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Progress and Persistent
Challenges in Retributive
and Restorative Processes

Mayesha Alam





Women and Transitional Justice

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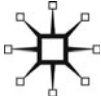
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▶ **Women and Transitional
Justice: Progress and
Persistent Challenges
in Retributive and
Restorative Processes**

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*For Carol,
With gratitude and respect*

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Foreword

Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes is an important and much-needed contribution to understanding the crucial role of women in peacemaking and transitional justice. Mayesha Alam examines several processes to address transitional justice, here, from the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda to the Bangladesh International Crimes Tribunal and the Truth, Justice and Reconciliation Commission of Kenya. We have much to learn both from the successes as well as the inadequacies of these and other examples.

It is a fact that there can be no peace without justice. Indeed, peace is born of justice. Peace is also inextricably linked with equality between women and men and the protection of women's rights as human rights. Yet, women who comprise at least half the planet's population, are increasingly directly targeted through use of sexual violence in armed conflicts and usually bear the highest civilian toll of conflicts. Women are critical to enabling their societies to transition from conflict to sustainable peace because they have direct experience of events, know what issues must be resolved, and are crucial to preserving social order. Yet – more often than not – women still find themselves on the margins of justice and peace processes.

It is appropriate that this study takes place as we are about to mark the twentieth anniversary of the Fourth UN Conference on Women, which reaffirmed the

human rights of women and girls as “inalienable, integral and indivisible part of universal human rights.” The Platform for Action that was adopted by more than 180 countries included a key section on women in armed conflict that focused both on the role of women in peace and security as well as the need to protect women’s human rights and respond to the crimes perpetrated against them. This link between women and peace and security was significantly reinforced five years later when the UN Security Council adopted Resolution 1325. The resolution called on all parties in conflicts to respect women’s rights and recognize the need for their participation in peace negotiations and post-conflict reconstruction efforts. It also established a connection between maintaining international peace and security and preventing and responding to sexual violence used as a tactic of war to target civilians.

Over 40 countries and NATO have adopted National Action Plans to implement Resolution 1325 in the conduct of their diplomatic, military, and development operations in areas of conflict recognizing that it is not only the right thing to do but also the smart and strategic course for peacebuilding and post-conflict rebuilding. I was the US Ambassador for Global Women’s Issues at the time the US Government was engaged in drafting its plan. President Obama noted at the time of its release that the National Action Plan represented a fundamental change in how the United States would approach its policies and programs to support women in areas of conflict. The United States would ensure that perspectives and considerations of gender are woven into the DNA of how the United States approaches conflict prevention, peace processes, protection of civilians, and rebuilding after conflict.

Transitional justice is critical to achieving sustainable peace. Despite the need for greater research and scholarship in this area – and Mayesha Alam’s work helps to bridge the knowledge gap – we know from the peace processes in which women have been engaged – from Northern Ireland and Rwanda to Liberia – that when women are involved in conflict resolution and peace negotiations, they place a high premium on transitional justice. When they are not, the result is frequently recurring conflict. Such was the case in Angola. As Ambassador Don Steinberg, who was the former US Ambassador to Angola and observer of the all-male peace process that was to end the Angolan civil war, “the men from both sides gave each other amnesty for the crimes they perpetrated against the women.” Neither issues pertaining to transitional justice

nor other critical issues to ensure a sustainable peace were adequately dealt with by the negotiators. Angola regressed into civil war, again, soon after this agreement that excluded women and overlooked their experiences.

Whether women's experiences and gender sensitivity are brought to bear on decisions affecting transitional justice or whether crimes perpetrated against women (and men) are investigated and addressed or other forms of redress are adopted will depend on whether there is the political will to ensure that women are significantly included in the peace, reconciliation, and transitional justice processes. As a woman in Afghanistan said to me in a conversation one evening in Kabul, "Stop looking at us as victims and look at us as the leaders that we are." Without women's representation and leadership in the decision-making processes, the realization of transitional justice will remain inadequate and crimes of sexual violence and rape will go unpunished. Moreover, this will have a great deal to say about the future and whether an enduring peace will be possible.

I have vivid recollections from my life that reflect the challenges women face in transitional justice initiatives. In 1997, I accompanied then First Lady Hillary Clinton when she visited Arusha, Tanzania, where the International Criminal Tribunal for Rwanda had been established. After a long conversation with Justice Louise Arbour, we observed a training workshop on sexual violence, which was very critical to the Tribunal's efforts to live up to its mandate. As Clinton pointed out, "The war in Rwanda was waged with the lives and dignity of women and children. The evidence suggests that rape and sexual assault were committed on a mass scale. They were tactics of war. On this, the world community must speak with one voice: such tactics will never be tolerated. We must see to it that criminals who practice them – who subject women and children to sexual abuse and violence – will be investigated, prosecuted, and punished with the full force of the law." As Mayesha Alam points out in her examination of ICTR, this tribunal marked the first time a definition of sexual violence was offered by an international transitional justice institution.

When I was in Sarajevo, Bosnia, as US Ambassador for Global Women's Issues, an older woman approached me at a gathering one evening with tears in her eyes. She told me how she had been raped during the conflict. Her rapist is a policeman in her neighborhood – a law enforcement official who is a daily reminder of the crime perpetrated against her. All these years later, there has never been any justice

rendered in her case or for the thousands of women like her. As Mayesha Alam notes in her analysis of the International Criminal Tribunal for Yugoslavia, “the trickle-down approach has been insufficient in providing redress to victims of gross-human rights violations and the extent to which social cohesion or reconciliation has been advanced by the ICTY, particularly for marginalized groups such as women, at the most local levels in questionable.” All these years later, the wounds are still festering and the peace is not what it could be.

When I was in Guatemala where rates of femicide are among the highest in the world and where justice has been illusive years after the end of a 30-year civil war, I met with a courageous Attorney General, Claudia Paz y Paz and committed government judges and lawyers at all levels of a maturing justice system. They have been working diligently to bring the military dictator to justice as well as to end the continuing impunity. As several victims of the war and continuing violence against women said to me, “We now believe that there can be justice in Guatemala.”

When I traveled with Secretary Clinton to Goma in the Democratic Republic of the Congo where impunity is unchecked and the numbers of rapes committed is staggering, we met with survivors who described not just the physical and emotional damage they suffered but the toll on their communities. As Secretary Clinton observed, “The dehumanizing nature of sexual violence ... shreds the fabric that weaves us together as human beings, it endangers families and communities, erodes social and political stability and undermines economic progress. We need to understand that it holds all of us back.”

Burma/Myanmar is coming out of five decades of isolation with the prospect of building a new democracy. There are ongoing efforts to end the decades-long conflicts between the ethnic minorities and the military that have taken a tremendous toll on the minority populations – a toll that has included sexual violence and rape. There can be no new future for Burma unless the ethnic conflicts are resolved and reconciliation becomes a reality. Ethnic women have told me they are actively engaged in conflict resolution in their communities but their role is yet to be taken seriously, particularly at the national level where cease fires and peace processes are being led. Without their participation in the public dialogue and negotiations to resolve the ethnic conflicts, the prospects for sustainable peace are unlikely.

The discussion in this book directly affects women, but it also affects everyone. It is about conflict prevention, human security, about

sustainable peace, and successful post-conflict transitions – and transitional justice is imperative for all these issues.

Mayesha Alam has contributed to an important discussion for research and scholarship in this field but, even more importantly, it is a discussion that cannot and must not be divorced from the practice of conflict prevention and peacebuilding. There are critical lessons here for today, for what is happening from Afghanistan to Syria to the DRC and beyond. We can all hope and act in a way that these lessons will be taken seriously and affect efforts to end conflict and contribute to sustainable peace, security, and opportunity.

Melanne Verveer

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There are many people whose support and encouragement made this book possible and while I cannot list all of them here, I want to make particular mention of a select few without whom this project would never have seen the light of day.

First and foremost, I am grateful to my parents who have supported my aspirations, even at times when they did not necessarily understand my motivations, and without whom I may not have become so passionate about human rights. Indeed, it was their stories of surviving the 1971 Bangladesh Liberation War, and surviving the genocide that took place within it, that peaked my interest in human rights from an early age. And because they gave me the gift of their personal history, as well as the history of our people, I decided to take my curiosity into an intellectual foray.

I am also grateful and indebted to Melanne Vermeer, who continues to inspire and mentor me. Furthermore, I am privileged to have studied under Charles Villa-Vicencio, who made my first introduction to transitional justice. Without Charles and others like him, I could not have begun the research that eventually resulted in this book.

And, finally, I am grateful to the individuals who willingly participated in the research process. Their perspectives are invaluable to the findings and analysis here.

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Introduction

Abstract: *How a nation interacts with its past creates the foundation upon which its future is built. Where a country's history, whether deep-rooted or recent, is characterized by grave human rights violations – transitional justice mechanisms can help form new bonds between people, and between citizens and their government. Transitional justice can be an effective tool for reconciliation, political stability and judicial reform but the field has been plagued by a problem all too common in peacebuilding and statebuilding: the inadequate, unequal inclusion of women's voices. How can transitional justice institutions provide due diligence to the lived experiences of women during violent political upheaval? How can transitional justice help transform unequal gender relations? The analysis here grapples with these and other questions, straddling theory and practice.*

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Women continue to be at the peripheries of international law, at the broadest levels, as well as in transitional justice initiatives, including at national and sub-national levels. This results in not only the exclusion of women's perspectives, aspirations, and talents in transitional justice initiatives but it also results in a preference for male-centric approaches to governance that uphold unequal gender relations. And yet, any transitional justice institution that does not recognize and address this problem – irrespective of when and where – risks failing half the population in question, thereby undermining the fragile peace that opened the space for transition, and in turn stability and social cohesion.

Research and scholarship can help shift the focus to a new direction: from the problem at hand to a workable solution. In other words, evidence-based analysis can help to bridge the theory and practice gap in order to make transitional justice processes more effective and inclusive. Pursuant to this end, *Women and Transitional Justice* considers, from a theoretical and practical standpoint, how the inclusion of women affects transitional justice processes and their outcomes as well as how to better practice gender mainstreaming in transitional justice initiatives that are retributive or restorative in nature.

The research in this book is situated at the intersection of scholarship on transitional justice and feminist international scholarship. In a cross-disciplinary effort, this book combines theoretical approaches from the fields of conflict resolution and peacebuilding, international jurisprudence, feminism, statebuilding and psychology of intergroup relations to a selection of recent transitional justice cases that serve illustrative purposes for the arguments made in this book. The arguments and analysis presented here are based on a feminist interpretation of transitional justice. The findings of this study have theoretical and practical applicability, and as such, are intended to serve as resources for academicians, students, policymakers, and practitioners.

Why this focus and why now?

Justice, in a transitioning context, is a precursor to empowering a nation where former warring groups can live alongside each other in harmony. And yet, even in the 21st century, the underrepresentation of women and women's voices from decision-making processes of larger peacemaking, peacebuilding, and statebuilding is a pervasive issue. It is now widely

accepted that when the needs and demands of half the population – that is, that of women – in any post-conflict context are left unheard, or their past experiences and contributions are left unacknowledged, a very heavy price is paid by not only them but the society at large. There is a dearth of quantitative and qualitative data on the *impact on* women as well as the *impact of* women in transitioning from conflict to peace. Although the body of knowledge has significantly grown since the 2000 passing of the historic UN Security Council Resolution 1325, there is much that we still do not know and there is even more to do to elevate women in peace and security efforts worldwide.

The essentialization of women, the assumption and indifference toward treating all women as the same, is frequent, problematic, and counterproductive in transitional justice initiatives. Attendees and experts at a 1998 Conference in Dakar titled, “West African Women in Aftermath of War,” noted through consensus that, “women who live through war and conflict do not fall into a single group” (Meintjes, Pillay and Turshen, 2001: 5). Moreover, the experts at the conference agreed that there is no “aftermath” for women, at least by the same indicators prioritized by states, external donors, international agencies, and political elites in pursuit of their own interests. In the aftermath of mass conflict and extreme violence, especially in cases where gross human rights violations of the worst kind have been committed, women continue to experience gender-based violence and structural, political, and economic challenges that undermine their rights, freedoms, and well-being (Meintjes, Pillay and Turshen, 2001: 4). Data collected by many researchers in the last two decades suggest that domestic violence has a tendency to rise in “post-conflict” phases when there are competing and conflicting social, economic, and political pressures (Goldblatt and Meintjes, 1998; Ibeanu, 2001). There are undulations of and variations of women’s roles in periods of heightened conflict that are shaped by both the impact of the conflict on women as well as the impact of women on fostering war and fostering peace. These carry into the transitional stage and justice and reconstruction initiatives, can either reinforce or help transform unequal social relations that influence the gendered roles occupied by men and women.

Considering the under-researched nature of gender issues in transitional justice, the analysis and discussion in this study contains descriptive, normative, and prescriptive value. The urgency of gender mainstreaming in transitional justice in order to facilitate more equal representation and participation of both men and women cannot be

overstated. The recidivism of conflict, even after peace agreements are reached, illuminates the need to rethink how peace, justice, security, and social unity are approached in fragile, transitioning, or post-conflict societies. The analysis here supports the case for creating conditions conducive to gender equality, gender balance, and gender justice in transitioning societies. This is crucial in order to tend to the conflict-related experiences and human rights related needs of both men and women.

The research and analysis of this project provides a thorough theoretical discussion of how and why increasing the inclusion of women and women's perspectives in transitional justice has proven to be tricky, what some of the persistent normative or institutional challenges continue to be and what mechanisms have been employed by a variety of stakeholders to introduce a gendered perspective into transitional justice processes. This book grapples with some tough questions, including how can transitional justice institutions move away from reinforcing socially prescribed notions of womanhood that typically designate women as passive subjects whose primary existence is limited to the private sphere? In a similar vein, how can transitional justice processes – whether prosecutorial, reparative, restorative, or a hybrid form – cease from upholding the version of this monolithic “ideal woman” while also giving due diligence to the lived experiences of women in conflict, war, or times of political upheaval? How can transitional justice help transform unequal gender relations in a way that contributes to rectifying the past marginalization of women and also prevents future exclusion of women's perspectives from political dialogues that have consequences at local, national, and even international levels?

An outline of the book

Chapter 1 focuses on defining key terms and concepts in order to provide the theoretical underpinnings for this study. In particular, drawing from the fields of international relations, conflict resolution, feminist scholarship, and international law, the chapter provides an overview of terminology such as *transitional justice*, *redress*, *retribution*, *violence*, *peace*, *security*, *gender mainstreaming*, *gender analysis*, *gender justice*, and *sexual and gender-based violence*. The chapter acknowledges that many definitions are contested and certain concepts are commonly conflated. The chapter also notes that certain terms are fluid and shaped by the arc of history and human experience. This discussion, which references

competing definitions, theorists, and applicability of theories, sets an important foundation for the analysis, argument, and case studies that follow in the subsequent chapters.

Chapter 2 summarizes the research methodology of this book before surveying some of the most relevant thought-leaders whose scholarship intersects feminism and transitional justice. In doing so, the chapter highlights how the arguments and scope of this book complement and compare with the work of other theorists. In addition to academic works, this chapter references some of the key practice and policy developments in the field of women, peace, and security in order to highlight the practical applicability of this study.

Chapter 3 provides a discussion on international law as pertaining to transitional justice, with specific analysis on the extent to which it is gender-sensitive or patriarchal. In doing so, the chapter highlights some of the critical gaps and limitations that currently exist and their consequences. The theoretical discussion here is accompanied by a brief analysis of the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY) and The Rome Statute. The discussion compares the definitional precedents set in ICTR, ICTY and ICC, and highlights some salient lessons learned related to women's inclusion, participation, and representation.

Chapter 4 is a case study on Bangladesh and the ongoing International Crimes Tribunal that was established in 2010 by the then Prime Minister Sheikh Hasina to hold perpetrators of gross human rights violations committed during the country's 1971 Liberation War. Bangladesh is a nation born out of a bloody civil war with what was previously known as West Pakistan that began in March and ended in December, during which time some 250,000 women are thought to have been raped by the Pakistani forces, some 1 million people were massacred and some 10 million people were displaced. And yet, until the International Crimes Tribunal was established, there had not been any formal national or international processes to hold perpetrators accountable for their crimes. The reasons for this delayed pursuit of justice are complex and touched upon in the chapter. In short, the research and analysis provided here indicates that the Bangladesh ICT has provided limited redress for women who were victims, survivors, combatants, informants, caregivers, ammunition smugglers, internally displaced persons, or refugees.

The ICT in many ways has become a vehicle for political revenge and marginalization of dissidents affiliated with certain parties and ideologies.

Even where known culprits have been tried, verdicts have been susceptible to pressure from the top-most echelons of the Bangladesh government. These criticisms are not to say that some of the individuals who have been charged and convicted are not guilty of the crimes of which they are accused but rather that the ICT, in its design and implementation, is flawed and therefore has delivered a tainted, partial, and in many cases, non-inclusive form of justice.

Chapter 5 focuses on the extent to which two different elements of restorative justice – reparations and truth-telling – can be useful for addressing conflict-related and post-conflict needs of women in societies that have experienced a dark period characterized by violence and human rights abuses.

Chapter 6 is the second in-depth case study included in this book and specifically on the Truth, Justice and Reconciliation Commission of Kenya. When a political settlement was brokered through international mediation after a violently contested presidential election, a national dialogue resulted in the establishment of the Truth, Justice and Reconciliation Commission (TJRC) of Kenya. Genuine efforts were made to be gender-sensitive, to ensure gender balance, to encourage the participation of women, and to provide redress to women and men based on their experiences and suffering.

However, the TJRC was plagued by controversy from the word go and, as this chapter demonstrates, the robust set of recommendations provided by the commission to promote gender equality, redress for sexual and gender-based crimes, and the increased political participation of women continue to be unrealized because of a shortage of political will and resources.

The final chapter of the book provides some overall conclusions, thoughts, and recommendations for better integrating women and women's perspectives into transitional justice institutions, including in retributive, restorative, and hybrid processes. These conclusions and recommendations are applicable to not only the countries referenced in this book but also others, such as ongoing processes and in the planning of future initiatives.

Key findings

Although the primary focus of this book is on women's experiences and their inclusion and participation in transitional justice process, the

distinction between gender neutrality and gender sensitivity in transitional justice, and larger human rights discourse, is central to the findings presented here. Indeed, these concepts that relate to both men and women help to form the basis for developing a more narrowed focus on women. Gender sensitivity in transitional justice requires gender mainstreaming in: (a) the theoretical frameworks that underpin post-conflict transitions, (b) design of institutions such as tribunals or truth commissions, and (c) in the participatory implementation of processes such as truth-telling, compensation programming, or punishment of perpetrators. The general key findings of this book include the following:

- ▶ Gender mainstreaming in transitional justice is a mechanism for increasing women's participation and this is imperative to fulfilling the intended functions of transitional justice institutions, not least that of facilitating a more just transition from conflict to sustainable peace.
- ▶ The inclusion and equal participation of women in transitional justice processes needs to be approached from a direction that moves away from gender neutrality and instead toward greater sensitivity related to: (a) women's unique experiences during political upheaval and violent conflict, (b) women's post-conflict needs for redress for violation suffered during violent conflict or political upheaval, and (c) women's historical accounts of conflict, political upheaval, and human rights violations. To ensure gender mainstreaming, the same principle should be applied to men, as well.
- ▶ Transitional justice can only be effective, and contribute to enduring peace, if perspectives of all genders are incorporated into the design and implementation of processes.
- ▶ Instruments and institutions of transitional justice can become loci for forming more equal relations between social groups, including between men and women in order to construct a new gendered reality as opposed to that which existed prior to the period of conflict. This can only be achieved, however, through an intention to transform gender relations, which requires gendered analysis throughout academic investment, legal reform, political leadership, and grassroots action.
- ▶ Gendered analysis in transitional justice creates a path toward more equal gender relations by re-conceptualizing what is meant by victimhood, atrocity, inequality, redress, and ultimately, even justice.

