We Are Not the Spoils of War.

President Maureen, International Presidents and Sister Soroptimists it is an honour for me to be speaking to you in my home country

"It is all that woman's fault, she told me she was not married. I know she said no, but we highlands men are entitled to more than one wife so I took her anyway".

These were the words of a man appealing against his conviction and sentence for abduction and rape of a young woman he met on a road, made to two fellow judges and myself in the Supreme Court of Papua New Guinea. He took a fancy to her, she refused his overtures, in the course of her resistance he formed the view that she was not married. She was in fact married. He took her, kicking and screaming, home and held and raped her there. He already had a wife who was not impressed by this interloper.

What struck me was: *what was his concern?* -- not that she refused, he knew that ("I know she said NO"), or that it was all her - "that woman's"- fault. That, after all, is the oldest legal defence on record. Adam used it on God in the Garden of Eden. It did not work then and it is not working now.

But **"she told me she was not married".** He was concerned about what would happen if he interfered with another man's wife, another man's property. If he offended local norms --- the repercussions could lead to fighting. It was not the woman's feelings, her rights, her refusal. But his worry was the rights of another man, a husband.

And that has been, for centuries the attitude to women whose clans, towns, countries were vanquished in war. Women were property under ownership of men, a father, a husband, a slave owner. Rape was considered a property crime committed, not against the woman, but her owner, it could reduce her work ability or value on the marriage market.

Hence women were property the conqueror could take, the conqueror could not only have anything he could carry or drive away – furniture, gold, livestock, but also women and children, as the spoils of war. It was a complete defeat, a vanquishing of the enemy. It also showed that they could not protect their own women and children.

This was an attitude that prevailed, not only in European wars, but also parts of Asia. One example is the Chinese wars waged by Khubilia Khan against the Japan in the 11th and 12th centuries where women were captured, held and even distributed among vanquishing troops.[1]

Not many ancient wars were actually subject to written or universally accepted Codes or Laws; there were "traditions" but they did not necessarily decide or deal with the status of civilians. Some, like the war code of the Saracens, made clear "Women and minors of both sexes become the immediate property of the captors" Male prisoners of war could be ransomed, released or exchanged. Women could not.

One example of a traditional law or rule of war, showing that such rules are not unique, came before me as a judge was in Papua New Guinea following a tribal fight. Tribal fighting, although a criminal offence, did not often come to a court hearing because the participants would not give evidence against each other. In that particular case the warring factions met at the time and place arranged, the men to fight while the women sat along the sides of the battle ground sharpening arrows, tending wounds and supplying food. The accepted procedure was when one side realised things were not going well the fighters would take off, running for the hills while their accompanying womenfolk would carefully, methodically and slowly collect their sharpening stones, food etc, spread out in a line and slowly walk with careful deliberation up the hill after the retreating men. The winning side could not chase their retreating enemy until all the women were out of the way. This was one of the local rules of war. The winning side broke that rule by chasing and killing one of the women who formed the barrier between them and their enemy. This very serious breach of the traditional rules of war was enough to cause the losing side to treat the killing as murder and report it to the police who in turn to brought it to court in a criminal trial.

Attitudes to gender based violence, including rape, in war varied. According to the researcher Roy Porter, to the ancient Greeks rape was "socially acceptable behaviour well within the rules of warfare" and "women were legitimate booty, useful as wives, concubines, slaves, battle-camp trophy". That attitude, while not universal, was very common. Peter Karsten wrote in 1978 "To the victor goes the spoils" was the battle cry for centuries and women were included as part of the spoils of warfare".

[1] Khubilia Khan's Lost Fleet: James P. Delgado, University of California Press 2008

Also civilian women were killed because of their ability to produce children of the enemy. They had not fought or carried arms but had potential – the potential to reproduce.

Did attitudes change and if so when? The answer is debatable.
Grotius – considered by many lawyers as the father of International Law - said "You may read in many places that the raping of women in time of war is permissible and in many others that it is not permissible. Those who sanction rape have taken into account only the injury it does to the person of another, and have judged that it is not inconsistent with the law of war that everything which belongs to the enemy (including women) should be at the disposition of the victor."

Kelly Askin who has written widely on the history of gender based violence in war, identifies "In the late eighteenth and nineteenth centuries, a smattering of treaties or war codes began including vague provisions for protecting women:

The Treaty of Amity & Commerce (1785) specified, in case of war, "women and children… shall not be molested in their persons."

