peoples’ tribunals under international law but they would provide them a formal recognition at the international level. It is now necessary that, for the first time in history, an international tribunal or a domestic court clearly asks for the testimonies collected by one of the numerous peoples’ tribunals that have been established in the past years.

Women’s Tribunals and Democracy

In this section I contend that women’s tribunals manifest democracy at the international level. For the purpose of this research, I consider democracy as participation by the concerned persons in a process, which is characterised by transparency and non-discrimination.

The notion of democracy in international law cannot clearly be explained in a short article dedicated to women’s tribunals. A few remarks are, however, necessary to build the framework of the forthcoming analysis. First, it should be said that the concept of democracy was not very common in international scholarship before the dissolution of the Soviet Union¹³⁰. It seemed inappropriate for a community –

vestment Arbitration: How to Draw the Line Favorably for the Public Interest, in “Fordham International Law Journal”, 35, 2012, pp. 510-564.

¹²⁸ Mark S. Ellis, *The Contribution of Non-Governmental Organizations to the Creation of International Criminal Tribunals*, in *Research Handbook on International Criminal Law*, ed. Bartram S. Brown, Elgar, Cheltenham 2011, pp. 143-177, p. 163.

¹²⁹ William A. Schabas, *The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, Cambridge 2006, p. 619.

¹³⁰ Gregory H. Fox – Brad R. Roth, *Democracy and International Law*, in “Review of International Studies”, 27, 2011, pp. 327-352; p. 327.

the community of States of Westphalian origin – which was characterised by sovereign and independent States. Nonetheless, the principle of democratic legitimacy has emerged as one of the most radical changes after the fall of the Berlin Wall. In particular, between 1989 and 2010, “domestic governance – understood here in a traditional way as the use of public authority at the domestic level through a central governmental authority – has been regulated by international law to an unprecedented extent, the latter going as far as to prescribe a given type of procedure to accede to power at the domestic level”¹³¹. As early as 1992, an author posited that “democracy is on the way to becoming a global entitlement”¹³².

Secondly, it should be acknowledged that, given the structure of the international community, it is difficult to transpose the concept of democracy as developed at domestic level into the international realm. As has been pointed out, the international community lacks “global demos”¹³³. Nonetheless, it is still possible to find elements of democracy in the principles of procedural fairness, in human rights, civil liberties, the rule of law, and free elections. These, however, constitute only “steps towards democracy, not reliable indicators that democracy has been achieved”: what is needed is the recognition in international law of “a principle of democratic inclusion”¹³⁴.

In recent years, democracy has emerged in the provisions of binding and non-binding acts that have included extensive mechanisms of civil society participation in different fields, such as international environmental law. An illustrative example is the Rio Declaration adopted in 1992 according to which “[e]nvironmental issues are best handled with the participation of all concerned citizens”¹³⁵. And even more recently, the involvement of civil society has been invoked as a response to the lack of transparency which has characterised international organisations and negotiations for multilateral agreements: an aspect which has clearly emerged during the negotiations for the *Transatlantic Trade Investment Partnership*¹³⁶.

Against this backdrop, it is possible to appreciate the experience of peoples’ tribunals, and women’s tribunals more specifically. Where the mechanisms provided by international law are not sufficient to respond to injustice, peoples’ tribunals fill this gap, they are capable of responding to a quest for “real global democracy sus-

¹³¹ Jean D’Aspremont, *The Rise and Fall of Democratic Governance in International Law*, in *Selected Proceedings of the European Society of International Law*, ed. James Crawford, Hart, London 2011, p. 1.

¹³² Thomas M. Franck, *The Emerging Right to Democratic Governance*, in “The American Journal of International Law”, 86, 1992, pp. 46-91, p. 46.

¹³³ Referring to international environmental law, see Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, in “The American Journal of International Law”, 93, 1999, pp. 596-624; p. 600.

¹³⁴ Susan Marks, *The Riddle of All Constitutions*, Oxford University Press, Oxford 2000, p. 109.

¹³⁵ UN Doc. A/CONF. 151/PC/WG.III/L.33/Dev. 1 (1992).

¹³⁶ After huge criticism, the European Commission has published the documents which explain the position of the European Union. See the website, http://ec.europa.eu/trade/policy/in-focus/ttip/index_it.htm.

tained by the rule of law”¹³⁷. This “real global democracy” can be analysed from a women’s point of view as a response to discrimination on the basis of gender. I argue that women’s tribunals are not only a response to impunity and forgetfulness, but are also capable of eroding the historically unequal power relations between men and women, which are present in all societies and increase in wartime and in post-conflict situations.