- ▶ A gendered analysis requires greater participation, inclusion, representation, and leadership by women in design and implementation of transitional justice mechanisms.

Moving beyond examining *gender* and, instead, focusing on *women* (without conflating the two), this book focuses on certain country cases, particular processes or institutions within those countries, and specific aspects of women's roles and experiences in these institutions and processes. Altogether, ICTY, ICTR, The Truth and Justice Reconciliation of Kenya, and the International War Crimes Tribunal for Bangladesh are studied in this book, with the latter two in an in-depth manner and based on new research and primary data collection. Key findings in this book related to these four cases include the following:

On ICTY

- ▶ The creation of ICTY was a significant step in recognizing the suffering of women during wartime as well as the role women can and do play in creating peace, conciliation, and new beginnings.
- ▶ The role of women's advocacy groups, both at the national and international levels, was integral to the emphasis placed by architects of ICTY to address a wide range of crimes and human rights violations, including those that disproportionately affected women. However, "little effort has been made to establish links between the Tribunal and local communities" (Patterson in Mertus and Van Wely, 2004: vii) since the proceedings began. The trickle-down approach has been insufficient in providing redress to victims of gross human rights violations and the extent to which social cohesion or reconciliation has been advanced by the ICTY, particularly for marginalized groups such as women, at the most local levels is questionable.
- ▶ The participation of women witnesses, judges, lawyers, counselors, trauma staff, translators, and security personnel had significant and demonstrable effects on the proceedings of the tribunal (Mertus and Van Wely, 2004). The appointment of a gender advisor in the Office of the Prosecutor was an important first step in changing perceptions about women's ability to hold positions of authority. However, men, in all cases heard as part of the ICTY, far outnumbered women as witnesses, judges and in other roles, and as such, ICTY lacked gender parity in levels of participation.

- ▶ An earnest effort was made as part of the ICTY to investigate and address cases of sexual violence committed against both men and women during the violent conflict. However, to split in half the number of cases heard on sexual violence against men versus women was to misrepresent history and the harms suffered by victims. The Bassiouni Report¹ (1994) acknowledges sexual violence against both men and women, “but it does not suggest that these are comparable to the widespread and systematic rape of women, or that they occur across all categories of sexual assault” (Campbell, 2007: 424). The *Delalic* case made an important contribution to understanding sexual violence as gender-based violence when the court found and ruled that rape committed against a woman, “was inflicted upon her ... because she is a woman” and thereby “represents a form of discrimination” (ICTY-96-21-T Judgment, 1998).

On ICTR

- ▶ ICTR is one of the multiple transitional justice initiatives that were created after the genocide ended and, in theory, the different initiatives are supposed to complement each other in order to provide a comprehensive sense of justice to Rwandans and to establish a vertically and horizontally broad-reaching historical record.
- ▶ The 1998 trial of Jean Paul Akayesu, a former politician and member of the right-wing Mouvement Democratique Republicain (MDR) party, was a historic step in not only advancing gender sensitivity in transitional justice but, more broadly, changing the way in which rape is understood and addressed in international law.
- ▶ ICTR was also the first time a definition of sexual violence was offered by an international transitional justice institution.² Although the *Akayesu* definition set an important precedent, there are some legitimate critiques that have developed since it was first proposed. For example, the focal emphasis of the *Akayesu* definition for sexual violence is on the question of consent, which is a limiting conceptualization of the issue and thereby restricts how cases are heard and judgments are reached.
- ▶ The prominence of sexual and gender-based violence in ICTR rose only after a push by the Tribunal’s then only female judge, Navanethem Pillay, who currently serves as the UN High

Commissioner for Human Rights, demonstrating the importance of diversity in leadership positions and the inclusion of women.

- ▶ Another important hallmark of ICTR in gendering transitional justice was reached in 2011 when Pauline Nyiramasuhuko, a former Minister of Women's Affairs and Development during and prior to the 1994 genocide, was convicted of genocide, crimes against humanity, rape, persecution, violence to life, and outrages of personal dignity. This was the first time a woman was convicted of these crimes and demonstrated that women are not only victims but can be perpetrators, facilitators, or spoilers of such crimes. In other words, the conviction of Nyiramasuhuko broke gender stereotypes.

On TJRC of Kenya

- ▶ The contested 2007 presidential elections represent one of the most turbulent political events in Kenya's history, which produced significant violent upheaval; but it also created an opportunity for Kenyans to look into their past and address some of the worst human rights violations and abuses committed against citizens since independence.
- ▶ The Truth, Justice and Reconciliation Commission was established with ambitious mandate, which included gross human rights violations, economic crimes, land disputes, social marginalization, ethnic violence that had occurred in the country between December 12, 1963 and February 28, 2008.
- ▶ Gender sensitivity in the current model of the TJRC was developed in accordance with the Constitutive Act that established the commission and incorporated a "Gender Policy" along the three-stage work plan. Genuine efforts were made to ensure gender balance in the recruitment of staff and appointment of commissioners. This deliberate choice is commendable both for the symbolic value, sending a message to society that women can not only contribute meaningfully to the nation-building and truth-seeking process but that they are also reliable and competent leaders.
- ▶ Despite good intentions in introducing gender perspectives into the design and implementation of the TJRC, there are some structural flaws and shortsightedness that have compromised the effectiveness

of the commission to deliver gender-sensitive justice. Moreover, the lack of political will to implement the recommendations provided by the TJRC and the willingness of some elected officials to take apart the TJRC's findings, in direct contradiction to the principles upon which the institution was founded, have been counterproductive altogether to the transitional justice mission of the commission.

On ICT of Bangladesh

- ▶ The ICT has been widely criticized by human rights groups for failing to meet international legal standards and, consequently, has very little international credibility. Many Bangladeshi citizens and international observers see the ICT as more a political tool of Sheikh Hasina's rather than a legitimate justice-oriented institution.
- ▶ In addressing gross human rights violations from 1971 has failed to fully integrate the perspectives of women and other traditional marginalized groups such as religious minorities, indigenous populations, the disabled, etc.
- ▶ There has also been an inadequate attempt to hear cases related to sexual and gender-based violence or to make possible the testimonies of survivors and witnesses who are victims of such crimes.
- ▶ The structure and nature of the ICT also makes it an institution, in certain ways, set up to fail. Some of the worst known human rights violators and alleged perpetrators of crimes against humanity have been tried in absentia because they are either in self-imposed exile or returned to West Pakistan after the end of the Liberation War and will not be extradited to Bangladesh to stand trial. There have also been allegations of illegal procedures followed to secure convictions and collect evidence from suspects or witnesses that are contrary to international legal standards and basic human rights, including provisions on detention, interrogation methods, access to attorneys and other legal resources, etc.
- ▶ The ICT has, to date, also failed to provide gender justice and, as a stand-alone mechanism, has not met the various needs of men and women, but in particular women, whose experiences continue to be excluded from the official account of history and the public discourse on the Liberation War.

Notes

- 1 The Bassiouni Report, formally titled “Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” was submitted by the then UN Secretary General Boutros Boutros-Ghali to the UN Security Council on 27 May 1994. The report was produced by the Commission of Experts and provides detailed information, as well as recommendations for response, on the extreme human rights violations committed during the breakdown of Yugoslavia and the need to move swiftly toward investigation and prosecution of perpetrators. The report specifically mentions the saturation of rape throughout the conflict zone as well as the use of ethnic cleansing by the Serbian government and the Serbian military against minority populations. The full report can be read here: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf
- 2 *Akayesu* described the crime in these terms: “Any act of sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact” (*Akayesu*).

1

Defining Key Terms and Concepts

Abstract: *Defining terms sets the theoretical and conceptual parameters for this study. In this chapter, transitional justice, conflict resolution, gender, gender mainstreaming, sexual violence and gender-based violence are introduced, along with some of the debates related to these concepts, and other key terminology that falls under these topics, which are pertinent to the arguments presented in this book.*

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Transitional justice: redress through restoration and/or retribution

For states in transition, especially those emerging out of periods of mass political violence and socioeconomic upheaval, undertaking transitional justice initiatives can have transformative effects on the state's political institutions, social cohesion, rule of law, and even economic viability. At an individual level, transitional justice can provide a forum through which to air grievances, seek redress, or face the consequences of one's actions. These are some of the most common purposes that transitional justice can serve but, to date, there is no single, accepted, universal definition of what constitutes transitional justice.

The term "transitional justice" was coined by Ruti Teitel in her 2000 seminal work *Transitional Justice* and, since then, has gained prominence in scholarly and policymaking discourse on human rights. Her conceptualization of transitional justice is intimately connected to the human rights and justice discourse that emerged in the post-World War II era, shaped primarily prompted by the horrors of the Nazi Holocaust. The strong emphasis on accountability, legal institutions, punishment, and collective healing can be traced back to the Nuremberg Trials, which are most commonly perceived as the first instance of a transitional justice initiative (Teitel, 2000). However, the idea of transitional justice – what it means, what it encompasses, how it is useful, whom it serves, and when it is appropriate – have continued to evolve in the decades since WWII. For example, Paige Arthur (2009) argues that the notion of transitional justice is inseparable from, and a product of, the late 1980s, in particular the experience of human rights advocates and civil society groups who fought against oppressive regimes in multiple Latin American contexts to shed light on serious crimes perpetrated by the state against citizens, mainly civilians. Her conceptualization of transitional justice emphasizes a shift away from a "naming and shaming" approach to justice toward one focused on "transition[ing] to democracy" that prioritizes accountability and legal reform (Arthur, 2009: 321).

Some scholars in the post-Cold War era have argued that the label "transitional" is unnecessary and even misleading because it distorts the essence of justice, whereas others argue this label is what distinguishes, in theory and in practice, justice in the wake of conflict from justice during times of peace and stability (Bickford, 2004).

The International Center on Transitional Justice (ICTJ), an independent, nongovernmental organization that does research, advocacy, consulting, and training in this field, proposes a theoretically inclusive and practically oriented definition. According to the ICTJ, transitional justice is:

A response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation, and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuses. (ICTJ, "What Is Transitional Justice?" Lines 1–5)

This definition acknowledges the political dimensions of undertaking this type of justice, the systematic nature of crimes and widespread abuses, the inseparable nature of transitional justice from larger justice without dismissing the former altogether, and identifies the links between transitional justice, peace, and democracy.

In this sense, transitional justice – like other forms of justice – is about distinguishing between right and wrong and responding appropriately and proportionately to the wrongful act, the agent of the wrongful act, and the sufferer of the wrongful act. Yet, unlike other forms of justice, transitional justice occurs in response to or in the aftermath of violent conflict and political upheaval. As such, there are a few exceptional elements, which include the extreme nature of the harm caused, the larger sociopolitical context, and the likelihood of collective suffering, all of which bears historical significance at the national – and sometimes international – level. Indeed, in transitional justice, not only are crimes almost always politicized but so too are the institutions and processes of transitional justice.

Transitional justice initiatives usually address the most egregious human rights abuses and thus are by nature selective in terms of what crimes are addressed, which perpetrators are held accountable, and even which victims are offered redress. No transitional justice institution – whether it is a special court, a truth commission, a memorial, a reparations administration, or some other form – can offer redress to every victim. As such, there is often a give-and-take component of transitional justice, an understanding that exists between society and the state that not all crimes can be punished, not all victims' needs shall be met, and that healing is only ever partial. In turn, transitional justice is less about

reconstructing the past and more about transforming the present and creating a new direction for the future.

Transitional justice offers a set of legal and political mechanisms that can be utilized to facilitate accountability for perpetrators, justice for victims, inter-group reconciliation, and truth telling. At the same time, transitional justice creates the opportunity to establish an accurate historical record of a conflict and to offer voice to the voiceless by acknowledging different narratives based on varied experiences that may include extreme physical violence or entrenched socioeconomic suffering and political marginalization. Transitional justice, by both the virtues of its conceptualization and overarching purpose, is at once focused on the past, the present, and the future. Buckley-Zistel and Zolkos (2012: 2) explain:

As a past-oriented practice, [transitional justice] addresses wrongs that have been committed during a conflict; as a present-oriented practice, it establishes a new ethical and institutional framework of post-authoritarian and/or transitional politics for interpreting the past and, through this, it seeks to prevent the future occurrence of gross injustices and violence.

Anderlini, Conway and Kays (2006: 1) propose an alternative, narrower framing of transitional justice. They claim that transitional justice only includes:

Short term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society's transition away from conflict or authoritarian rule.

In doing so, the time dimension added by Anderlini and her colleagues – which some scholars and practitioners agree with whereas others do not – excludes processes such as the ongoing war crimes tribunal in Bangladesh, a case discussed later in Chapter 4 because the transitional justice initiative began four decades after the violations were committed. In this same vein, the “short-term and temporary” limits set by the definition suggest that there is a window of opportunity for transitional justice in a post-conflict situation. There is no universal agreement amongst scholars or practitioners about whether there is an optimal time period after the cessation of conflict within which a transitional justice initiative must be mounted in order to be useful, or, whether transitional justice can be something that is pursued without a time frame. This is one of the key debates in the field.

There are pros and cons to the timing of any transitional justice initiative; whereas some societies rush into it, others wait a very long time before beginning a collective process of accounting and redressing for the past, if ever. Various models and experiences suggest that although there may be a time in any given society or context that is “ripe” for the establishment of a transitional justice endeavor, context-blind time frames are neither useful nor should they be dictated by theorists. Indeed, whether transitional justice can and should be undertaken – and through what mechanisms – varies from case to case and must be contextually relevant and historically appropriate.

Transitional justice is both a top-down and bottom-up idea and requires some agreement or consensus between the state and the masses. This is not to suggest that the relationship is equal or that the state and citizens want the same things at the same time. Rather, that transitional justice requires both the commitment of state authorities as well as buy-in, even if uneven, from the people. Anderlini, Conway, and Kays highlight one very important connection between transitional justice and peace by introducing the idea of sustainability. As they correctly argue, peace in the wake of extreme periods of violence and human rights abuses can only be sustainable when the wrongs committed and the wrongs suffered are addressed. As such, transitional justice is also a mechanism for creating enduring peace and this idea inextricably links it to the field of conflict resolution.

Conflict resolution: conflict, peace, security, and violence

Transitional justice is part and parcel of the field of conflict resolution. Conflicts arise when two or more parties are in disagreement because a mutually agreeable resolution is ostensibly unachievable. Conflict, here, relates to disagreements – particularly those that have a violent manifestation – in the realm of international affairs and that can arise between or within states. In accordance with the continuum of violence, conflict resolution here encompasses different stages of addressing conflict including prevention, de-escalation, management, mitigation, resolution, and transformation. Although transitional justice is conventionally thought of as a post-conflict issue, it holds important functions for preventing a recurrence of conflict, and therefore reducing the recurrence

of human rights violations addressed by a transitional justice initiative, as well as for maximizing peace and security.

Peace and security are two sides of the same coin but “security” is hardly a monolithic concept. Rather, security is a relative concept and what constitutes security can vary vastly. Increasingly, scholars and political leaders are acknowledging that as with conflict, a continuum of security exists. Although a more conventional and realist outlook frames the concept of security in a state-centric manner, referring exclusively to the physical security derived from the norm of sovereignty and the accrument of a robust military, more progressive and inclusive notions of security acknowledge that beyond tanks and borders, security is also about what happens inside a state and in particular, the security of individuals. This broader conceptualization of security, which is increasingly referred to as “human security,” is pertinent to transitional justice and the pursuit of gender equality within transitional justice processes.

Peace, individual security, and state security have a reciprocal relationship. Peace, here, encapsulates more than purely the absence of armed conflict or war. Rather, peace is a state of harmony between states and within states, including between sociopolitical groups of people. Transitional justice seeks to transform states and societies, which can only be doable with a broader perception of both security and peace.

Closely related to peace and security, violence can manifest in many forms for many reasons and is not simply the act or consequence of physical harm. An inclusive conceptualization of violence, like security, is integral to transitional justice because redress is sought not only for human rights abuses that result in physical harm but also for other material and non-material forms of suffering. The toolbox of transitional justice mechanisms makes room for physical and non-physical forms of violence and usually this can be traced along lines of retributive versus restorative justice. So what is meant by violence?

In accordance with Galtung’s theory, violence can be *direct*, which is the more traditional conceptualization whereby physical harm results from combat or assault, or *structural*, whereby political, economic, social, and legal systems result in marginalization such as health inequity, or *cultural* whereby direct and structural violence are legitimized, sustained, and carried out (1969: 169–170). All three forms are significant not only to transitional justice broadly but also to the application of a feminist

analysis of the field that concentrates on women's participation, inclusion, and experiences vis-à-vis transitional justice.

Gender mainstreaming, gender balance, gender analysis, and gender justice

As previously noted, women have been historically excluded from partaking in, benefitting from, and being present within transitional justice institutions. The field of transitional justice, like the field of international law, is and always has been a male-dominated space as a consequence of both the overwhelming presence of men as decision-makers, leaders, and agents as well as a male-centric manifestation of laws, doctrines, norms, precedents, and guidelines. In other words, men have not only been the “movers and shakers” in transitional justice processes but, typically, they have also been the majority of beneficiaries. For example, in the post-conflict stage, when agreements are reached between conflicting parties and negotiations are held related to demobilization, disarmament, and reintegration or amnesty for human rights abuses, there have been very few instances until the mid-1990s where women's experiences and needs were factored into those conversations.

The need to promote gender equality and to elevate women, who have been historically marginalized, in efforts of transitional justice has grown in tandem with the “women's rights as human rights” framework that gained significant momentum in the 1990s. As such, gendering transitional justice has begun to occupy a growing space in academic debates and political consciousness in the last 20 years. And yet, women and their voices still remain a largely peripheral consideration even in the 21st century. In both the design and implementation of specific initiatives in transitional and post-conflict societies, women and their perspectives remain underrepresented. This fact is inseparable from broader trends of gender inequality vis-à-vis peace and conflict, including but not limited to the continued stark underrepresentation of women in peace negotiations, post-conflict statebuilding, and judicial reform. Moreover, the experiences of women during violent conflict and sociopolitical upheaval, many of which are distinctly dissimilar to the experiences of men, tend to remain excluded from public discourse and national memory. How a society responds to questions of grave human rights violations, historical injustices, and the material and symbolic

costs of war can be insufficiently gender sensitive and as such exclusive instead of inclusive.