Order No 20 (1847) a supplement to the U.S. Rules and Articles of War, listed the following as severely punishable: 'Article 2: Assassination; murder stabbing or maiming; rape".

The Declaration of Brussels (1874) stated, the "honour and rights of the family …. should be respected." Note it is "should" not "shall", it is not mandatory

The Oxford Manual (1880) asserted, "human life, female honour, religious beliefs … must be respected. Interference with family life is to be avoided."

Although the language for most of these treaties is imprecise, presumably the provisions were intended to protect women and children against sexual assault but this is not always spelt out. The term used is "family honour" which does not acknowledge the woman's right not to be assaulted or to suffer.

But there was a much earlier written law. Here, in Ireland, Cain Ardoman – The Law of Innocents - protecting the status women was made in 697.

According to Irish tradition Ardoman, a senior cleric, and his mother saw a battle field where women were dead and dying, for in those days women had to fight whether they wanted to or not. They saw one woman's head was on one side of a stream, her body on the other and her baby was trying to feed from her dead body. Ardoman's mother told him to do something about it. He drafted a law which prohibited physical and sexual abuse of women, declared that women were not chattels and stipulated punishments. It had effect throughout Ireland and areas in Scotland and northern England under the influence of Irish clerical laws. If that could be done in Ireland 1,300 years ago, why not the rest of the world now?

Experts, such as Kelly Askin and Theodor Meron, consider the Lieber Code passed in USA in 1863, following the Civil War, which outlawed rape and assault on women as the foundation for the modern laws of war which are codified in the Geneva Conventions. But even these first conventions did not clearly spell out that there should be no rape, no sexual assault on women. Art.46 of the 1907 Geneva Conventions stipulated that "family honour and rights, the lives of persons and private property, as well as religious convictions and practices must be respected." The Code did not say the integrity of individual woman and girl was to be protected and respected nor did it acknowledge their suffering. Here again it was "family honour and rights" that was to be respected, arguably the drafters had not moved away from the concept that women and children were the property of fathers or husbands.

It was not until August 1949 and Art (4)(2)(e) of the Protocols to the Geneva Convention was the prohibition of rape, enforced prostitution and any form of indecent assault spelt out as a fundamental guarantee of humane treatment. Also detained women were to be are separated from men and, while in detention, supervised by women.

The first of the modern post war criminal tribunals were those after World War 11. They were heard in Nuremburg or Tokyo. But no sexual crimes were prosecuted at Nuremburg or Tokyo. WHY? It was known that rape happened, sometimes on a massive scale. Rape or sexual violence were not explicitly criminalized in the statute of the Nuremberg Tribunal nor mentioned in the judgements as either war crimes or crimes against humanity. But many experts say the 1907 protocol could have been used. Rape was recognised as a crime against humanity in Local Council Law No. 10 which governed the subsequent trials held by the Allied "military powers" against lower-level Nazis.

Rape was stated as a crime the Tokyo statutes but no-one was prosecuted. Yet thousands of Korean women and girls were held as sexual slaves, euphemistically called ‘comfort women’ for years.

Why? I have heard it said that the prosecuting powers did not want to offend ‘susceptibilities’, whatever those might be. But other researchers say it was because the Allied troops were as bad as other combatants. Thousands of women and girls were assaulted and raped as the Soviet army entered Berlin. To the extent that the Soviet War Memorial erected by the Soviet Union at Tiergarten in Berlin as the tomb or monument to the unknown soldier was/is referred to as the Monument/Tomb of the Unknown Rapist.

Other researchers and historians who have looked into the records of the time say Stalin was reluctant to do anything against his own Russian soldiers who committed rape and degradation upon women as they fought through the Soviet Union and Europe. Sexual assault was seen as a sort of entitlement. Hence they were no prosecutions. That is an attitude I heard in evidence during the Prosecutor v. Charles Ghankay Taylor trial. A witness testified that a leader of the rebels in the Revolutionary United Front, when something was said about the treatment of captured women told his troops “Enjoy yourselves boys. This is your time”.

So when and how did it change?

The Statute of the International Criminal Tribunal for the Former Yugoslavia, the first of the modern war crimes tribunals declared rape, enforced pregnancy and enforced prostitution as crimes. Rape had been widespread during the civil war in the Balkans; there were camps where women were detained and used by their captors for sex and where women of one ethnic group were deliberately impregnated by men of another to ensure that their children were of the other ethnicity.