Conclusions

The analysis has shown that women’s tribunals, despite being neglected by most literature, play an important role in the development of international law. International law, especially in the last decades, cannot be simply conceived as the law of the “relations” among States. As clearly pointed out by some authors, the international legal system is characterised by “an endless constellation and combination or variety of actors and normative outputs and processes” and is “far more malleable than conventionally understood”¹³⁸. The establishment of new “entities” in the realm of the international community, such as the standard-setting bodies, which can be defined as “informal” bodies devoid of a mandate enshrined in an international treaty, is not new. An example is the Financial Stability Board in the field of international finance. Compared to peoples’ tribunals, however, these bodies have a sort of legitimacy – but they are not necessarily “democratic” in the procedure¹³⁹ – which derives from the approval by the governments which participate in the body.

Peoples’ and women’s tribunals have been rarely analysed since their authority does not stem from a decision taken by governments or international organisations and they are considered as not capable of having an impact on international relations or the judiciary. Nonetheless, I have argued that this approach is quite limited. In Guatemala, the Court of Conscience might not have been the direct cause of the procedure started before a domestic court, but it has surely determined an increasing awareness of the problem of the violence against indigenous women that occurred during the conflict. The fact that the same association that promoted the Court of Conscience then participated in the domestic proceeding is a clear indication of the impact that civil society can have. Despite not being able to assess individual criminal responsibility, peoples’ and women’s tribunals contribute to “building solidarity and affirming the experiences of those who have suffered human rights violations”¹⁴⁰, and they “reflect critically on existing legal rules and practices in order to foster change”¹⁴¹.

¹³⁷ Richard K. Falk, *War, War Crimes, Power and Justice: Towards a Jurisprudence of Conscience*, “Asia Pacific Journal”, 10, 2012, pp. 1-12, p. 10.

¹³⁸ Joost Pauwelyn – Ramses A. Wessel – Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, Leuven 2012, working paper n. 97 https://www.researchgate.net/publication/272289972_The_Stagnation_of_International_Law

¹³⁹ We are referring for example to the lack of parliamentary approval to their establishment.

¹⁴⁰ Andrew Byrnes – Gabrielle Simme, *Peoples’ Tribunals*, cit., 2013, p. 743.

¹⁴¹ Dianne Otto, *op. cit.*

Women in Sarajevo were conscious of the fact that they could not oblige governments to start new proceedings to get compensation for the abuses suffered during and after the conflict in Former Yugoslavia. However, their testimonies will be shared and kept as part of the collective memory of the abuses suffered by many women¹⁴². Furthermore, the material (testimonies, videos, written documents) collected by civil society tribunals could be used by other “formal” international or domestic tribunals – for example inquiry commissions or international criminal tribunals – to support further proceedings¹⁴³. This seems to be a very interesting aspect.

Let us propose an illustrative example in that respect. Considering the current situation at the international level, a tribunal dealing with the situation of female refugees should be welcomed and the testimonies heard in that context used or at least form the basis for further international proceedings and inquiries. This is the process started by the Independent International Commission of Inquiry on Syria, established in 2011 by the Human Rights Council with a mandate to investigate all alleged violations of international human rights law occurred since March 2011 in the Syrian Arab Republic. The reports issued by the Commission contain some parts of the testimonies collected first-hand. Since September 2011, the Commission has conducted more than 4,500 interviews¹⁴⁴. Photographs, video recordings, satellite imagery and medical records were collected and analysed. Reports from Governments and non-governmental sources, academic analyses and United Nations reports formed part of the investigation¹⁴⁵. At the end of the most recent report, the Commission reiterated the findings of a previous report in which it affirmed that Daesh had committed genocide against the Yazidis¹⁴⁶, and that the case should be referred to the International Criminal Court by the UN Security Council¹⁴⁷. If the case is brought to the attention of the International Criminal Court, the judges of this Court could rely on the facts and the testimonies collected by the Commission of Inquiry on Syria and – if created – by a peoples’ or women’s tribunal with regard, as in our example, to the situation of female refugees fleeing from Syria. In this article, I suggest that the associations that promote peoples’ and women’s tribunals should participate as *amici curiae* in international proceedings, presenting their reports. The use of such reports would not overcome the lack of legitimacy of peoples’ tribunals under international law, but it would provide them with a formal recognition at the international level. In other words, where legitimate international tribunals established by international organisations or States take into consideration the testimonies collected by peoples’ and women’s tribunals, this would represent a step forward in promoting democracy, which should be also conceived, as we have said, as a form of participation in decision-making processes

¹⁴² De Vido, *Collective Memory*, cit.

¹⁴³ Andrew Byrnes - Gabrielle Simme, *Peoples’ Tribunals*, cit., 2013, p. 743.

¹⁴⁴ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 11 August 2016, A/HRC/33/55.

¹⁴⁵ A/HRC/33/55, cit., par. 4-5.

¹⁴⁶ A/HRC/32/CRP.2, cit.

¹⁴⁷ A/HRC/33/55, para. 147, letter c).

at the international level. In the case of women's tribunals, they will also contribute to eradicating the unequal power relations between men and women, by fighting the silence that has often led to impunity.