Gendering transitional justice should be understood as the determination, acknowledgment, and addressing of unequal gender perspectives. Gender, as a social construct, is the categorization that distinguishes men from women and through this categorization shapes the roles, wellbeing, and influence of each group's members. Gender is a universal form of distinction but the degree of inequalities varies by context. Nevertheless, gender inequality, generally, encompasses the widespread and historical hierarchical positioning of men as superior to women in their perspectives, actions, and potential (Buckley-Zistel and Stanley, 2012; Valji, 2009; Askin, 2003). Moreover, gender differences tend to overlap with and are shaped by other identity lines such as race, ethnicity, economic status, geographic location, and even physical ability.

Mainstreaming gender refers to the acknowledgment, addressing, and inclusion of *both men and women* into any process, institution, or endeavor, within and beyond the field of transitional justice. Gender mainstreaming should not be interpreted as an excuse to bundle gender-based violations into general categories of harms suffered. This risks rendering the whole concept of gender insignificant in the debate and exposing only an incomplete and distorted account of the country's past.¹ Incorporating both men and women's voices, irrespective of economic status, political affiliation, ethnicity, or religious beliefs, is ultimately about giving credit where credit is due. At the same time, listening to the needs of men and not dismissing their demands for psychological care as weakness is also integral to transitional justice because men have to feel that their suffering is worthy of acknowledgment from fellow citizens and the government. The need for gender mainstreaming in transitional justice is part and parcel of a larger struggle to introduce gender sensitivity to the current international human rights regime.

The scope of this book is primarily concerned with the roles and experiences of women. It is important to reiterate that *gender* and *women* are not synonyms, they are not interchangeable, and the focus of this book on *women* is not a reflection of the two terms being conflated. On the contrary, the distinction is duly noted and appreciated. Although it is important to understand what is meant by gender mainstreaming, the scope of this study does not allow equal attention to the experiences of

both men and women. The focus, intentionally, gives priority to *women* within the field of and in relation to transitional justice. As such, while this book is part of the growing scholarship on gender and transitional justice, it is meant to be an addition to the sub-set of resources on women and transitional justice.

Valji's concept of *gender justice*, which is "the protection of human rights based on gender equality," deserves mention and some examination here as it is relevant to the analysis found in subsequent chapters (Valji, 2007: 4). Gender justice is a relatively new idea and one that has yet to be fully immersed in the field of transitional justice. Misunderstandings of what constitutes gender justice, alongside what constitutes gender equality and gender neutrality, or gender blindness, contribute to inadequate redress. Some of these misconceived assumptions, which will be discussed in greater details in the remainder of the book, include the following ideas: (a) men carry a heavier burden during wartime or armed conflict because they participate disproportionately as combatants, (b) men and women experience peace in the same ways, especially when a political settlement is reached, and (c) the exclusion of women from transitional justice results from their unwillingness to participate in public processes, such as criminal prosecutions or truth commissions, rather than from gender bias and a lack of gender sensitivity in legal systems and transitional institutions.

Gender justice should not be conflated with gender blindness. Gender justice is the notion that men and women deserve equal protection and equal redress, that both the experiences of men and women have meaning and significance, and that any redress should be based on their experiences in conflict and their needs in transitioning from conflict to peace. That said, it is important to note that not all experiences of men are the same and not all experiences of women are the same. On the contrary, they are not only different but in some cases opposing or contradictory. On conflict and post-conflict experiences, it is important to appreciate the differences *between* genders and *within* genders. Ni Aolain (2012: 208) points out that:

A significant body of gender-oriented work in transitional justice has mirrored the broader liberal legalism of the field by assuming *de facto* that all women in all settings implicitly prioritize certain issues (specifically, truth, justice, memorial practices and reparations).

At the same time, feminist scholars and proponents of gender justice have cautioned against the, “add women and stir” approach whereby it is assumed that the mere presence of women, irrespective of their background or role, in a transitional justice initiative is a sufficient mechanism for gender mainstreaming. As Ni Aolain (2012: 209) points out, “the inclusion of women within the discourse” is conducive to a “reordering” of gender relations “so as to reconstitute structural exclusion, discrimination and pervasive violence against women,” which tend to be conditions present in most contexts where transitional justice institutions are established, including those covered in this book. Gender equality is not the same as gender neutrality and gender sensitivity is a prerequisite to gender equality.

Sexual violence and gender-based violence

Exploring questions of women’s exclusion, underrepresentation, and marginalization is closely related to understanding how sexual and gender-based violence crimes are represented in transitional justice institutions. From the outset, the distinction between the two must be acknowledged: gender-based violence and sexual violence are not one and the same. Although all sexual violence, whether perpetrated against a man or against a woman, can be motivated by gender-based degradation and dehumanization, not all gender-based violence is sexual in nature. A widespread misconception about sexual violence is that all victims are women and all perpetrators are men when in reality, although an overwhelming majority of women are victims of sexual violence men too can be sexually attacked. Furthermore, although men, especially in their role as combatants, are disproportionately perpetrators, women can also be guilty of committing, or abetting and facilitating, sexual violence.

Sexual violence has been present in war and armed conflicts for millennia. In fact, until recently, sexual violence during armed conflict was treated as inevitable, little more than “spoils of war” as discussed later in the book. And yet, there is almost universal consensus within the international community today that not only is sexual violence inexcusable, and therefore punishable, but also that it is not inevitable. At the same time, those who are victims, or survivors, of sexual violence can have varied experiences that span from the most brutal forms of penetrative sexual abuse to “lesser” forms of sexual degradation such as forced nudity

(Askin, 2003). Rape, one of the most common forms of sexual violence and one that occupies a particularly prominent space in transitional justice, occurs for a multitude of reasons, which differ from context to context. Some of the most common reasons across historical and geographic continuums include: as sexual relief for the perpetrators, as a means to forcibly impregnate as part of a larger ethnic cleansing mission, as a tactic to instill fear and terror within the population, as punishment for the actions of the women's male counterparts, and because – more often than not – women become heads of households during armed conflict and therefore are left to maintain a sense of normalcy in their families, making them doubly vulnerable while also vilified by their attackers.

Sexual violence is not merely horrific and condemnable because it is an assault on the consent of the victim but because it is also sexual in nature and there is an inherently gendered dimension to the harm inflicted. For example, if a woman is raped by penetration or if she is kept as a “war wife,” or sexual slave, her gender is pertinent to the crimes committed against her. On the other hand, if a man is sodomized or subjected to castration, here again, the violence inflicted is not only sexual in nature but also demeaning and dehumanizing in terms of his biology and his socially constructed gender.

In understanding the relationship between gender-based violence and sexual violence within the realm of transitional justice, narrative framing is key. Consider this: when men dominate the narration of armed conflict, as is historically the case, they are perceived as actors within that conflict but in contrast, when women are treated as victims of rape and violence, their roles in both conflict-affected and post-conflict settings are passive. Although introducing women as victims into transitional justice initiatives can be a powerful tool to give alternative forms of history, provide a record of certain crimes committed against civilians, expose perpetrators and hold them accountable for their wrongdoings, and give a sense of justice to witnesses, there can also be some unintended consequences that – if not managed properly – could harm the transitional justice institution. For example, if women are part of a transitional justice process as victims but not visible or present in any other roles, this can reinforce stereotypes of women as perpetual victims who constantly require protection and thus are merely weak, passive subjects. It is important to differentiate between “women as objects of transitional justice processes,” where they are primarily victims, and “women as exerting autonomous capacity,” or in other words, decision-making

capacity in roles such as “negotiators, political actors and change agents” (Ni Aolain, 2012: 209). When women are viewed as only victims of sexual violence, their experiences do not stand alone, and instead, exist only in relation to men’s experience in conflict. Narrative framing that only showcases victimhood is all too common. It can contribute to the conflation of gender-based and sexual violence. It can influence how gender dimensions are viewed and addressed in processes and institutions of transitional justice whereby patriarchy inherent in legal, political, and cultural systems is reinforced, in turn fomenting unequal and misrepresentative gender relations.

Indeed, one of the main criticisms lodged against the increased attention to rape and sexual violence cases in transitional justice processes – whether in retributive or restorative forms – is that this risks perpetuating a one-dimensional portrait of women’s lives during wartime and political upheaval. Women’s experiences in conflict extend beyond simply being victims of sexual and gender-based crimes; women are not only victims but also actors and even when women are victims, their experiences can be diverse. Victimhood, for men and women, comes in various forms and can have varying short-term and long-term effects. Although it is important to acknowledge this in scholarship and practice, it is also important to recognize that the widespread use of rape in the Former Yugoslav Republic, Rwanda, Sudan, Libya, Syria, and other recent violent conflicts throughout the world has undoubtedly helped to raise the issue of sexual violence on the international security agenda at the UN, the G8, NATO, and other forums.

There is growing consensus amongst international policymakers that responding to gender-based and sexual violence in conflict is inadequate and that much more needs to be done to prevent human rights violations that specifically or strategically target women and girls. For example, the Prevention of Sexual Violence Initiative (PSVI), established in 2013 by the United Kingdom, has been instrumental in rallying more than 130 countries to agree to work toward the creation of an International Protocol on the Investigation and Documentation of Sexual Violence in Conflict. If such a Protocol becomes a reality in the near future, it will not only further highlight the need to end impunity against such odious wartime crimes but it could also help shed light on the varied experiences of men and women in conflict. UNSCR 2122 (Article 2, 2013), “Recognizes the need for timely information and analysis on the impact of armed conflict on women and girls, the role of women in peacebuilding

and the gender dimensions of peace processes and conflict resolution.” Implementing this goal has the potential to influence and improve not only the practice of post-conflict transitional justice but also peacemaking more broadly. Of course, this will require political commitment, cooperation, resources, and accountability mechanisms.

Note

- 1 For more information, refer to Scanlon and Muddell (2008).

2

Landscaping Feminist Scholarship on Transitional Justice

► **Abstract:** *When seeking answers to how women experience period of violent conflict and how these experiences shape their post-violence justice needs, one should situate feminist analyses of transitional justice initiatives within the framework of larger feminist analyses related to transitioning from conflict to peace. This chapter summarizes the research methodology of this book before surveying some of the most relevant thought-leaders whose scholarship intersects feminism and transitional justice. In doing so, the chapter highlights how the arguments and scope of this book complement and compare with the work of other theorists. In addition to academic works, this chapter references some of the key practice and policy developments in the field of women, peace, and security in order to highlight the practical applicability of this study.*

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A feminist analysis of transitional justice, as employed in this book, offers a conduit to expose the tensions between political versus social, collective versus individual, elite versus masses, and most importantly between male-led agency versus woman-subjected passivity in transitional justice mechanisms which have, traditionally, not only disenfranchised women and their right to redress but also marginalized other non-dominant societal groups. The findings presented in this study are based on primary and secondary qualitative research. Academic resources are juxtaposed with international, legal, and historical frameworks to provide a nuanced, practice-oriented set of analyses. Primary data, collected by other researchers as well as the author, are referenced in this book. These include testimonies from witnesses, perpetrators, and victims; formal correspondences between the government and civil-society actors; news coverage of transitional justice processes by both local and international outlets, and first-hand interviews with individuals who participated in or have intimate knowledge of the International Crimes Tribunal in Bangladesh and the Truth, Justice and Reconciliation Commission in Kenya. To further inform the practice of transitional justice, this book considers not only why gendering transitional justice, both theoretically and practically, has proven difficult but also what emerging trends are effective for elevating women, their needs and desires, their perspectives, and their participation in transitional justice processes. The arguments presented in this book appeal to an opportunity for intellectual, normative, and practical transformation. Introducing gender perspectives into transitional justice, and thereby augmenting a greater sensitivity for women's conflict and post-conflict experiences as victims, agents, bystanders, spoilers, and perpetrators can help to deconstruct unequal gender relations and, thereby, strengthen democracy, sustain peace, and improve security.

Feminist international scholarship

Feminist international scholarship, since the beginning, sought to add feminist perspectives to male-biased research, and is the product of a series of geographically and historically expansive movements to counter patriarchal systems. At its core, feminist theory – an umbrella discipline – seeks to understand the nature and reason of societal inequalities along gender lines but many versions, or “waves” of feminist scholarship and activism have precipitated. In brief, the “First Wave” paradigm originated

in Western societies in nineteenth and early twentieth centuries, centering primarily on women's suffrage and economic mobility. Although this version of feminism did spread to other parts of the world, it was concentrated and mostly active in the United States and Western Europe. The "Second Wave" of feminism, pioneered by Simone de Beauvoir (1949), combined Marxist theories on class warfare to the inequalities of women's public and private experiences, gaining momentum in the 1960s. It is important to note that as the "Second Wave" spread throughout the world, it coincided with the era of decolonization throughout South Asia, Africa, and other parts of the Global South as well as the rise of communism in the Far East. Consequently, these other political and cultural revolutions shaped how feminism manifested contextually (Schneir, 1994). By the late 20th century and at the cusp of the twenty-first, another major rethinking of feminism was championed – especially in the West – known as "Third Wave" feminism. This iteration of the paradigm greatly emphasizes intersectionalities, that is, how gender is affected by and affects other dimensions of identity such as politics, race, ethnicity, religion, culture, or warfare, and challenges the previous two waves of feminism. Furthermore, the "Third Wave" also brought forth the rise of post-structuralism in feminism as well as standpoint epistemological framework (Lorber, 2009).

Beyond simply introducing "women to preexisting frameworks, such as positivism," contemporary feminist perspectives in research seek to transform those, which traditionally did little to change the way knowledge was produced (Hesse-Biber and Leavy, 2006: 25). Furthermore, proponents of the feminist international scholarship scrutinize social reality by challenging the conventional distinction and dichotomy between "subject" and "object," which is perceived as a "false dualism" (Hesse-Biber and Leavy, 2006: 26). Feminist objectivity questions the validity of objectivity in research altogether and instead contributes to both the process of research as well as the value-added of research by placing objectivity and subjectivity "in a dialectical relationship" (Hesse-Biber, 2006: 27).

Feminist scholarship and transitional justice in late 20th century

The move from violent conflict – whether they are long and drawn out wars or shorter spurts of political upheaval – can be enhanced through

transitional justice initiatives that, in theory, facilitate democratic governance. However, as Georgina Waylen (1994: 329) points out, “Institutional democratization does not necessarily entail a democratization of power relations in society at large, particularly between men and women.” And yet, this recalibration of power relations along gender lines is imperative for a functioning democracy in which men and women can act as citizens, equal under the law, entitled to the same protections and able to access the same opportunities to participate in a living democracy.

Although the post-Cold War era has seen a creation of transitional justice institutions throughout many parts of the world, which has coincided with the emergence of new scholarship on the subject, the intersection of gender and transitional justice remains understudied. Although there are some scholars, from the fields of law, international relations, politics, and feminism, who have helped make important strides in exploring answers to critical questions – and as such are referenced duly in this chapter – there is much more to be understood and even more to be translated from theory to practice.

In the 1990s, much of the earlier scholarship tying feminism with transitional justice concentrated on addressing gender-based violence and sexual violence in conflict, particularly through international law¹ (Copelon, 1994; Askin, 1997, and others). This is hardly surprising considering the known magnitude of these types of harms in the Balkan Wars and many of the ethnic conflicts and civil wars in Africa, which captivated the international community’s attention and mobilized the pursuit of justice through international interventions, ad hoc tribunals, and hybrid courts.

The creation of the ICTR, ICTY, and the Rome Statute of the International Criminal Court shaped developments in larger transitional justice scholarship as well as unprecedented level of focus on women as victims of gross human rights violations, crimes against humanity, and war crimes. Academic investigation by feminist researchers helped buttress the call of women’s rights activists who campaigned to hold accountable perpetrators of sexual and gender-based crimes as part of these transitional justice institutions. At the same time, activists and practitioners influenced researchers and they leveraged this reciprocal relationship to advance a common interest. Despite important advances to increase gender sensitivity in transitional justice institutions in the 1990s, Moshan (1998: 154) argues that the international legal achievements represent “only a partial victory.” Although accountability for

gender-motivated crimes was emphasized in the Rome Statute, the translation of international legal doctrines into actionable progress has been limited, especially at national and sub-national levels.

Feminist scholarship and transitional justice in the 21st century

Many of the hard fought victories of feminist activists and scholars from the late 20th century did little to dismantle the perception of women as perpetual victims in wartime. The turn of the century brought with it new thinking about how to not just acknowledge women's wartime experiences but also how to advance their progress, writ large, in post-conflict societies. Important landmarks in the larger field of women, peace, and security propelled the paradigm shift, which had begun to precipitate in the late 1990s. In October 2000, the United Nations Security Council passed Resolution 1325, a monumental document that formally recognized for the first time in history the unique impacts of war and armed conflict on women and girls as well as the potential impacts on peace by women and girls. This historic moment in international relations encouraged a growth in scholarship on gender issues in war and peace. This is, of course, not to say that scholarship on the impact of war and peace on women, and of women, had not existed before but rather that the momentum in international policymaking generated by Resolution 1325 also reenergized intellectual discussions and knowledge production. The broad mandate of UNSCR 1325 is relevant to the field of transitional justice but there is no specific mention of it in the resolution. Nevertheless, UNSCR 1325 was a boost to the proponents of gendering transitional justice.

Similarly, the establishment of the UN Millennium Development Goals (MDGs) also encouraged a new focus on the experiences of women in fragile and insecure contexts and women's economic empowerment as a tool for achieving economic growth alongside gender equality. Like UNSCR 1325, although there is no specific mention of transitional justice in the five MDGs, MD #3 focuses specifically on gender equality and, as such, is relevant to advancing women's needs, presence, and participation in transitional justice institutions. Indeed, the emergence of the field of human security has shaped transitional justice scholarship, with calls for a deeper and wider understanding

of individual-level physical, socioeconomic, and political security. Copelon asserts the key to achieving greater gender equality in post-conflict societies is through an inclusive approach to rebuilding. She called upon transitional justice to go beyond simply trying to right the wrongs of the past and, instead, improve “basic economic and political conditions” that buttress structural, cultural, and direct violence along gender lines (Copelon, 2000: 236).

Harms suffered by women during war or political upheavals do not exist in a vacuum. They are shaped by the experiences of women prior to such conflict and usually carry over and can morph into other forms even after the cessation of violence including the rates of violence against women, their access to education, health, and employment, and their ability to participate politically – can serve as an indicator of not only the level of human security in that society but also the likelihood of violent outbreaks and worse fates to come. The World Economic Forum’s annual Gender Gap Index demonstrates that where women are the worst off, so too are those countries typically affected by violence, instability, insecurity, poverty, and deep social divides. Some have even argued that women are like the canaries in the coalmines: how they fare can be an important indicator of larger sociopolitical, economic, and security conditions in that setting.² As Nahla Valji (2007: 13) points out, “women’s experiences of injustice during conflict are also a result of existing inequalities and as such are not necessarily the crimes that are codified in international human rights law.” She proposes a more holistic form of “gender justice” that encompasses the post-conflict, during-conflict, and post-conflict continuum of women’s experiences.