But initially there were few prosecutions for sexual offences. Justice Richard Goldstone, an early prosecutor, conceded this. The explanations given included that women do not want give evidence or re-live the trauma or embarrassment. Likewise initially in the International Tribunal for Rwanda no actual indictments for sexual offences were laid. It was not until a witness described the gang rape of her very young daughter during the evidence in a case against a town mayor called Akeyesu that Judge Navi Pillay – she is now commissioner for Human Rights – intervened and asked why the rape was not being prosecuted? Akayesu had not been prosecuted for rape or any other sexual crime. The

Court directed the Prosecutor to investigate. A new indictment was laid and Akayesu was convicted; rape was declared "an act of genocide" and a definition given.

It was a landmark both for its definition and for clearly showing that rape was just as much a crime in war as in peace. **And** that women were not automatically spoils of war.

Other cases followed and with the appointment of both women investigators and prosecutors, e.g Brenda Hollis and Patricia Sellars, further charges for gender based violence were laid by the joint ICTY and ICTR Office of Prosecutor.

However the fact that these crimes were committed against captured vulnerable women did not mean perpetrators admitted that it happened or that the old "it was all that woman's fault" defence was not tried -- as a recent video issued by the ICTY which includes Kunarac giving evidence in his own defence -- shows.

The Special Court for Sierra Leone brought further developments and is considered as "as a critical landmark for international justice in prosecuting sexual and gender based crimes committed during conflict" according to a recent United Nations Security Council meeting and report by UN Women. At present all its Principals are women, the only such international tribunal. Soroptimists have a particular interest in Sierra Leone, our project Homes and Hope made a major contribution to the rehabilitation of women and children displaced by war.

The court was set up following a request by the Government of Sierra Leone to the United Nations after a civil war that raged in that small West African country for ten years. The war was noted for the brutality of the atrocities visited upon civilians, killing by beating and burning, the deliberate chopping off of arms, hands and legs, the abduction of people for forced labour, as sex slaves and as child soldiers, pregnant women were cut open to settle bets about the sex of their unborn babies and there was deliberate destruction of homes, villages and cities.[2] The modus operandi was to enter a village, burn homes, round up the people, publicly rape women, particularly young women and take away able bodied males, females and children - the children to be used as child soldiers.

[2] *Prosecutor v Brima, Kamara & Kanu*, SCSL-2004-16-PT, Judgment 20 June 2007
and *Prosecutor v Brima, Kamara & Kanu* in Appeal, SCSL-2004-16A-PT, 22 February 2008

The Special Court for Sierra Leone is noted for several landmark decisions in International Law including the decision on the immunity of a Head of State,[3] on the application of amnesties in peace treaties to crimes against humanity and war crimes[4] and the recruitment and use of children in war (commonly referred to as child soldiers[5]) and forced marriage. The court's mandate was limited to those "who bore the greatest responsibility", which led to "it was not me, the other bigger boy did it" type defences.

The original indictments against members of two warring factions, the Revolutionary United Front and Armed Forces Revolutionary Front charged rape, sexual slavery and outrages against personal dignity. In February 2004, the Prosecution sought leave to amend its Indictments to, inter alia, "add one more and new count of forced marriage", a crime against humanity. The Trial Chamber agreed in those two cases and recognised "the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offences with a view to bringing the alleged perpetrators to justice". One judge, Justice Boutet, referred to the Special Court's own Rules, the reluctance of victims of sexual violence to come forward and report the crime, the reports of the International Committee of the Red Cross, and of the Special Rapporteur on the Systematic Rape, Sexual Slavery and Slavery-like Practices during Periods of Armed Conflicts. (It is a sad reflection on our world that we need a Special Rapporteur on systematic rape)

Trial Chamber II, of which I was a Judge, heard and ruled on the evidence in *Prosecutor v Brima, Kamara and Kanu* (the Armed Forces Revolutionary Council or AFRC trial). That decision considered, for the first time, the international criminal law relating to child soldiers, forced marriage and sexual slavery.

In the course of the civil war two rebel groups, the Revolutionary United Front and the Armed Forced Revolutionary Council regularly abducted civilians and used them for forced labour such as mining, domestic work and carrying of loads, and in the case of women and girls, for sexual purposes.