In recent years, much of the analysis of feminist scholars of transitional justice has focused on to what extent the developments of the late 20th century, even if driven by women’s rights organizations and civil-society advocacy, actually advanced the emancipation of women and the attainment of gender justice or whether, underneath the surface, little has changed in the legal and political paradigms underpinning transitional justice and the institutionalization of feminist norms. For example, Martha Fineman and Estelle Zinstag’s edited volume, *Feminist Perspectives on Transitional Justice* (2013), represents the more contemporary, critical analysis in this field. In this volume, Catherine O’Rourke (2013: 13–18) identifies three broad reaching problems with international law as it relates to women: being “legally deficient,” being guilty of “sexualizing and infantilizing women,” and buttressing the “silencing [of] individual

women.” She also draws attention to the vast distance that remains between international law and local gender politics. O’Rourke (2013) also makes an important distinction between the harms suffered by women during conflict and the codification of criminal offences in international or domestic law. The two do not always overlap, which undermines the ability of transitional justice institutions to adequately address the lived experiences of women. At the same time, international and domestic laws influence norms, mores, and social attitudes. For this reason and others, she argues that international law has direct and indirect consequences on gender relations, justice, normative culture, and reparation for women in post-violent upheaval settings (O’Rourke, 2013). However, international law is not the only factor that affects gender justice.

Feminist scholarship on transitional justice in the 21st century has placed a greater emphasis on the importance of women’s agency. This represents a shift away from a previously predominant focus on redress for harms suffered, especially sexual and gender-based violence, toward analysis on and arguments for greater women’s inclusion, participation, representation, and ownership of processes. Some scholars have highlighted the need to introduce the concept of women’s agency and the categorization of women as actors, or subjects, and not just objects, into transitional justice institutions. Ni Aolain (2012) argues that certain issues that may not traditionally be framed as central to transitional justice processes need to be incorporated more thoroughly, in a gender-sensitive manner, in order to transform women’s lives. Among these are “social and economic equality, reproductive health choices, cultural identity and the criss-crossing of interlocking identities in conflicted or repressive societies” (Ni Aolain, 2012: 208).

And yet, scholarship on women as victims of sexual and gender-based violence has not ceased to exist. On the contrary, certain developments in international policymaking have invigorated new research and investigation. The UN Security Council acknowledged in Resolutions 1820 (2008), 1888 (2009), 1960 (2010), and 2106 (2013) that sexual violence can and is used as a tactic in warfare, that the perpetration of sexual violence is a very complex issue, and that ending impunity for sexual violence is central to deterring and preventing the crime. The widespread use of sexual violence in the Democratic Republic of the Congo is perhaps the most notable ongoing conflict that has energized policymakers, practitioners, and academics but it hardly stands alone. Recent scholarship on the intersection of transitional justice and sexual violence has centered

on not only the merits of different methods for holding accountable perpetrators but also how to deter and prevent these odious crimes, instead of only responding to them. This represents an important shift in theory and practice.

The rapid increase in transitional justice processes – which have been realized in various retributive, restorative, and hybrid forms – has encouraged numerous case studies that have tackled the questions of how to introduce feminist perspectives, what has worked or is working, and what has or is not working. These developments in practice are also making possible comparative study in academia. Case studies from lesser-known or ongoing processes in Latin America, East Asia, and parts of Africa are particularly informative because they represent a new wave of transitional justice initiatives. The case studies presented in this book – on Bangladesh and Kenya – are intended to complement the work of preceding scholars. They have also been chosen, in particular, due to the author’s familiarity with and personal interest in both cases and, because they are so current, they present fresh material for analysis. Through the arguments and analysis presented here, it is hoped that – if and where possible – some of the lessons learned from Bangladesh and Kenya will be lifted, adapted, and applied elsewhere in future transitional justice initiatives. At the same time, as the Bangladesh ICT is still in operation, the findings here – although critical – are meant to help improve the gender-sensitive functions of this particular institution. Despite its shortcomings, the Bangladesh ICT is not a lost cause, yet.

Notes

- 1 For the purposes of this book, the term “international law” here encompasses international criminal law, international human rights law, and international humanitarian law.
- 2 The “canaries in the coal mines” comparison is one frequently used by Ambassador Melanne Verwee, who was the first-ever US Ambassador for Global Women’s Issues, and is the author of the foreword in this book.

3

Retributive Approaches to Transitional Justice: A Feminist Analysis of How International Law Shapes National and International Prosecutions



Abstract: *The distinguishing factor of retributive justice, in contrast with restorative justice, is its central emphasis on holding perpetrators legally accountable for their actions and administering punishment fitting the crime. This chapter provides a discussion on international law as pertaining to transitional justice, with specific analysis on the extent to which it is gender-sensitive. In doing so, the chapter highlights some of the critical gaps that currently exist and their consequences. The theoretical discussion here is accompanied by a brief analysis of the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY), and The Rome Statute. Although these are not full-fledged case studies, the definitional precedents set in ICTR, ICTY, and ICC are compared to highlight some salient lessons learned related to women's inclusion, participation, and representation.*

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Retributive transitional justice initiatives that involve criminal prosecutions – whether through international courts, domestic courts, or quasi-legal measures – seek to deal with gross human rights abuses such as genocide, ethnic cleansing, war crimes, crimes against humanity, and mass rape. Retributive justice typically has a punitive element to its function. The exposure of truth is only the first step toward acknowledgment, followed by accountability through punishment, which is meant to: (a) reprimand the wrongdoer(s) including the offender, the architect of the crime and/or the facilitators of the crime, (b) offer some form of redress to the victim, and (c) serve as a deterrent for future repetition.

Tracing gender and rape in international human rights and criminal law

There is a reciprocal and reinforced relationship among the norms, legal structures, and practices that constitute international human rights law. Catherine Campbell (2007: 412) claims that, “law functions not ‘as an aggregate of isolated elements, [but as] a configuration or a network of relationship.’” Roles of actors in a conflict, such as who is a victim and who is a perpetrator, are defined within substantive law in accordance with their actions and the law is expected to respond to the consequences of their actions. In this sense, laws are instruments to define social relationships and categories of actors in transitional justice. There are a plethora of different international human rights laws articulated in different doctrines, agreements, and treaties that have been created to serve as tools for human rights protection by policymakers, jurists, and thought leaders. This chapter focuses on the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, UN Security Council Resolutions,¹ and the precedents set by the Nuremberg, Tokyo, ICTR, and ICTY trials.

The desire to form a permanent international legal body to oversee matters of human rights protection and try cases for the most egregious of violations is hardly new. Rather, this idea was expressed over a century ago and gained intense momentum in the aftermath of World Wars I and II. In fact, what is today known as the International Criminal Court (ICC) has undergone a number of iterations and grown from previous international legal initiatives such as the Treaty of Peace Between the Allied and Associated Powers and Germany (signed on 28 June 1919).

Also known as the Treaty of Versailles, the treaty specified a recommendation to create an ad hoc tribunal to carry out justice for human rights violations and hold accountable perpetrators of the war crimes, though such an institution was left unformed.

The horrors of World War II, the creation of the United Nations, and the adoption of the Universal Declaration of Human Rights (UDHR) reenergized a hopeful international community to follow through with the inherited vision of an international criminal justice system. The creation of the United Nations War Crimes Commission (UNWCC) was proposed but this body never became operational due to political and resource constraints. Instead, the Allied Powers initiated the Nuremberg trials in 1945, which gave rise to a second international military tribunal in Tokyo in 1946 (Moshan, 1998: 166). None of the post-World War II tribunals, however, paid adequate attention to the needs and experiences of women. Rape and sexual violence were treated largely as spoils of war and the voices of Korean and Chinese “comfort women,” for example, who had essentially been kept in sexual slavery by the Japanese military, remained unheard. In fact, in addition to the violations of human rights inherent in sexual violence, the euphemism that developed at the time of “comfort women” who were kept in “comfort stations” is a double injustice because victims of rape camps were not given their due diligence and those who benefited from or who enjoyed the functions of rape camps were not held accountable for their actions. Although rape was included as a crime against humanity, “in the Allied Local Council Law No. 10, under which intermediate-ranking Nazi war criminal were prosecuted,” charges were never brought forth or heard in court (Copelon, 2000: 221). Gender mainstreaming was neither a priority nor even a part of the legal discourse and political consciousness at the time, irrespective of the crimes committed and the needs of victims. As such, the experiences, needs, participation, and representation of women were excluded and this was the dominant, cultural, accepted practice of the time.

The language of both the UDHR and the 1951 Genocide Convention exemplify the low prioritization of a gendered perspective and the patriarchal international governance system that continues to shape how war and peace are made today. For example, the Convention on Prevention and Punishment of the Crime of Genocide is gender neutral, meaning that it does not specify crimes that are committed with a gender-based element. The Convention, simply put, lacks a gendered perspective. As such, neither sexual violence nor gender-based violence, irrespective of

whether committed against men or women, are named in the Convention despite the fact that Articles II (b), (c) and (d) can be gender motivated:

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Thus, a critical examination of this significant piece of international law reveals a misguided and misinformed attempt to be gender neutral, as was the common tendency in international human rights, by the architects of the Genocide Convention. In trying to be “fair” and “equal,” the Convention failed to appreciate the different experiences and needs of men and women during times of genocide and other humanitarian crises. Where gender neutrality was prioritized, gender sensitivity was compromised. This has, historically, made it more difficult for prosecutors and advocates to provide adequate gender justice, in turn reinforcing the gender inequitable nature of international law.

Moreover, the Genocide Convention is especially important to transitional justice proceedings, whether of legal or non-legal mechanisms, in post-conflict societies because of the framing of human rights violations, crimes, and relationships between perpetrators and victims. Consequently, although the Genocide Convention is a state-centric example of international law, it influences the way in which institutions such as ICTR, ICTY, and ICC have been established as well as how victims and perpetrators are classified or brought forth for accountability purposes. The Cold War did little to further the creation of an international criminal court and human rights protection on a collective scale took a back seat to the nuclear arms race, decolonization, and proxy wars scattered across the globe.

Although benefits did not trickle down to men and women in conflict as may have been envisioned, the creation of a couple of international treaties are worthy of mention. These include the 1966 International Covenant on Civil and Political Rights (ICCPR),² 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),³ and the 1984 Convention Against Torture and Other Forms of Cruel, Inhumane, and Degrading Treatment or Punishment.⁴ These treaties

have contributed, on a broader level, to the evolving feminist paradigm of transitional justice. Although they do not include specific mention of transitional justice, these international doctrines represent important milestones in the development of human rights in international relations and, consequently, are relevant to advancing a feminist perspective in transitional justice institutions.

In the 1990s, the breakdown of the Former Yugoslav Republic, which necessitated the creation of the International Criminal Tribunal for Yugoslavia (ICTY) in 1993, as well as the creation of the International Criminal Tribunal for Rwanda, subsequent to the 1994 genocide, created opportunities for furthering the theoretical understanding and practical development of transitional justice (Moshan, 1998: 168). Growing in tandem with the mixed success of ICTY and ICTR, a sustained push from political, legal, and academic domains resulted in the creation of the International Criminal Court (ICC) in 1998 under the auspices of the Rome Statute. The remainder of this chapter compares the way in which ICTR, ICTY, and the Rome Statute address sexual violence, weighing the merits of various definitions and approaches from the three systems against each other.

International Criminal Tribunal for Rwanda

UN Security Council Resolution 955 established the International Criminal Tribunal for Rwanda (ICTR), an ad hoc transitional justice institution in November 1994 to deal with the aftermath of deep-sown ethnic conflict and genocide. Based out of Arusha, Tanzania, ICTR is one of the multiple transitional justice initiatives that were created after the genocide ended and the new government, currently led by Paul Kagame, came to power. When the ICTR was established, “sexual violence in war was, with rare exception, largely invisible. If not invisible, it was trivialized; if not trivialized, it was considered a private matter or justified as an inevitable by-product of war” (Copelon, 2000: 3). However, the 1998 trial of Jean Paul Akayesu, a former politician and member of the right-wing Mouvement Democratique Republicain (MDR) party, was an important step in furthering gender sensitivity in transitional justice and setting international precedents. After his arrest and extradition from Zambia in 1995, Akayesu was sent to Arusha to stand trial for 15 counts of genocide, crimes against humanity, and other grave breaches

of human rights. Akayesu was a hallmark case because, according to the ICTR Report *The Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-T), hereafter referred to as *Akayesu*, the judgment was, “the first interpretation and application by an international court of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.” (Fourth Annual Report, September 1999). It was also the first time a definition of sexual violence was offered by an international transitional justice institution. *Akayesu* described the crime as follows:

Any act of sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. (*Akayesu*)

This definition set a precedent and has been referenced in prosecutions within international transitional justice ever since. Even when newer alternative definitions have been proposed or adopted, the *Akayesu* judgment usually serves as a standard bearer. The expansive nature of the *Akayesu* definition did not limit what constitutes rape to only vaginal or anal penetration and instead included other forms of sexual assault and harassment. This was an important feature of the definition as it fit the diverse nature of sex crimes committed during the genocide. Philip Weiner, in his legal analysis of *Akayesu*, points out that the definition did not specify what constitutes “coercion” and it also did not “address lack of consent” (2013: 1210). The *Akayesu* case is an important example in understanding how gendered perspectives shape the progression of transitional justice institutions and why gender balance, or gender parity, in the decision-making and implementation phases is integral to achieving gender justice.

The prominence of sexual and gender-based violence in ICTR rose only after a push by the Tribunal’s then only female judge, Navanthen Pillay. In fact, initially, sexual violence did not appear in the mandate of ICTR and the crimes that were to be pursued. As the *Akayesu* case reveals, it was only after a couple of female witnesses mentioned their subjection to rape as part of testimony relating to other charges, that Judge Pillay became curious and urged the prosecutors to look at rape, sexual violence, and gender-based violence as crimes unto themselves rather than by products of other crimes such as ethnic cleansing and genocide (*Akayesu Trial Judgment*, para. 416; Walsh in Pankhurst, 2012: 39–40). Judge Pillay set the ball in motion for the court to move in a new

direction and changed the course of international transitional justice there onwards. This is not to say that Judge Pillay, simply by virtue of her gender, guaranteed the elevation of the status of sexualized violence against women. The presence of women in positions of authority does not guarantee an improvement in the way that transitional justice is practiced or the redress that is offered to victims. Rather, the example of Judge Pillay demonstrates how a diversity of expertise – including in the form of representing both genders in decision-making positions – can make the approach of transitional justice institutions more inclusive and more holistic. An opportunity is created that must be seized. The leadership of Judge Pillay – and her ability to connect with the female witness in a way that male judges may not have been able to, to pick up on the nuances of the witnesses' testimonies – reinforces the need for gendered perspectives and for gender balance in the practice of transitional justice.

Although the significance of the *Akayesu* case, as well as the uniquely inclusive nature of the definition, should not be dismissed – there are some legitimate critiques that have developed since it was first proposed. For example, the focal emphasis of the *Akayesu* definition for sexual violence is on the question of consent. Although the sexual nature of the violence is its distinguishing factor from other types of violence, it is the lack of consent that criminalizes sexual violence in the current international human rights regime. This, however, detracts from the sexual and gender-based nature of the violence itself. Making sexual violence about lack of consent can be problematic because the same emphasis on lack of consent is not placed on comparable crimes such as non-sexual grievous bodily harm, torture, or indentured servitude. If part of the struggle in gendering transitional justice is to make gender-based violence, including sexual violence, on par with other crimes against humanity, as argued by the prosecution in *Gacumbitsi*,⁵ another ICTR case, then the same standards should be used in weighing each (para. 149). After all, is being subjected to violence, irrespective of whether it is sexual or non-sexual, ever consensual? The answer, simply, is no.

The gender neutral nature of the *Akayesu* definition is also limiting. By both the motivating intent of the perpetrator and the nature of the harm suffered by the victim, sexual violence is very much a gendered crime and should be defined and treated as such by practitioners and academics alike. To tiptoe around the gendered dimensions of sexual violence is an injustice to victims because it is a misunderstanding and

false categorization of the crime. Moreover, failing to acknowledge the lack of gender neutrality inherent in sexual violence offers a free pass for the perpetrator because it suggests that although he or she is guilty of sexual violence, he or she is somehow not guilty of gender discrimination and subordination. In essence, treating sexual violence as gender neutral under international law does not acknowledge the full extent of crime and its effects. Although sexual violence can be committed against men as well as women, and by men as well as women, there is always a gendered element. A more inclusive definition of sexual violence would acknowledge these multiple dimensions of the crime.

In addition to the definitional precedent setting of ICTR, another important milestone was reached in 2011 when Pauline Nyiramasuhuko, former Minister of Women's Affairs and Development during and prior to the 1994 genocide, was convicted of genocide, crimes against humanity, rape, persecution, violence to life, and outrages of personal dignity (*BBC News*, 2011a). The conviction is noteworthy on multiple levels: in general, it sent a signal to victims and survivors that impunity is unacceptable and their suffering is recognized by the country, and the world. Moreover, the conviction was a formal acknowledgment and reaffirmation through international law proceedings that there is no place for sexual violence in humanity, let alone on such a massive and brutal scale. But an element of this conviction that cannot be ignored is the fact that the high-profile culprit is a woman. As such, the conviction of Nyiramasuhuko broke gender stereotypes that paint women as only victims of sexual and gender-based violence and showed that women can be perpetrators and are therefore accountable and punishable for their actions. Indeed, undoing such misleading but deep-rooted stereotypes is an important part of introducing gendered perspectives into transitional justice and increasing gender sensitivity. Furthermore, the conviction of Nyiramasuhuko – after a decade in detention – has been influential at the national and local levels of transitional justice within Rwanda. Numerous other women have been charged with and convicted of extreme human rights abuses.

International Criminal Tribunal for Yugoslavia

The International Criminal Tribunal for Yugoslavia (ICTY), which was established by the United Nations Security Council after the violent

breakdown of the Former Yugoslav Republic, was a monumental step in international transitional justice. The ad hoc tribunal resulted from an international intervention that brought together judges, lawyers, and peace professionals from around the world in a concerted effort to expose the human rights abuses committed by the Milosevic regime and its agents against Bosnian Croats and Bosnian Muslims. The tribunal was also meant to serve as an outlet for truth, healing, and reconciliation for victims and survivors. Moreover, the establishment of the ICTY signified that although a cessation of violence had been secured on paper in the form of the 1995 Dayton Peace Accords, peace on the ground and among the local people was far from actualized.

The creation of the ICTY represents an important step in recognizing the suffering of women during wartime as well as the role women can and do play in creating peace, conciliation, and new beginnings. In Security Council resolution 808, which condemned the “massive, organized and systematic” use of rape during the conflict, a direct link was made between sexual violence and genocide. According to a commission of experts appointed by the United Nations, during the Bosnian War between 1992 and 1995, as many as 50,000 women are estimated to have been raped in addition to many others that went unreported in other parts of the Former Yugoslav Republic throughout the Serbian occupation (1992). The language of the Resolution 808 – reminiscent of the Genocide Convention – was a deliberate attempt to stress the severity of well-documented rape, torture, forced imprisonment, and attempt to shift ethnic demographics via forced impregnation. Resolution 808 (1993) specifically expressed “grave concern” caused by the “treatment of Muslim women in the former Yugoslavia.”

The role of women’s advocacy groups, both at the national and international levels, was integral to the emphasis placed by architects of ICTY on addressing a wide range of crimes and human rights violations, including those that disproportionately affected women. In the design of ICTY’s mandate and selection of cases as well as witnesses, inclusion of gendered perspectives ensured the classification of rape and gender-based violence as a grave violation of international law, rather than simply an inevitability in war, according to Richard Goldstone, who was the Chief Prosecutor of the Court (Mertus and Van Wely, 2004: viii). The ability of women’s rights activists to negotiate and advocate effectively, in turn influencing international policymakers, local jurists, and foreign legal experts who were forming the ICTY, challenged the

patriarchal system of international jurisprudence and the patriarchy of local governance.

Once the proceedings began, gendered perspectives came from not only women witnesses but also from the representation and participation of women in a variety of roles including as judges, lawyers, counselors, trauma staff, translators, and security personnel. Nancy Patterson, one of the prosecutors who served at the ICTY for some seven years, noted how women, both literally and figuratively, saw things that men did not and therefore their testimonies were integral in the court's journey toward establishing a complete – or as close to complete – truth and thereby holding accountable perpetrators as fully as possible (Mertus and Van Wely, 2004). For example, whereas men were kept in concentration camps in windowless rooms, Bosnian and Croat women were not, and therefore they witnessed certain realities that their male counterparts did not and could offer perspectives in “all kinds of cases,” not just ones in which they were victims of sexual violence (Patterson quoted in Mertus and Van Wely, 2004: viii).

Furthermore, the appointment of a gender advisor in the Office of the Prosecutor and of women to various positions of authority – even if not in a balanced quantitative ratio – were important steps for changing the perception of women as weak and passive. Women's inclusion and representation as translators, for example, helped reinforce confidence in female witnesses. Additionally, having men and women working alongside each other for a common cause was a stepping stone towards creating a new social order and returning some semblance of normalcy to a society broken by war and fear. The goal was to move beyond tokenism and instead instigate normative shifts, thereby undoing the cultural and structural violence that persisted and helped to sustain unequal gender relations even after the direct violence had stopped.

Of the many cases of sexual violence that were heard as part of the ICTY, two deserve special mention: *Prosecutor v. Furundžija* and *Prosecutor v. Kunarac, Kovac & Vokovic*, because of the important precedents they set. A definition of rape emerged out of the *Prosecutor v. Furundžija* case, which classified the crime as the following:

- i the sexual penetration, however light:
 - a of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - b the mouth of the victim by the penis of the perpetrator;
 - c by coercion of force or threat of force against the victim or a third person.

Although an important step in establishing legal guidance, the *Furundžija* definition was a limited interpretation of the sexually violent crimes that did not fully encompass the extent of assault committed or suffering experienced during the conflict. For example, although the specification of penetration was important, as was the element of coercion, which signaled diminished consent, the definition did not extend to non-penetrative forms of sexual abuse and other acts of sexual and gender-based violence. It also did not mention the physical and non-physical consequences of the forced sexual penetration. Moreover, although the definition did not specify the perpetrator as male and the victim as female, there is an unstated bias toward this configuration that inadequately encompasses alternative gender configurations between victims and perpetrators (e.g., male on male violence, female on male violence or even female on female violence). The positioning of oral sex alongside vaginal or anal sex was an important step toward acknowledging different types of sexual violence and their equal gravity under the law. In *Kunarac*, rape was treated as a crime against humanity (Weiner, 2013: 1212). This acknowledgment signaled a new appreciation for the gravity of the crime compared to other crimes that were historically treated with more severity such as genocide or ethnic cleansing. Moreover, an amended definition of rape was adopted that included the aforementioned language from *Furundžija* but included additional emphasis on the question of consent.⁶ As Weiner (2013: 1213–1214) points out, “the mens rea element requires not only proof of general intent to effect the sexual act, but also proof that the accused knew the sexual act was taking place without the victim’s consent.” This element of the judgment, however, would make it more difficult to prove guilt thereafter and, in effect, made guilty convictions harder to secure, even where there was sufficient evidence of rape. Whereas in *Furundžija*, the definition focused on the perpetrator, by honing in on threat, force, and coercion in the sexual act, in *Kunarac*, the focus was placed on the victim, by honing in on consent.

In the ICTY, approximately half of the total number of cases of sexual assault, systematic rape, and gender-based violence have featured male victims whereas the other half have featured female victims (Campbell, 2007: 423–424). At first sight, the equal representation of crimes committed against men versus women is commendable because it is a step toward undoing the notion that gendering transitional justice, and international law, is only about women’s representation as well as the idea that men cannot be victims of sexual violence. The attention to men

as victims of sexual violence by the ICTY also challenged the invisibility of male victims of sexual violence that is pervasive throughout war and conflict, including the shame borne by men who are sodomized and subjected to sexual assault.

Although it is crucial to make sure that sexual assault against men is not only acknowledged but also investigated and prosecuted, evidence from ICTY as well as other international and national transitional justice processes suggests the experiences of men and women as victims of sexual violence are not the same. There is a qualitative and quantitative difference in the subjection of men versus women to sexual violence, as well as the motivations behind such crimes by the perpetrators. The selection of cases – and this applies to sexual violence as it does to any other crime against humanity – is supposed to represent a larger picture of the realities specific to that conflict. To split the number of representative cases of sexual violence equally between male and female victims, as has essentially been done in the ICTY, is to misrepresent history and the harms suffered by victims. Men in Yugoslavia, and in any other comparable case of mass atrocities where a transitional justice process has evolved afterwards, are not subjected to sexual violence as rampantly or in as many different ways as women.

Gender mainstreaming is about paying attention to and prioritizing the experiences of *both* men and women, but this should not be conflated with assuming that the experiences of men and women are identical or equal. To suggest that by trying the same number of cases of sexual violence against men as against women is somehow a marker of gender equality is a false notion because it skews the reality of the situation and instead risks becoming a show of tokenism. One case from ICTY, *Prosecutor v. Delalic*, made an important contribution to understanding sexual violence as gender-based violence when the court found and ruled that rape committed against a woman, “was inflicted upon her... because she is a woman” and thereby “represents a form of discrimination” (ICTY-96-21-T, Judgment, 1998). Similarly, the Bassiouni Report,⁷ which was published in 1994, acknowledges sexual violence against both men and women, “but it does not suggest that these are comparable to the widespread and systematic rape of women, or that they occur across all categories of sexual assault” (Campbell, 2007: 424).

Cases of sexual violence that were tried in the ICTY had a much lower conviction rate than other types of violent crimes. This can in part be explained by the difficulty in attaining evidence against perpetrators and

the restrictive definitions of rape. At the same time, the low conviction rates result from some self-limiting aspects of the ICTY system that undermined the ability of prosecutors to secure convictions, deliver proportionate punishments, and provide redress to witnesses and survivors. Courtney Ginn (2013) argues that the low conviction rate results from a failure on the part of the Office of the Prosecutor in adequately preparing for sexual violence trials, the hesitation of victims to testify due to fear of social stigma or retaliation, and inadequate cooperation between the Office of the Prosecutor and the Victim and Witnesses Unit that was responsible for preparing and supporting victims and witnesses. These lessons learned highlighted by Ginn (2013) based on interviews with ICTY stakeholders have enormous value for the ways in which the national court system, which has taken over the transitional justice process, approaches sexual violence cases now that the ICTY mandate has expired. As Ginn (2013) points out, just because the War Crimes Chamber is inheriting the ICTY's cases should not mean that it also inherits the difficulties that the ICTY faced in prosecuting cases on sexual violence. The shortcomings of the ICTY in addressing cases of sexual violence can provide cautionary lessons to other transitional justice contexts. After all, many of the challenges that limited the conviction rate for sexual and gender-based crimes are present in other countries, even if the history of the conflict is different.

The Rome Statute

The Rome Statute was a historic step in engendering international human rights law and creating a legal and normative foundation for transitional justice processes. The architects of the Rome Statute did not defect to gender neutrality, as had been the pattern previously. In fact, the Statute offers a definition for the term “gender,” unlike previous international humanitarian law.⁸

Thanks to relentless lobbying and determination of some parties present at the 1998 Rome Conference, not least of all from the Women's Caucus, incorporating a gender-sensitive perspective in both the language and the scope of the Rome Statute became a point of heated debate (Reilly, 2007). The process to introduce a gendered dimension to the Rome Statute, and thereby introduce this consciousness grounded in international law into the future workings of the ICC, had begun

long before the convention in Rome. The support for specifications on gender-based and sexual violence were hardly uniform, however, and instead, the language that was eventually adopted required bartering and compromise in a long-running multilateral negotiation between states and non-state actors. The following clauses were eventually accepted into the Rome Statute:

Article 7.1(g) under “Crimes against humanity,” which addresses the following: “Rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity”;

Article 7.1(h) under “Crimes against humanity,” which addresses the following: “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

The mention of “forced pregnancy” was in particular a point of contention between some parties, such as Arab states and the Vatican, and women’s rights activists because of disagreements on both what constitutes forced pregnancy as well as how the rules set in the Statute would impact national interpretations of such terms. To help limit disagreements, the Statute clarifies: “‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy” (Article 7.2(f), 1998).

The ICC also provides guidance on sexually violent crimes, describing rape as follows:

I. The perpetrator invaded the body of a person by conduct resulting in penetration, however light, of any part of the body of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body.

II. The invasion was committed by force or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or the abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.

The above language describing rape in the Rome Statute encompasses prosecution of the sexual violence as either a war crime or a crime

against humanity. The nature of the definition is, in effect, “a compromise between the traditional and the more expansive definitions of the sexual act of rape” (Weiner, 2013: 1217). The ICC prioritizes proof of coercion over proof of lacking consent. Moreover, the ICC definition is inclusive in its reach of victims as it recognizes that the question of consent does not apply to all those who are subjected to sexual violence, including children, the infirmed or elderly, and the disabled. Within the ICC’s framing of sexually violent crimes, emphasis is placed on the intention of the perpetrator to cause bodily harm by penetration and mental or emotional harm by coercion, including by force or by threats.

Despite learning from the shortcomings of the ICTR and ICTY, the ICC is not immune from problems of its own. In some ways, the ICC is flawed in its ability to deliver gender justice by its structure and the way in which individuals, states, rights, and crimes are connected. The ICC and the Rome Statute, as instruments of international law and therefore confined by the parameters of the discipline, are constricted in their categorization of gender and reflection of gendered experiences in conflict. For example, the way in which the Rome Statute frames harm, women’s experiences in armed conflict are presented as exclusive to sexual violence in accordance with “elements of crime” definitions (Turano, 2011: 1046). In other words, the ICC does little to change the narrowed interpretation of women’s wartime experiences and to change the perception of women as perpetual victims in armed conflict.

In reality, women’s experiences are much more complicated and are part of a continuum of gender-based structural, cultural, and direct violence. The fact of the matter is that, “harms committed against women during armed conflicts are quite different than the crimes prosecuted by criminal tribunals” (Turano, 2011: 1065). This is because suffering is, more often than not, context-dependent and may not fit within peacetime legal conceptualizations of causation. And yet, institutions such as the ICC or a tribunal tend to emphasize isolated incidents as opposed to trends of abuses. Moshan (1998: 155) argues that the inclusion of gender motivated crimes in the Rome Statute, albeit an important step, is “not enough to ensure gender justice.” In short, she calls the Rome Statute, “ultimately only a partial victory for gender justice” (Moshan, 1998: 155). This is reinforced by the critique presented by Edwards regarding the relationships between victim and Court set by the structure of the ICC. Campbell (2007: 413), in her deconstruction of international justice systems, argues that, “how criminal law itself constructs the wrong is crucial

to understanding the relationships between gender and the international prohibition upon sexual violence in armed conflict.” This is a noteworthy point but can be taken a step further applying the same principle to a broader range of crimes including, but not limited to, sexual violence.

In short, within the realm of retributive justice, the progress over time in creating gender sensitivity is reflected in the language of institutions and the slow, but nevertheless, continued development of international laws. Feminist civil society organizations were instrumental to the criminalization of rape in the ICC and the inclusion of a definition for gender, hard-fought accomplishments that relied on the leadership of both academics and activists. At the very least, the developments in ICTR, ICTY and the ICC – albeit imperfect – have ensured that international human rights and criminal law is not ignorant to rape and other forms of sexual violence committed by men and women against men and women. The translation of legal precedents into practice, however, has been inconsistent and uneven from context to context.

Patriarchy in international criminal and human rights law

Despite the progress made by and on behalf of women in the 1990s, feminist scholars have long noted the patriarchal nature of the international legal system. Although human rights are meant to be equal for men and women in international law, the reality of the international justice system is one that is gender unequal. Applying a feminist analysis can help discern pros and cons of international law versus other legal frameworks as well as encourage gender-sensitive improvements. O’Rourke (2013: 139) posits that international law is, “a floor, but not a ceiling,” when it comes to the pursuit of gender justice in conflict-affected and post-conflict settings. In other words, although it provides a baseline from which to operate and can serve as a template, it is hardly a magic bullet or trove of solutions. Not only does international law need to continue to evolve in order to be more gender-sensitive and less patriarchal but it is also only one system that may not be appropriate for every context.

Part of the problem in both the theory and practice of international transitional justice is the deep-seated assumption that security, both in definition and experience, is the same for men and women. This assumption is reflected in international law. As Ni Aolain (2009: 1064) points

out, for many women living under unstable and insecure conditions, “the relationship between physical violence experience during conflict (noting that the term will be broadly understood) and the security of the post-conflict environment are not discontinuous realities but rather part of one singular experience that is not compartmentalized.” This gendered perspective contradicts the male-dominated, patriarchal narratives that usually set post-conflict security agendas and shape the way in which transitional justice initiatives are designed and implemented.

O’Rourke (in Fineman and Zinsstag, 2013: 22) argues that international criminal law is “legally deficient” in both doctrine and operation. Not only is international criminal law masculinized in its focus, but it also is discriminatory in its management of victims and limiting in the decision-making capacity it offers prosecutors. Campbell (2007) echoes this criticism of international human rights law. She asserts that legal norms and practices, “instantiate and reiterate, rather than transform, existing hierarchical gender relations” (Campbell, 2007: 415). At the same time, international criminal law does not necessarily align with domestic laws and the divide between the two can have severe consequences for the functions of a transitional justice institution, including with respect to women’s accessibility, participation, and representation. This is especially true when international criminal law and national or domestic law has divergent or even contradictory definitions of certain gender-based or sexually violent crimes. Moreover, Campbell (2007) argues that international criminal law sexualizes, infantilizes, and silences women. In other words, women’s experiences during war or violent conflict and upheaval exist in international criminal law only in relation to men and not as stand-alone experiences. They are, predominantly, sexualized and the mechanisms for dealing with them do not always encourage the ability of women to tell their own stories and exercise their individual voices. Franke (2006: 818) argues that, “the translation of human suffering into a vocabulary and a form that is acceptable and appropriate to a judicial proceeding can be a dehumanizing experience.” This is particularly true for women who must navigate patriarchal legal systems or seek justice in spite of unequal gender relations or who continue to experience violence, in multiple forms, even when “peace” has been reached politically.

Another school of criticism against international criminal law posits, “feminist engagement with international criminal law as hegemonic and imperialist.” (O’Rourke, 2013: 20). In other words, some feminist engagements, in their nature and outcome, have disempowered certain

groups and, as such, certain feminist approaches to transitional justice are responsible for the restrictive and even patriarchal nature of international legal system. For example, international criminal law is almost exclusively focused on the legal accountability of culprits of human rights abuses and, as such, neglectful of the socioeconomic dimensions of harms that are ever present in violent conflicts and political upheavals, including increased poverty and loss of livelihoods. O'Rourke (in Fineman and Zinsstag, 2013: 40) warns that "feminist-informed developments in ICL have done little to redress this gap." Some recent feminist scholarship on transitional justice has encouraged a broader analysis of the field that looks beyond a sole focus on international criminal and human rights law. Researchers are beginning to devote greater attention, analysis, and problem-solving to the structural and cultural violence that overlap with war and violent political upheavals in order to alleviate human suffering and provide more appropriate and proportional redress. The international legal system, in its current form, is not the most apt tool for this purpose.

Not all transitional justice initiatives manifest in the form of retributive justice such as criminal prosecutions or other conventional legal initiatives. Rule of law in transitioning societies is typically weak or wholly absent, even when there is a legitimate government in place and important steps toward democratization and the building of functional public institutions have been taken, sound judicial practices are not guaranteed (Paris, 2004). For this reason and others that may be more context-specific, some societies that choose to undertake transitional justice initiatives forgo retributive measures. On the other hand, many feminist scholars of transitional justice question the validity and usefulness of retributive forms of transitional justice in providing redress to women. In addition to critiques of the patriarchal nature of legal systems, feminist skeptics of retributive processes highlight the perpetrator-centric nature of prosecutions (as opposed to more victim-centric approaches); the potential for reopening old wounds or harming women survivors of sexual and gender-based violence in new ways by engaging them in retributive processes; the lack of reparative measures in retributive processes that typically result in jail sentences, executions, or other punishments that may not directly benefit survivors or help transform the lives of women, and the ways in which retributive processes tend to reinforce – rather than dismantle – stereotypes about women's wartime experiences.

And yet, irrespective of whether a transitional justice initiative is retributive in nature – and exists within some legal framework that delineates what constitutes a crime and who is a criminal – almost all transitional justice mechanisms, including truth and reconciliation commissions, reparative or compensatory programs, and amnesty deals, are shaped by international legal norms and precedents.⁹ As such, it is important to understand how international law creates the foundations for transitional justice institutions, especially retributive models, and where there are gender biases in international law that impact the inclusivity and gender sensitivity of any given process. The subsequent chapter is a case study on the International Crimes Tribunal in Bangladesh, which has been shaped by international norms and laws but is a national process.

Notes

- 1 This chapter includes discussion on UN Security Council Resolutions directly pertinent to the discussion on ICTR and ICTY. For discussion on UNSCR1325, 1820, 1888, and others, see index.
- 2 Adopted by the United Nations General Assembly on December 16, 1966, ICCPR commits parties that ratify the treaty to respect civil and political rights such as the respect to life, freedom of religion, freedom of speech, right to due process, right to electoral participation and others. ICCPR is a component of the International Bill of Human Rights, in addition to UDHR and ICESR.
- 3 Adopted by the United Nations General Assembly on December 18, 1979, CEDAW defines discrimination against women as the following: “Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”
- 4 Adopted by the United Nations General Assembly on December 10, 1984, the Convention on Torture bans torture, degrading treatment, and refoulement, which is the return or refouling of a person to a state where they s/he may be tortured. Torture is defined as “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering

is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

- 5 Sylvestre Gacumbitsi, tried in the ICTR, faced numerous charges for his part in the 1994 genocide and was ultimately convicted of extermination as a crime against humanity as well as rape as a crime against humanity. During the *Gacumbitsi* trial, the definition of rape was once again debated and the *Akayesu* definition was weighed against the *Kunarac* definition. Ultimately, the narrower *Kunarac* definition was adopted in pursuit of a conviction. For more information, see Philip Weiner, 2013.
- 6 The *Kunarac* definition included the following language at the end: “Consent for this purpose must be given voluntarily as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”
- 7 The Bassiouni Report, formally titled “Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” was submitted by then UN Secretary General Boutros Boutros-Ghali to the UN Security Council on May 27, 1994. The report was produced by a Commission of Experts and provides detailed information, as well as recommendations for response, on the extreme human rights violations committed during the breakdown of Yugoslavia and the need to move swiftly toward investigation and prosecution of perpetrators. The report specifically mentions the saturation of rape throughout the conflict zone as well as the use of ethnic cleansing by the Serbian government and the Serbian military against minority populations. The full report can be read here: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf
- 8 In the Statute, gender “refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above” (Article 7.3, 1998).
- 9 For a more in-depth discussion on norm formation and norm domestication in international relations, in particularly on issues of peace and security, refer to further literature by social constructivists including Martha Finnemore and Katherine Sikkink.