Those women and girls who were forcefully abducted from their homes were taken back to the rebel camps and fighters could select those women and girls they wanted as wives. Commanders got the first choice. Very young girls were sometimes allocated to young SBU (small boy unit) fighters. A

[3] Head of State Immunity, *Prosecutor v. Taylor,* SCSL-03-01-1-059

[4] *Prosecutor v Kondewa*, SCSL-04-14-AR 72 E Decision on Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process. Amnesty provided by Lome Accord 25 May 2004

[5] *Prosecutor v Kondewa*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Soldiers) 31 May 2004

bureaucratic system of registering the names and allocation of these women was instituted in some camps and fighters were obliged to sign for the women or girl allocated to them as wives, as if they were giving receipts for bags of rice. The captors sometimes kept those women or girls they captured themselves. The woman was told she was the wife of the captor or fighter. She was given no choice in the matter and was punished if she refused. She was obliged to cook, carry his (often looted) property through the jungle, have sex and bear his children. But whatever status the "husband" had she also had, she got food if he had food, if he was a commander she had someone to work for her and, in one example, the power to distribute looted goods. But if she transgressed she was severely punished – e.g by being lashed and held in a rice box and if he tired of her she was rejected and often sent to the front to fight. She could not leave. Other women who were not allocated as wives were available to all and any man in the camps and were raped and gang raped. They were held and forced to work, unsuccessful escape was usually punished by death.

We held that recruitment and/or use of children in armed conflict is a crime but my two judicial colleagues held there was no separate crime of forced marriage. I disagreed on that and on their decision about the drafting of sexual slavery. On forced marriage I said

> ["T]hat forced marriage involves "the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victims".

The Appeals Chamber agreed and The Special Court was the first international tribunal to return convictions for sexual slavery and forced marriage as crimes and in the judgment in *Prosecutor v Sesay, et al* to hold that rape can be an act of terror. There were also convictions for outrages against personal dignity and, in the recent Taylor trial, we particularly referred to the public humiliation of raping women and girls in front of family and community as a degradation amounting to an act of terror.

I am not qualified to say why there has been an increase in the prosecution of crimes of sexual and gender-based violence. I have heard it said that it is due to the increase in the number of women on the bench of courts in domestic and international courts. Example given are Justices Pillay, Louise Arbour and Elizabeth Odio Benito in ICTY and myself regarding forced marriage and sexual slavery. I am not convinced that the presence of women on the bench is the sole reason. I suggest

these developments also reflect the trend in domestic jurisdictions and the work of the women's groups and others to raise awareness of sexual and gender-based violence and the need for action against such violence. We were the ones who actually said what many believed.

For we achieve nothing alone.
I could not have carried on without support of my family and a husband who encouraged me to work --- and I saw many wives who were not allowed to work ---- and who often drove me late at night to police stations and for 100s of miles on dirt roads to remote jails.
Being Irish means membership of one of the biggest mutual support groups in the world --- I recall it was the Irish sisters who came to my accommodation when I was on court circuit in the remote towns in Papua New Guinea and said "you cannot stay in this dump" and put me up for weeks in their convent, who gave us refuge when our home and the town we lived in were destroyed in a volcano and who alerted me to problems and abuses that I could do something about. I recall one such message brought me to a prison in an isolated part of the highlands where I found, among other things a woman serving six months for "talking cross" to her husband. What if we all were convicted to six months for talking cross to a spouse? Also a woman convicted because, as a widow, she went around with men contrary to a local traditional custom. I ruled that such a custom, which could be considered part of the law of PNG, as contrary to the equality provisions in the Constitution which said the law could not discriminate on grounds of sex. There was no custom that a man, being a widower, could be charged for 'going around' with women.
And being a Soroptimist – in PNG I turned to the Soroptimists for help for the needs of women prisoners, they always responded. My own club in Bangor who supported and encouraged; and, when I went to Sierra Leone it was the Soroptimists who were the very first to meet, took me to their homes and helped, and then in Netherlands again the Soroptimists invited me to their club and befriended me.

So I say that it is only together that we achieve, that includes changes that show women have stopped being the spoils of war and it is by facing THE FUTURE TOGETHER can we continue to achieve, not only in my field but in any field.

Justice T.A. DOHERTY, CBE
Special Court for Sierra Leone