4

The International Crimes Tribunal for Bangladesh: A Delayed, Politicized, and Self-Limiting Experiment in Transitional Justice

Abstract: *The International Crimes Tribunal for Bangladesh – as a transitional justice institution – is at once very delayed, only created some 40 years after the Liberation War, and at the same time rushed, hasty in its proceedings, and rushed to judgments. It is the subject of limited scholarship although there has been some recent pioneering work by a handful of researchers. This chapter focuses on the history of the conflict, with particular emphasis on the experiences of Bangladeshi women during and after the war, and to what extent the ICT has acknowledged the wartime experiences of women, provided redress to women survivors, and furthered gender equality more broadly in the Bangladeshi context. The chapter also notes the ICT’s legalistic shortcomings, susceptibility to political tampering, and a lack of victim-centric approach to justice.*

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The birth of Bangladesh: a bloody, costly, and messy nine-month labor

The happenings in East Pakistan constitute one of the most tragic episodes in human history. Of course, it is for future historians to gather facts and make their own evaluations, but it has been a very terrible blot on a page of human history. U Thant, Secretary-General of the United Nations, June 3, 1971.¹

The secession of East Pakistan that resulted from the Bangladesh Liberation War remains one of the bloodiest violent conflicts in modern times and produced a humanitarian catastrophe of astounding proportions. Over the course of nine months, between March 26, 1971 and December 16, 1971, a million² Bengalis are thought to have been killed at the hands of the Pakistani military and their Bengali abettors. Additionally, as many as a quarter of a million Bengali women are thought to have been raped, 20 million people were internally displaced and approximately 10 million refugees fled to India (Saika, 2011). These figures continue to be the subject of disagreement between the Government of Pakistan, the Government of Bangladesh, and the larger international community. In fact, despite large-scale atrocities known to have been perpetrated against Bengalis based on their cultural and ethnic identity, the facts of violence are murky. Although it was not categorized as such at the time, the Liberation War in Bangladesh is a “forgotten genocide,” according to Gary Bass (2013), of the 20th century – one that is evocative, in its horrors, of the Nazi Holocaust.

The origins of the Liberation War are complex, shaped by colonial history, geographic dimensions, geopolitical pressures, cultural clashes, and religious fervor. In the 1947 formation of Pakistan, Islam was not only the primary but also arguably, only principle constituting nationhood that was supposed to unify West and East Pakistan. As would soon become apparent, this was a serious miscalculation by both British colonialists – who demarcated India–Pakistan borderlines – and Pakistani leaders such as Zulfikar Ali Bhutto, who envisioned an Islamic republic. In reality, East and West Pakistan were vastly different regions in terms of culture. Add to this the geographic distance created by India in the middle of East and West Pakistan, which undermined social cohesion and solidarity with the central government in Karachi. Vast economic disparities also contributed to a growing frustration amongst Bengalis. Although East Pakistan was a hotbed for economic activity and essential

for growth, most of the resources generated there were transferred to the West.

Soon after the partition of India and the establishment of Pakistan, cracks began to appear in the country's sociopolitical fabric and resentment grew over time between the West and the East provinces. The government in the West, based out of Karachi, was not blind to the brewing tensions, and they recognized early on that an argument for unity based on common Islamic values was an insufficient political strategy. In turn, "successive governments in [West] Pakistan embarked on a strategy of forcible cultural assimilation towards the Bengalis" (Mookherjee, 2006: 435). The liberation movement reached a turning point in February 1952 when the Pakistani government used force against and killed Bengali protestors who were petitioning Karachi to recognize Bengali as an official language alongside Urdu. At the time, Bengalis constituted a majority of Pakistan's population but the government insisted on imposing Urdu as the sole official language of the country. Police officers used tear gas and also opened fire at the University of Dhaka campus, wounding many students and academics as well as killing several unarmed individuals (Kabeer, 1991). The events of February 1952 catalyzed the political aspirations of secessionists who increased their mobilization efforts with growing support from the majority of Bengali masses. The climax point came in early 1971, after contested elections and a reluctance of the Yahya Khan regime in Karachi to hand over power to the victorious Bengali political party, the Awami League (AL). Sheikh Mujibur Rahman, who at the time was the head of AL and who would become known as Bangladesh's founding father, declared Bangladeshi independence on March 26, marking the beginning of the war.

***Beerangana, Muktijoddha, and Razakar:* the roles and experiences of women in the Bangladesh Liberation War**

To this day, women are predominantly remembered as victims of the Liberation War. Yasmin Saika argues that women were "principal targets" of brutality committed by Pakistani military – and their Bengali abettors or *Razakars*. As such, women bore the brunt of the civilian suffering. Anecdotal evidence from survivors and witnesses, as well as journalistic reports and photographs, demonstrate that the nature of violence was

varied and extreme. In addition to rape, women were victims of retaliatory killings, torture, physical abuse, dismemberment, forced pregnancy, imprisonment, and other forms of brutality. Moreover, whereas ethnic Bengali women of various religious, economic, social, and geographic backgrounds were subjected to these types of attacks, D'Costa and Hossain point out that Hindu and other non-Muslim minority women were targeted based on not only their Bengali identity but also their non-Muslim identity, especially by Islamic fundamentalists who were loyal to the Pakistani government and the ideology behind a united Islamic Pakistan (D'Costa and Hossain, 2010). Pre-pubescent girls and grandmothers, alike, were targets of sexual assault. According to Susan Brownmiller (1975: 82), "girls of eight and grandmothers of seventy-five had been sexually assaulted during the nine-month repression. Pakistani soldiers had not only violated Bengali women on the spot; they abducted tens of hundreds and held them by force in their military barracks for nightly use. The women were kept naked to prevent their escape."

Despite the magnitude and remarkable nature of the sexual violence described earlier, in reality, women's lived experiences were far more complex than the common, dominant narratives that constitute public memory of the Liberation War. Women were more than merely victims. Elizabeth Herman³ argues, "Women played a very large role in the Bangladesh Liberation War but the public memory of women's roles is very small." Most commonly, women are assigned to two distinct and ostensibly mutually exclusive categories: that of "victims" or that of "war heroines." Even the honorific title, *Beerangana*, which is supposed to mean war heroine, has – over time – been reduced to a term of pity and victimhood. As a result, Herman found that women who were known to have been raped felt an inability to "control their own narratives" and instead, were left "stuck with labels" assigned to them by politicians or government officials, family members, or the media.

In reality, many women who survived sexual assault were also agents of liberation, performing various functions including fighting alongside men as freedom fighters, serving as nurses and informants, providing domestic support, smuggling weapons and ammunition, and setting traps for the Pakistani military. (Mookherjee, 2003: 164). In addition, women during the war were in charge of protecting children and homes, keeping their families fed and safe, sheltering the elderly, and many of the other day-to-day caregiving tasks generally ascribed to women during peace time (D'Costa, 2005: 244). Instead of acknowledgment and

appreciation, there is a shroud of silence about women's experiences but it is something that the women who survived the war have never forgotten. Herman recounts, "This baggage [from the war] was carried by them all the time, everywhere." It was an inescapable tragedy of their lives, even if they were not just victims but also agents of change.

The consequences of these massive rape campaigns extended far beyond psychological trauma; medical trauma was also common – especially due to the brutal and frequent nature of attacks – as were unwanted pregnancies. Estimates range from 25,000, to as high as 70,000 according to the Government of Bangladesh (Debnath, 2009: 49). In the aftermath of the war, civil society organizations – including the National Central Women's Rehabilitation Board – tried to organize adoptions or abortions for women who had become pregnant through rape during the war (D'Costa, 2005: 233). Debnath (2009: 55), in describing the plight of women in the Liberation War, argues that rape "was not for sexual gratification or a random act of desire," but rather, "it was enacted within a specific historical context in which women's bodies were employed as political vehicles to sow terror, humiliate, inflict racial slander, and consolidate control of the 'enemy.'" This idea resonates with UN Security Council Resolution 1820 (2008), which acknowledges that rape is a "weapon of war." More than an inevitability, it is a tool that specifically targets civilians and that fulfills specific functions, including – but not limited to – assisting ethnic cleansing as well as destroying social fabrics.

The Government of Bangladesh attempted to rehabilitate and reintegrate female victims of sexual violence, who were typically shunned by their families and societies, by developing a scheme to arrange marriages with freedom fighters or other unmarried or widowed men. The effort, however, proved to be unsuccessful (Brownmiller, 1975). Despite the Rahman government initiative to provide redress to *Beeranganas* through this and other programs – including ones focused on vocational training – the fate of most women was soon put aside for other, "more pressing," matters that faced the Government of Bangladesh. And so, a blanket silence on wartime rape became the cultural norm. Noteworthy, too, is how the number of female headed households in the aftermath of the Liberation War was far greater than before the violent conflict began in March. Considering the political instability of the newly formed Bangladesh and the historic economic marginalization of East Pakistan before 1971, it is not surprising that there was widespread poverty in the

post-war era. This exacerbated human suffering and made life even more difficult for war widows and other female heads of household, especially those who were landless. The post-conflict experience was particularly fraught with social and economic challenges for *Beeranganas*, or “war heroines,” who were survivors of rape and other forms of wartime brutality.

The Government of Pakistan has repeatedly refused to issue a formal apology for the human rights abuses committed during the 1971 war and the repercussions of this extend to not only the continuous post-war political tension between Bangladesh and Pakistan but also the sense of acknowledgment of suffering of Bengali survivors. The debate on whether Pakistan should apologize and if so, for what and in what forms, is beyond the scope of this study. However, it is important to note that the lack of an official apology from Pakistan only further heightens the silence and marginalization that has characterized the post-war experience of *Beeranganas*. Although some Pakistani women’s rights groups have issued public apologies to Bengali victims of sexual and gender-based violence, these gestures are peripheral and unendorsed by the authorities (D’Costa, 2011: 158).

In 1992, a Bangladeshi civil society initiative to provide symbolic justice to survivors of gross human rights violations in 1971 – in particular women – was initiated in Dhaka and christened the “People’s Tribunal.” The *Ghatak-dalal Nirmul Committee*, or the “Committee for the Elimination of the Killers and Collaborators of ‘71 and the Restoration of the Spirit of the Liberation War,” was established by several activists including the mother of a *Muktijoddha*, or freedom fighter, called Jahanara Imam and a journalist by the name of Shahriar Kabir (D’Costa, 2011: 152). The civil society movement was motivated by a number of different factors. For example, the personal experiences of members, including prominent individuals such as Imam and rape survivor Ferdousi Priyobhashinee, were a clear driving force. This combined with the lack of government leadership to address the legacy of war, the quest for a more holistic record of wartime human rights violations that would be less obsessed with political rivalries and more victim-centric, and a deep frustration with the corrupt political activities of the governing elite, many of whom included alleged Bangladeshi war criminals who had resurfaced under the guise of groups committed to the values of Islamic piety. Women’s rights activists were an important part of the

larger civil society coalition that also included researchers, journalists, and non-governmental organizations.

Civil society and independent media tried to step in where the Government of Bangladesh had failed: to provide redress to victims and survivors, to hold perpetrators accountable, and to establish a more accurate historical record. However, these efforts were pursued in piecemeal ways and lacked the ingredients necessary for transformative action such as clear leadership, a common vision, financial resources, political backing, and wide geographic reach in urban and rural areas of the country. For example, the “People’s Tribunal” – despite good intentions and being locally grown – proved to be ineffectual, underfunded, and lacked public buy-in and government support. There were also unanticipated harmful consequences for some participants whose testimonies exposed them to scrutiny and even humiliation. Rape, according to Mukherjee, “remains concealed as a secret, a public secret, only to be invoked at specific moments in the context of intersubjective dynamics” (Mookherjee, 2006: 434). Mookherjee’s research from the village of Enayatpur is a microcosm of the way in which sexual and gender-based violence committed during the Liberation War exists in the collective public memory. Debnath refers to this phenomenon of victim-shaming in her analysis of women’s experiences in the Bangladesh Liberation War. She argues that in Bangladesh, “the main crime in the village is not the rape itself, but the women’s disclosure of it” (Debnath, 2009: 52). The end result of this mock trial experiment was, in some respects, the opposite of what advocates of the initiative had hoped for. And so, again, the pursuit of justice and accountability for war crimes, including but not limited to sexual and gender-based violence, was unfruitful.

The story of one survivor: Ferdousi Priyobhashinee⁴

[Rape] happens everywhere. Sometimes people do it for selfish reasons, sometimes people do it for political reasons, sometimes people do it because they are made to do it. – Ferdousi Priyobhashinee, 2013

When the Liberation War began in 1971, Ferdousi Priyobhashinee was a divorcee with three dependent children. She worked at a jute mill and while she was continuously aware of and affected by the political upheaval, uncertainty, and precipitous violence surrounding her, her primary concern was keeping her job and, in doing so, keeping her income.

On March 25, 1971, her immediate fear that she could not continue to work became real (Kabir, 1999). On March 26, Rahman declared the independence of Bangladesh and the Liberation War officially began. By March 29, Priyobhashinee's town had been invaded by Pakistani army forces and on May 30, she fled her house (Kabir, 1999).

Seeking shelter, Priyobhashinee traveled toward her grandparents' home. On the way, she came across a Hindu woman whom Priyobhashinee encouraged to flee with her but, Priyobhashinee recalls, this illiterate, rural woman could not understand the unfolding political situation and instead was more concerned about leaving behind her cattle and the land that she farmed. In Priyobhashinee's opinion, "most of the Bengalis in the rural areas were like this and because they were uninformed, illiterate, simple people, it was easier for the Pakistani army to massacre as efficiently as they did, in such great numbers and so rapidly." In early April 1971, without a safe shelter and on her own, Priyobhashinee went from house to house in her neighborhood and in the neighboring village seeking refuge but was unsuccessful until she encountered a former colleague from the jute mill where she had previously worked. This non-Bengali man offered to protect her but instead, along with some other non-Bengali civilians and Pakistani sympathizers, arranged for her to be taken to a house occupied by a Pakistani army captain. There, she was told her that she would have to "compensate for her brothers," who were "traitors" because "they had joined the Liberation War" (Kabir, 1999). After a long night during which she was harassed, Priyobhashinee managed to escape only to be tracked down a few days later. To her shock and horror, the men who had tried to rape her and who had tormented and harassed her were now charging her with the murder of a local intellectual whose murder, at the hands of a Naxalite group, she had witnessed.

Despite pleading her innocence, Priyobhashinee was taken back to the home of Captain Duljarin from where she had escaped and she was told that her punishment would be to work as his "secretary." Duljarin, according to Priyobhashinee, had a reputation for torturing women. He did not speak Bengali and she refused to speak Urdu, the native language of Pakistan, so in broken English, she pleaded for her life and her dignity but to no avail (Kabir, 1999). Her sexual abuse began at the hands of Captain Duljarin. Lieutenant Korban, Captain Khaliq, Captain Sultan, and a local businessman who assisted the Pakistani military by the name of Malik Yusuf, also joined in (Kabir, 1999). The gang rape and

torture was continuous and she was kept awake for more than 24 hours, although she maintains that she lost consciousness at times due to the brutality of the violence, before she was handed over to more Pakistani army officials. At that point, they began to interrogate her about the murder charge against her. During the interrogation, the officers would “take breaks” to rape her again and again. Colonel Khatak, Colonel Abed, Colonel Abdullah, and Colonel Zafar had joined the group who assaulted her (Kabir, 1999). Thereafter, she was forcibly moved to a concentration camp, where she recalls remembering the Nazi persecution and torture of Jews during her own imprisonment. After some time in the concentration camp, she was moved to another compound near her former work place where she continued to be held prisoner and where countless more Pakistani military and government officials, mostly junior officers, took turns abusing her. Her imprisonment and torture, which had begun in March, would continue until December, and during this entire time, only one Pakistani abuser allegedly asked for her forgiveness. This was a man by the name of Major Altaf Karim, who claimed that he loved her and that he had committed the acts of violence against her “only because I’m a soldier and had to do what I was told” (Kabir, 1999). He offered to marry her but she refused.

After Bangladesh’s independence, Priyobhashinee struggled to return to normal life. In addition to the psychological trauma from her imprisonment, torture, and sexual violence, she could not assimilate into society. There was a shroud of silence, mistrust, and stigma that enveloped women like Priyobhashinee who had been victims and survivors of wartime rape. Many who learned of her imprisonment and sexual slavery labeled her a “collaborator” under the assumption that she had somehow assisted the Pakistani army. For 28 years, Priyobhashinee would, for the most part, remain silent about her wartime ordeal. She recalls:

Society rejected me but I also rejected society. I was completely isolated, I did not want to socialize with anyone except for my immediate family. Even my extended family became almost like strangers to me. That was my life for twenty-eight years. Society blamed me for sleeping with the enemy and I believed it. But finally I asked myself, “What did I do wrong?” This pain was too unbearable to keep holding onto so I had to let it out. I had to tell my story which was like an unbearable weight on my chest.

The general patriarchal, sociocultural norms created the expectation that women would return to their typical peacetime roles of caring mother, obedient wife, and docile daughter, existing primarily in the

private – and not public – sphere. Priyobhashinee did finally recount her story, with the encouragement of her second husband, to Shahriar Kabir for his book in 1999, and joined the *Ghatak-dalal Nirmul Committee*. She traveled to Japan, with help from the committee and a legal-aid society, to meet with Korean *comfort women*. She traveled to Tokyo as an observer to the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery⁵ where she met a woman who was 99 years old who testified about her experience during World War II. She also met UN officials who talked to her about her experience and this international convening inspired her and gave her confidence to speak up. She became a vociferous advocate for justice and accountability mechanisms, and has been involved as a civil society representative in the ongoing International Crimes Tribunal.

Forty years delayed: The International Crimes Tribunal and the illusion of justice

At the end of the Bangladesh Liberation War, an armistice was reached on December 17, 1971 but there remained serious unresolved issues between Bangladesh, India, and Pakistan. Among these included the refusal of Pakistan to recognize Bangladesh as a sovereign state, the fate of thousands of prisoners of war (POWs) among the three countries, as well as border disputes over Kashmir between India and Pakistan. Bangladesh was also focused on holding Pakistani soldiers, including some 1,500 POWs, accountable for war crimes (D’Costa, 2013). Whereas Bangladesh insisted that Pakistani POWs should face charges in Bangladesh, Pakistan refused to comply and wanted to hold proceedings in Pakistan. The government of Sheikh Mujibur Rahman, the first president of the nascent nation, faced enormous statebuilding, peacebuilding, and economic development challenges. This, combined with the lack of international legal frameworks and the highly polarized nature of international Cold War politics, meant that an international tribunal such as the ones pursued for Rwanda and Yugoslavia beginning in the 1990s was virtually unfathomable. Even if accountability mechanisms were feasible, the ability of the Bangladeshi government to pursue the worst culprits of crimes against humanity were drastically diminished by the fact that most members of the Pakistani army – low-ranking soldiers and top-generals alike – had returned to West Pakistan at the end of the war.

In 1972, the Government of Bangladesh established the Bangladesh Collaborators Order to address the role of Bangladeshis who had, directly or indirectly, assisted the Pakistani military's efforts to quash the independence movement and who had committed, or helped others to commit, grave human rights violations. The Order was followed by the 1973 International Crimes Tribunal Act, which was supposed to establish the legal bodies to oversee prosecutions, deliver punishments, and root out Bangladeshi collaborators who were disdained not only for the role they played during the Liberation War but also because they were perceived to be political threats that could make unstable the nascent government. However, the legal infrastructure to follow through with implementation of these goals was lacking as were resources, leadership, and public backing necessary to deliver such a transitional justice institution. By November 1973, Rahman – who was bogged down by competing pressures – signed a new declaration granting a general amnesty to most Bangladeshi abettors, conspirators, or sympathizers who had directly or indirectly supported the Pakistani Yahya Khan regime and military. This political compromise was done in the name of national unity and a collective effort to move forward. Unlike in some other places such as Rwanda or Yugoslavia, where peace and justice were pursued within close succession of each other, in Bangladesh, there was a trade-off for peace that overlooked justice.

In 2008, Sheikh Hasina, Rahman's daughter and who had previously served as Prime Minister, campaigned against the Bangladesh Nationalist Party (BNP) on the promise that if elected again, she would bring the perpetrators of the genocide, war crimes, and crimes against humanity, who were categorized as national traitors, to justice. Her determination to hold war criminals accountable stemmed from inheriting the legacy of her father's vision, her family's wartime and post-war experience, the momentum generated by civil society activists such as Jahanara Imam and the *Nirmul Committee* in the 1990s, and a political calculation designed to consolidate Awami League's stronghold of power. After Hasina's successful election that ousted her rival and at-the-time Prime Minister Khaleda Zia, the Government of Bangladesh began the task of fulfilling the campaign promise. Unlike most other transitional justice institutions, the very long period that passed between the commission of crimes and the initiation of a transitional justice process raised critical questions about the feasibility of such a tribunal. Nevertheless, the Hasina government moved forward with haste. Hasina's supporters, as

well as many other Bangladeshis who agreed that delayed justice was better than no justice, welcomed the establishment of the International Crimes Tribunal (ICT) in 2010.

The ICT proceedings pitted political rivals against each other and trials were pursued with a determination to deliver the harshest punishments with the greatest expediency. Vengeance was a common thread throughout the most high-profile cases and the targets of prosecutors were mainly individuals who, in the present day, belong to Islamist political organizations. This has reignited deep political divides between secularists, such as Hasina, and theocrats from Jaamat-e-Islamiyaah and other similar organizations. The amnesty granted by Hasina's father, Rahman, in 1973 as well as the political shifts that happened thereafter – not least Rahman's assassination – created the conditions through which, over the course of some three decades, many alleged perpetrators of gross human rights abuses were able to enter the Bangladeshi political scene, including through appointment or election. The ascension of these individuals to power fomented the kind of aforementioned silence and suppression of women's Liberation War narratives. This was in part because the once well-known culprits and collaborators were suddenly in positions of enormous political power and influence and they perceived the calls for justice against war crimes to be the works of atheist, left-wing ideologues (Bangladesh Khelafat Andolon,⁶ 2008). Political instability – including violent outbursts – has, consequently, been the backdrop of the ICT.

From the earliest stages, the ICT drew skepticism and criticism from local and international observers, including US government officials and non-governmental organizations such as Human Rights Watch.⁷ As *The New York Times* (2011) reported, the Tribunal's "exclusive focus on the Bangladeshis who bloodied their hands assisting the main perpetrators – the Pakistani military – makes the court look like a government appendage eager to settle a domestic score." The mandate of the ICT did not extend to Pakistani perpetrators. Critics have argued that the Tribunal lacks legitimacy or credibility amongst a significant portion of the Bengali population, not least because of the over-politicized, non-inclusive nature of the proceedings, but also as a result of the barriers to participation for ordinary citizens who want their testimonies heard.

On a general level, the ICT has been marred by allegations of corruption, political wrangling, mismanagement, legal shortcutting, and a "guilty until proven innocent" approach to justice. For example, the Human Rights Watch (HRW) analysis that was released in 2013 stacked

significant procedural criticisms against the ICT in its handling of the Ghulaz Azam case. Azam is one of the most notorious accused perpetrators of crimes against humanity and war crimes. His role in assisting the Pakistani military during the Liberation War is public knowledge, although the extent of his involvement and the nature of his individual role is debated. The HRW report, in short, alleges that Azam did not receive a fair trial. Unsurprisingly, representatives of the ICT did not agree with the criticisms leveled against the institution. However, what ICT defendants failed to recognize and acknowledge was that HRW – like other international organizations – did not defend Azam’s role in the war nor disagree that with the guilty verdict. Rather, HRW and other international critics argued that the trial that led to Azam’s conviction and sentencing was flawed because it did not grant due process and was susceptible to the political maneuverings of the Prime Minister and her associates. The evidence for both these charges against the ICT in its handling of the Azam case are quite strong. In other words, the haste with which the ICT pursued a conviction and sentencing against Azam allowed procedural shortcomings that have delivered not only justice that is delayed but also justice that is tainted and tampered with. These types of legalistic failures only reinforce the notion that the ICT is partisan experiment in transitional justice.

Officials of the ICT have repeatedly claimed that the Tribunal is an independent body that is immune from political manipulation. Some defendants of the ICT have gone so far as to suggest there is an international conspiracy to not only deny that genocide took place in Bangladesh but to also prevent the Tribunal from performing its functions and thereby delivering justice. Defendants of the Tribunal have also argued that it is domestic institution and therefore not subject to international laws. For example, Shahriar Kabir in his testimony before the EU parliament claimed: “We appreciate international community’s observations as also their close monitoring, but any kind of interference in our internal matter that will hinder the trial process or frustrate the victims,” is unacceptable (International Crimes Strategy Forum, 2012). Proponents and defenders of the ICT, including those within the institution and those on its peripheries, such as Barrister Afroz, Priyobhashinee, and Kabir, have used the norm of sovereignty in response to international criticisms. In their opinion, as well as that of Prime Minister Hasina and her political allies, the international community’s criticisms are neither relevant nor legitimate because the Tribunal is a national endeavor. As Priyobhashinee

argues, “I don’t understand the criticisms from the international community. This happened in Bangladesh, this did not happen elsewhere. Outsiders cannot understand what happened here.” Priyobhashinee’s biggest criticism of the Tribunal is that it has moved too slowly, “Verdicts have been delivered but punishments are not being administered. That is unacceptable. They are caught in legal, bureaucratic processes.” When asked, she admits that the ICT’s capacity is insufficient for the crimes that need to be addressed. She identifies resource, personnel, and security constraints as impediments to greater efficiency.

On December 12, 2013, Abdul Kader Mullah was executed by hanging, amid widespread political violence across Bangladesh in reaction to both the Supreme Court’s decision to uphold the death sentence as well as growing unrest about the upcoming 2014 general elections. In the aftermath of Mullah’s execution, Dhaka and other parts of Bangladesh were flooded with protests – some in favor of the sentencing and others in retaliation for it. Priyobhashinee’s response to the execution was mixed. She said:

We cannot be liberated from our horrible history just by the death of one perpetrator. This is symbolic justice. This is the death of only one man, even if he was a monster, he’s only one monster.⁸

Indeed, Priyobhashinee correctly identifies the limitation of transitional justice institutions – at large – especially retributive processes such as those carried out in Bangladesh. It is impossible to put all alleged perpetrators of war crimes and crimes against humanity on trial. Even when one individual is tried, found guilty, and punished, retributive transitional justice offers symbolic redress to the society in question. Priyobhashinee concedes that the Tribunal is not a perfect institution, that it has its limitations. But for her and many others like her, delayed, imperfect, and partial justice is preferable to no justice. Priyobhashinee’s rapists and torturers will likely never see justice for what they did to her and others like her. For her, the closest form of justice she can hope for – and today expect through the ICT – is the holding accountable of *Razakars* for their part in the war. She recalls the failure of the international community to protect her and others like her during the war, which, she argues, voids foreigners of the right to criticize the ICT. She says, “Hardly anyone in the international community paid attention to what [Bengalis] suffered during the war. Even when our people cried out for help most other countries did not give us a helping hand so why should they now come and criticize

what we are trying to do for ourselves and for our future generations?” This is a legitimate question, even if it is one derived from an emotional sentiment based on her personal experience. And the answer to this question is complicated but worthy of analysis.

Zead Al Malum, the former Prosecutor of the ICT, who testified in front of the European Union Parliament in Brussels, along with Barrister Afroz and Shahriar Kabir, provides – in part – an answer to why the international community has a stake in the processes and outcome of the Bangladesh transitional justice experiment. Former prosecutor Al Malum said, in front of the EU parliament, that, “The Act itself is a domestic law ... this justice process was never part of any intervention by the international community ... this is purely a domestic process ... this Tribunal is not an international tribunal. The only international element is the nature of the offence of the crimes” (International Crimes Strategy Forum, 2012). Al Malum was trying to defend the ICT and do so on the basis of national sovereignty but his admission that the crimes the ICT addresses are codified in international human rights law reiterates just exactly why the international community not only can criticize the ICT but also how, without international human rights law and international norms that underpin laws against war crimes, crimes against humanity, genocide, and mass rape, the ICT could not exist.

Whereas the Bangladesh ICT is a national endeavor, it does not exist in an international legal vacuum and, in fact, as there is no definition for crimes against humanity provided in domestic law that is applicable to the ICT, the international law definition is in use *de facto*. In this case, the question arises: if the ICT is borrowing definitions of crimes covered under its mandate from international law, then should it not be subject to meeting international legal standards? Bangladesh is a state signatory to the Rome Statute, the International Covenant on Civil and Political Rights, CEDAW, and numerous other treaties. Any blanket rejection of any international criticisms leveled against the ICT by the government of Bangladesh ignores these facts. Put simply, as a member of the international community, the Bangladeshi state cannot divorce itself from concern, criticism, and comment, especially when such complaints have legitimacy on legal grounds, as is the case with the ICT.

US Ambassador for War Crimes Steven Rapp noted during his visit to Dhaka in 2011:

It is important that the same rights be accorded to [ICT] accused as are guaranteed to Bangladeshi citizens who are charged with other violent

crimes. The Bangladesh constitution and laws provided that this was to be a special court responsible for its own rules and procedures. As the judges have amended the rules to incorporate concepts like the presumption of innocence and proof beyond a reasonable doubt, it is also important that they conduct these trials to ensure that the accused have the same right to consult with their counsel, the same time and ability to prepare their defense, and the same time and ability to challenge the process as they would have in other cases.

The decision to pursue a domestic process is not, in itself, problematic or worthy of criticism. Locally grown transitional justice institutions can have greater credibility within the local population, as demonstrated by experiences with *Gacaca* trials versus the ICTR in Rwanda or the TJRC versus the ICC trials in Kenya. Moreover, international, transitional justice interventions or initiatives are hardly immune to shortcomings and failure. That said, although the ICT is not an international tribunal, there have in fact been suspensions of national (i.e., domestic) laws that protect the rights of accused persons and even criminals. There are certain protections afforded to all citizens but, in the case of the ICT, the Bangladesh government has chosen to selectively ignore these protections in cases of certain defendants such as Azam. In doing so, the ICT has built in certain shortcuts for itself to pursue accused persons that give the Tribunal special rights and privileges while detracting the same rights and privileges from defendants, thereby weakening the fairness of the process.

Although accountability for crimes has been at the core of the Bangladesh ICT, there is a glaring omission in the mandate that is reflective of the sociopolitical culture that envelopes the public memory of the Liberation War. This is the issue of human rights violations committed by Bengalis against Pakistanis. There is little documentation of the extent to which these crimes were committed or their nature but, just as a war is never one-sided, neither are human rights abuses within it. Even in Rwanda, where the worst atrocities – both in sheer numbers and in their horrific manifestation – were committed by Hutus against Tutsi, the violence and abuses were not one-sided. Not only did Hutu sympathizers, some of whom were Tutsi and some of whom were from other ethnic groups, commit violations against Tutsi but there were also some, albeit fewer, violations committed against Hutus. A similar dynamic is true in Bangladesh. But just as the scope of the ICT does not cover crimes committed by Bengalis against Pakistanis, the public discourse on the war

also rarely – if ever – touches on this subject. Simply put, it is a taboo that is casually denied or deliberately forgotten.

One could argue that the ICT is meant to serve the Bangladeshi people and government and, as such, need not be concerned about what Bengalis may have done to Pakistanis during the war. However, if one of the primary objectives of the ICT is to establish a precise historical record, then should alternative narratives not be interwoven into the ICT process? These include the experiences and narratives of indigenous groups, religious minorities, disabled persons, the elderly, representatives of the Bengali diaspora, resettled refugees, and – as is most pertinent to this book – the narrative(s) of women. As Herman poses, “until other non-dominant narratives are recognized, how can justice emerge?”

Of the many shortcomings of the Tribunal, one is naturally more relevant to this study: the inadequate incorporation of women’s voices, perspectives, experiences, aspirations, and participation. To the extent that the ICT has addressed women’s wartime experiences, the scope has been very limited – focused predominantly on women as victims of rape and abuse – and without foundations to hold perpetrators accountable while also providing avenues to survivors that are conducive to healing old wounds. Dr Turin Afroz, an ICT prosecutor, spoke in front of the EU parliament to address international concerns about the Tribunal’s legitimacy and its adherence to international legal standards. In her statement, she argued that the debates on numbers of rape, sexual slavery, forced pregnancy, and gender-based violence are less important than appreciating that they did happen in masses and affected thousands, if not hundreds of thousands, of women (International Crimes Strategy Forum, 2012). As she correctly pointed out, justice cannot be delivered for every single victim because not all victims lived to tell their story and many who did survive their attacks have not come forward due to shame, social stigma, lack of access to courts, poverty, fear of repercussions, etc. She also admitted there are serious challenges in pursuing cases of sexual violence because investigations are particularly tricky. Even when a victim’s testimony is available, physical evidence is difficult to provide in the aftermath of the rape – let alone some 40 years after the crime was committed. It is clear that there are structural factors that limit the ability of the ICT to properly account for women’s wartime experiences. However, the architects and implementers of the ICT are also responsible for certain strategic failures that juxtapose the structural limitations.

Not only has no definition of rape or sexual violence been offered, neither has the one proposed in *Akayesu* or in The Rome Statute been adopted. As Iliopoulos (2011) points out, the definition of rape in national law is very restrictive; it refers exclusively to sexual intercourse, and thereby inadequate and inappropriate for the Liberation War context. The international legal precedents set and the elevation of crimes of sexual violence to the same level as crimes against humanity or genocide by the United Nations Security Council are applicable to the case of Bangladesh based on the evidence available, especially considering many women survivors are still alive and can – if they choose – offer their stories to the official record. The inability, or unwillingness, of the Tribunal to approach gender-based and sexual violence in a more inclusive, participatory, and deliberate way is a disservice to transforming unequal gender relations in Bangladeshi society and a failure of justice. It is also a political calculation that distorts the historical record of the country's war of independence.

There has been some debate in academic circles about to what extent women had real agency during the Liberation War and, to what extent, the roles that they played were prescribed or restricted by societal norms. Mookherjee (2003: 165) argues that women were agents “by invitation only” meaning they were active in furthering the liberation effort insofar as their male counterparts would allow and usually in forms that reinforced gender stereotypes. Irrespective of whether the roles performed by women during the Liberation War were orchestrated by others, the fact is that women did play various active roles but in historical accounts and public memory, women have been largely neglected except for their victimization. This is reflected in the International Crimes Tribunal. Debnath (2009: 54) argues that the Government of Bangladesh has deliberately avoided “unearthing women's actual experiences of 1971” as a tactic to “erase evidence of the humiliation and de-masculinization Bangladeshi men suffered” during the war. This, in turn, is part of a larger effort to uphold the patriarchal structure of society.

Ambassador Rapp made another important recommendation in his remarks in Dhaka (2011), one that is particularly relevant to the focus of this book. He wrote:

Finally, and most importantly, the process must be accessible to all. It is not easy for members of the public to attend court sessions. Ideally, the trial sessions should be broadcast on television or radio, or weekly reports should be aired that would show key testimony, arguments and rulings.

This recommendation speaks to one of the fundamental principles of transitional justice, which is to not only provide justice to a select few individuals but to societies at large, even if only in symbolic forms. If the ICT is supposed to do this, which was recognized as one of its founding goals, then the proceedings, not just the outcomes, of the Tribunal need to be more accessible to the general public, especially those who are not in Dhaka and certain social groups that are typically on the margins of society, including the poor, the illiterate, the elderly, religious or ethnic minorities, and women. Considering the unequal nature by which women and their voices and perspectives have been included in the Tribunal, the need to make the proceedings more accessible – including in visual and auditory formats – is doubly important. After all, as Barrister Afroz conceded herself, not every case – especially those of rape and sexual violence – can be heard and prosecuted but the select few that should provide redress to greater numbers of victims. If this is in fact the case, then how can the ripple effect she intends be ensured without increasing the public’s accessibility?

The present culture surrounding the legacy of the war is both pervasive and restrictive. It is the topic of conversation in public spaces, including television screens, cafes, restaurants, and social gatherings, as well as in private places, including at home. Part of the reason the war is so fresh in the minds of masses is because only 40 years have passed since the country’s independence and, so, many who fought or lived through the war are still alive. At the same time, the culture and discourse surrounding the Liberation War are dominated by the two opposing political parties who are at the center of Bangladeshi politics, the Awami League headed by Sheikh Hasina and the Bangladesh National Party (BNP) headed by Khaleda Zia. These women are bitter political rivals but continuous fixtures on the ballot come election time. D’Costa argues that the post-independence history of Bangladesh is saturated with “Demands of the Bangladeshi people for justice,” but these “have remained captive to a political battle for power and continual revisions of history which have allowed key perpetrators of such crimes to evade punishment” (D’Costa, 2013).

Two key themes that run parallel to and in some ways counter to each other in a paradoxical manner are the narrative of national victimhood as well as national pride. Victimhood, collectively, is focused on the assault suffered by Bengalis at the hands of the Pakistanis before and during the war. Pride, collectively, is focused on the fact that Bengalis

did, ultimately, emerge victorious, having defeated the Pakistani army and secured an independent state. Interestingly, there is a diminished emphasis on the role of the Indian government, which, in reality, was instrumental to the success of the Bengali freedom fighters in the final days of the Liberation War. Moreover, these two themes of victimhood and pride are then adapted and punctuated by the political ideologies, motives, and personalities of the Awami League and the BNP. The ICT is bolstering the two dominant narratives. As Herman discovered, “If you don’t subscribe to the official narrative, you don’t really talk about your personal experience. This undermines the sense of justice that individuals, in particular women, feel.” In brief, the personal is very much politicized and the national politics is very much personal.

So how does one move women away from the margins of the dominant narratives, collective memory, and history of the Liberation War? And how can redress be offered? The answers to these questions are multifaceted and there is no “one size fits all” solution. People’s needs vary depending on their experiences, their economic circumstances, their geography, their social position, and even the changing political climate against which they exist. Not all Bangladeshi women had the same experiences during the Liberation War and not all Bangladeshi women survivors want or expect the same kinds of redress. It is important, therefore, to abstain from generalizing, stereotyping or making presumptions that are uninformed or misinformed.

Herman surveyed approximately 50 women during her field research in Bangladesh, many were rural and poor but some were middle-class or upper-middle class urban residents. Many had never talked about their wartime experiences, especially if they had suffered sexual violence or torture, whereas a select few had been more vocal in recent years, as the political focus shifted toward the International Crimes Tribunal during Prime Minister Hasina’s campaign. Herman asked all of the women she interacted with, including those she photographed, what they wanted in terms of redress. Almost all mentioned a yearning for symbolic acknowledgment; some specified at the individual level, others spoke of national or international recognition, and some had no preference as long as acknowledgment came. She found that most of the women she spoke to felt a deep sense of gratitude for the fact that any outsider, and a younger person, was interested in how women’s experiences evolved during and after the war. A few commented to Herman on the fact that the international community hadn’t paid enough attention to the plight

of Bengalis, let alone Bengali women, during the war and in its immediate aftermath. This, for them, was not just an opportunity to speak but to be heard, to feel validated, and to feel important.

However, symbolic acknowledgment was not the only type of redress that some women seek. Individual answers varied but encompassed material and non-material gestures including monetary compensation, either because they suffered psychologically or physically, as well as mainstreaming women's experiences more pronouncedly into the ICT. Respondents also suggested the need to produce published versions of their narratives in history books, museums, and memorials. Many felt disenchanted with the current state of political affairs and wished to have greater political voice and to see a shift in national dialogue that moves beyond glorifying the past and instead prioritizes fixing the present. One woman whom Herman photographed was very clear in her demands for monetary compensation from the government, which she believes she deserves. Kakon Bibi has battle scars that prove she was a freedom fighter. "I got them while fighting with Sector 9 in the Liberation War." But unlike many of her male counterparts, she receives no monetary assistance from the Bangladeshi government in return for her military service and is not formally recognized as a veteran of the war. "They pay the men. I get no help from the government. Now my family has nothing" (Herman, 2011). This type of inequality is common and in many cases, accepted and not questioned. It is part of a larger normative culture that gives preference to men over women, prizes boys over girls, and reinforces unequal gender relations.

At a minimum, there needs to be greater acknowledgment of women's varying and impactful roles in the build up to, during, and after the Liberation War. In 1996, the Government of Bangladesh established the Liberation War Museum in an effort to provide a historical record and make that record more accessible to the public. The museum includes documents that archive the wartime experiences of women, most notably *Beeranganas*. (D'Costa, 2011: 153). Yet, the Museum has not moved away from reinforcing many stereotypes about women's roles, identities, and experiences during and since the Liberation War. A more deliberate effort to incorporate various narratives of women's lived experiences is necessary and this will require collaboration and exchange with civil society organizations. The creation of a museum devoted to women's multifaceted wartime experiences would also help provide symbolic redress and move women's wartime experiences away from

the peripheries of the dominant Liberation War narratives. Even grand symbolic gestures like a national holiday dedicated to the role of women who survived the Liberation War or televised conversations about women's experiences could send a strong message and break a normative political and economic cycle that places women below men. There have been very few public conversations between or with the women from the Liberation War. And yet, this is also a tool for establishing a more accurate, inclusive historical record and one that is democratic, participatory, and representative. The women who lived during the war are growing older by the day and it would be a betrayal of history as well as an added injustice to them to not recognize and acknowledge their experiences and roles. At the same time, more equal and proportional compensation schemes have practical value and the potential to transform lives that are currently lived in poverty. They could uplift both men and women who contributed to the war effort, whether they took up arms or whether they played other roles in support of the liberation movement.

The ICT process, in addition to a greater adherence to international legal standards, could also benefit from a closer relationship with civil society organizations to enhance the forms of redress provided to survivors and restore a focus on the needs of victims. Pursuant to gender equality within and beyond the ICT context, cooperation with Bangladeshi women's rights organizations could be helpful. At the same time, women's rights organizations in Bangladesh could enhance their role by learning from the experiences of women's rights organizations in other countries, especially those that have undertaken transitional justice initiatives. D'Costa (2011: 172) refers to this as leveraging "transnational networking." These types of international linkages between the Bangladeshi feminist movement and others could also help to overcome some of the shortcomings of women's rights groups in South Asia that have failed to coalesce women from different backgrounds together in pursuit of equality in a way that overcomes socioeconomic stratifications that separate rich women from poor women as well as ethnic or religious divisions that separate women from majority groups and minority groups.

Transforming unequal gender relations, not only as they relate to women's wartime experiences but also in terms of present day standing, necessitates a strengthening of rule of law, improvement of the national judicial infrastructure, and respect for independent judiciary. Without these essential elements, the ICT will continue to falter in fulfilling its

goals, especially with respect to women victims and survivors. Moreover, the Government of Bangladesh has to strengthen the country's justice systems in order to uphold the Constitution and bolster it from threats by those who would undo certain provisions such as the guarantee of equal rights to men and women. The aspirations of Islamist groups to dismantle this constitutional guarantee is no secret; many influential Islamists have expressed their desire to strip women of certain freedoms afforded by the Constitution because their Quranic interpretation slates men as superior to, and masters of, women. However, for as long as Bangladesh remains a secular republic, and insofar as groups such as Jammāt do not ascend to the highest national office, the government has a Constitutional obligation to protect and guarantee the emancipation of women that extends well beyond the purview of the International Crimes Tribunal and applies to all aspects of life. The Government of Bangladesh also has a responsibility to ensure that the ICT proceedings are fair. This is applicable not only in terms of upholding international and domestic legal standards that protect the rights of victims and alleged perpetrators but also in providing a just outcome to survivors of the Liberation War. And, to this end, the thoughtful, inclusive, mainstreamed, and participatory incorporation of women's wartime experiences and an acknowledgment of the desires of women survivors are essential.

Notes

- 1 UN Press Section, Office of Public Information, Press Release SG/SM1493, June 3, 1971, UN Archives, Series 228, Box 1, File 2, Acc 77/207, 11.
- 2 The exact number of deaths is unclear and estimates vary depending on source.
- 3 Elizabeth Herman is an American researcher and photojournalist who studies how narratives of war have shifted over time and conducts cross-country analysis as well as regional analysis on women's experiences and memories of conflict. She completed a Fulbright fellowship in Bangladesh in 2011 where she investigated, through oral histories and photography, the experiences of women in the Liberation War. Herman was interviewed as part of the research for this chapter.
- 4 Mrs Ferdousi Priyobhashinee was interviewed for this chapter by the author in December 2013. All of the information related to her provided here is from these interviews unless otherwise noted.

- 5 The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery was assembled after many years of civil society activism on behalf of 75 "comfort women" who originated from East and Southeast Asia. They represented as many as 200,000 other sex slaves who had been imprisoned and subjected to extreme and prolonged sexual abuse. According to Niamh Reilly (2007), the Tribunal strongly adhered to legal formalities that were meant to give the proceedings legitimacy, even though they were largely symbolic in function. For more information, see References for Reilly N (2007).
- 6 The press release by the Bangladesh Khelafat Andolon can be accessed here: <http://www.free-press-release.com/news-bangladesh-khelafat-andolan-condemns-inclusion-of-hafezzi-huzur-s-name-as-war-criminal-1207504048.html>.
- 7 Brad Adams, then Executive Director of the Asia Division at Human Rights Watch, wrote a letter to PM Sheikh Hasina to raise concerns over the transparency of the War Crimes Tribunal and the rights of the accused. The full letter can be viewed here: <http://www.hrw.org/node/98995>.
- 8 Interview conducted on December 13, 2013.

5

Restorative Approaches to Transitional Justice: A Feminist Analysis of Alternatives to Criminal Prosecution



Abstract: *Transitional justice is complex in its nature and incomplete in its ability to provide redress, even in the best of circumstances. And, as the previous two chapters demonstrated, although retributive processes have proliferated exponentially in the last two decades, their usefulness – especially as they relate to addressing the conflict-related needs and experiences of women – are limited despite important progress that has been made. So, what alternative exists? Restorative justice provides some options. This chapter focuses on the extent to which two different elements of restorative justice – reparations and truth-telling – can be useful for addressing conflict-related and post-conflict needs of women in societies that have experienced a dark period characterized by violence and human rights abuses.*

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There is a unique potential in transitioning societies to deconstruct, rather than fortify, pre-transition structural and cultural gender inequalities. In doing so, there is also a potential to, albeit only as a start, forge a more inclusive and equitable transition to democracy. Whereas corrective justice is built on the notion that, “a person who intentionally or recklessly causes harm or loss should pay compensation or make restitution to his victim, restorative justice strives to repair broken social bonds, prioritizing the rebuilding of relationships over retribution or punishment” (Ashworth, 1986: 107). As Charles-Villa Vicencio (2009: 47) argues, “criminal prosecution alone is too weak a premise on which to build social stability and redress deep-seated historical conflicts.” In contrast, restoration is about, “moving relationships in the direction of *becoming more morally adequate*, without assuming a morally adequate status quo ante” (Walker, 2006: 384). Restorative justice seeks to restore humanity and humaneness in a society that has experienced widespread inhumane violence. Therein lies an inherent reconciliatory element to restorative justice, distinct from retributive justice or corrective justice, both of which can be vengeful or fixated on establishing proportionality between harms suffered and rectifying action taken.

Whereas bartering and bargaining may offer a political truce to end bloodshed, social reconciliation is much harder to reach on the level of masses. The restoration of human dignity, one of the ultimate goals of transitional justice, cannot commence without acknowledgment of both suffering endured and suffering caused (Villa-Vicencio, 2010). And this is inseparable from some reconciliation between those who harm and those who have been harmed. More often than not, these categories of people overlap; even where there is disproportional violence, suffering happens on both sides of a conflict. Truth-seeking, truth-telling, and reparations can be a vehicle for social reconciliation.

Reparations as redistribution?

Reparations, whether in material or symbolic form, are part of the toolbox of restorative transitional justice. Reparations cannot bring back the dead, erase the trauma of survivors, or be viewed as an eraser of history. Instead, reparations, if implemented in a planned, mindful, and transparent manner, can ease the suffering of past victims, help rebuild lives and serve as one form of acknowledgement of past wrong by the

state or the state's failure to protect citizens during their time of need. Reparations can take multiple forms such as monetary stipends, return of confiscated or damaged property, remedy for lost inheritance, medical and education assistance, erection of memorials and monuments including those dedicated to both men and women, building museums that record an accurate past, and even incorporating multiple narratives and experiences of all social groups into textbooks. The effects of such reparative measures vary from context to context and from one individual case to another, but they can have transformative potential, especially for women who are poor or from marginalized ethnic, religious, social, or political groups. According to Catherine O'Rourke (2013: 154), "reparations provide not just a comprehensive framework of entitlements through which women's movements in transitional states can frame their demand and advance their political claims" but, more importantly, they also, "provide a clear institutional target for advocacy and influence, namely the state."

Pablo de Greiff argues that restoration is inherently deficient without some element of reparation. He offers a broad conceptualization of reparations that encompasses "all those measures that may be used to respond to human rights violations" (2004: 1). This definition is neither exclusive to victims nor does it offer a narrow scope of implementation methods. Reparations "should serve as a vehicle for acknowledging past violations and state responsibility for harms as well as public commitment to respond to their enduring impact" (Correa, Guillerot and Magarell, 2009: 6). Similarly, the International Center on Transitional Justice (ICTJ) frames reparations as measures that provide restitution, compensation or other future-oriented redress for harms suffered, losses endured or rights violated with the aims of address roots of abuse.

Economic justice is an important component of gender justice, according to many feminist scholars of transitional justice (Valji, 2007; Rubio-Marin, 2009; Ni Aolain, 2012; O'Rourke, 2013, and others). Pablo de Greiff (2006: 2) attributes the "prominence of reparations within feminist analysis" to "the uniqueness of reparations in transitional justice, as 'a measure on behalf of victims, rather than in response to perpetrators.'" Research and experience show that during times of violent conflict and political upheaval, women face particularly difficult economic hardships as they are often left responsible for providing shelter, food, and

care for their families while their husbands, fathers, and brothers – who may have previously been the breadwinners – are engaged in combat or killed. Women's economic roles thus change during times of conflict and political upheaval but their access to gainful employment can also be severely barred by conflict. In the aftermath of violence, even when a ceasefire is reached, women's conflict-related economic burdens do not necessarily subside (Meintjes et al., 2002). And yet, transitional justice processes have – to date – failed women in offering an economic justice that is fitting to the burdens uniquely borne by women during and after conflict.

Retributive approaches to transitional justice are often ill equipped to offer economic justice while reparative approaches, as part of restorative transitional justice institutions, are limited in logistical and financial resources to straddle the gap between short-term compensatory programs and long-term economic development programs. Ruth Rubio-Marin criticizes the current discourse surrounding Resolution 1325 vis-à-vis reparative justice. She claims that despite the unprecedented attention to gender and sexual based violence in the 21st century, “this trend has not led to any systematic reflection on the bearing that a gendered analysis of violence should have when discussing reparations for victims of mass and systematic abuses of human rights” (Rubio-Marin, 2009: 64).

In very few cases has a state accepted the responsibility of administering reparations, especially through monetary or material compensation. Even in some cases where efforts have been made, such as in South Africa, the results have been mixed, and unanticipated difficulties – some avoidable and others structurally imposed – diminished the symbolic value of the reparative gesture. Also true is the fact that not every claim can be granted and even when granted may not suffice the needs or demands of the beneficiary. Moreover, even where a genuine effort is made to administer reparations in a way that is sensitive to the experiences of women and is demographically equal, women may not be able to enjoy the benefits of reparations due to legal and sociocultural restrictions on female property ownership and inheritance. Likewise, illiterate, uneducated, or poor women who are beneficiaries of monetary reparations may not have the financial acumen to manage their money and this, too, can pose a practical dilemma.

These limitations and challenges that extend beyond the transitional justice context hamper the applicability of reparations as a form of redress

but, at the same time, until such barriers are addressed through normative and legal reform, the ability to create more equal gender relations is undermined. Women continue to lose out and remain marginalized. Reparations, although theoretically sound in transitional justice scholarship in general – and increasingly preferred by feminist scholars – are messy in practice, not least because states in transition often have huge economic burdens and shaky economies. As such, governments are, unsurprisingly, reluctant to take on further financial responsibilities that deplete the state's resources. In countries that deal with crimes of the past well after they have been committed, there is another type of reluctance on the part of governments to offer material reparations. In these contexts, the passage of time may make authorities perceive material reparations for long-gone suffering as inconsequential. In these contexts, the passage of time may make authorities perceive material reparations for long-gone suffering as inconsequential, but in fact, material reparations can help alleviate poverty even decades after the violent conflict has occurred. Bell and O'Rourke (2007) argue that feminism needs a theory of transitional justice that focuses on context-sensitive material reparations for women through transition process rather than merely imposing the particular feminist notion of reparations within transitional justice frameworks.

Reparations, when administered with a gender-sensitive intention that appreciates the needs and experiences of women alongside men can have transformative effects on gender relations. Gender-sensitive reparations require eliminating formalized gender-based discrimination in legislation as well as excluding patriarchal norms from how reparations are divided and to whom – even if the new approach contradicts preexisting laws relating to inheritance, land reform, custody of children, or property ownership. Finally, reparations programs, in order to fulfill the function of gendered justice, should expressly place men and women as equal stakeholders and contributors – albeit in different ways – to post-conflict rebuilding.

In the case of survivors of sexual and gender-based violence, there is a debate on whether reparations are appropriate, deserved, and useful as a remedy. Whereas some academics and activists argue that reparations – whether material or symbolic – can offer recognition and redress to victims of sexual and gender-based violence, others claim that it can be more harmful than helpful. The debate, therefore, centers on not only whether but also in what form reparations should be delivered.

Sexual and gender-based crimes committed during war, violent conflict, and political upheaval have physical, material, and non-tangible consequences that can affect victims and victims' families for a long time. These include, but are not limited to, medical problems, loss of bodily function, diminished working and productive capacity, psychological trauma, loss of livelihood, social stigma, displacement, and strained familial relations. These additional various forms of victimization that emerge from acts of sexual and gender-based violence cannot always be remedied by criminal prosecutions and other forms of retributive justice.

The Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation in March 2007 was an important milestone; the adoption of the declaration gave credibility to reparative forms of justice-seeking in post-conflict settings and also recognized the legitimacy of material and symbolic needs of survivors of sexual and gender-based violence. The 2011 UN Secretary General's Report on *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* identifies reparations as the "most victim-centered justice mechanism available and the most significant means of making a difference in the lives of victims." (8) However, Rubio-Marín warns that a singular focus on sexual violence vis-à-vis women in the aftermath of conflict, "suggests that sexual harm is universally the worst abuse and injustice that can happen to women," which, in turn, "risks the reduction of women's lives to a sexual dimension and entrenching patriarchal systems of meaning which sanction women's sexual purity or chastity as of utmost importance" (Rubio-Marín, 2012: 73).

Although it is difficult and, arguably impossible, to translate psychological trauma and physical suffering into monetary terms, compensation can help alleviate poverty and associated suffering. This may not erase the pain of past human rights abuses but it can improve livelihoods and there is value in that, too, especially when looking to the future. Rubio-Marín (2012: 77) argues that reparations for survivors of sexual violence should both provide "maximum recognition of harm" and have "an adequate correlation between harm and remedies" while at the same time – in delivery – protect individual victims from unintended harmful consequences that can arise because they seek reparations. (It is also important to remember that many survivors of sexual violence are also victims of forced impregnation and, as a result, can have children who are born out of conflict and dependent on them. This is a complex issue that has been studied from various angles, including the psychological

and social dimensions of children resulting from rape, and a wider discussion is beyond the scope of this book. Nevertheless, it is important to note that children are born from rape who remain with their birth mother impose new economic burdens. Material reparations, in this case, although complicated and messy to provide, could offer monetary redress and alleviate the economic hardships faced by a family. At the very least, women subjected to forced pregnancy should not be discriminated against or excluded from reparations programs based on the harm they suffered and the consequence of that harm, namely unwanted or unplanned children.

Rehabilitation is another viable form of non-monetary reparation. For example, services – including access to health facilities and educational opportunities – can have transformative effects on women and their families. Public education is a form of non-monetary, collective reparation and one that is closely linked to truth-telling. When public education is pursued in a gender-sensitive way, it can help to transform gender relations and place men and women on equal footing by acknowledging their experiences, their post-conflict needs and aspirations, and their potential to contribute to a new social and political fabric.

Truth-telling as recognition?

The practical challenges related to securing criminal convictions for human rights violations has helped to encourage truth commissions as an alternative mechanism for answering questions related to acknowledgment and accountability of crimes, recognition of victimhood and survival, and extent of harms suffered. Proponents of truth-telling argue that a state has a responsibility to investigate human rights violations committed against civilians in order to fight impunity, establish an accurate historical record, and give voice to survivors. Where rule of law is weak and judicial capacity for legal processes are inadequate, truth-telling can serve as an alternative model of transitional justice that is both restorative and distinguishes right from wrong.

The essence of truth commissions is the pursuit of truth in the forms of voluntary, participation-based truth-seeking and truth-telling aimed at establishing an accurate record of the conflict and human rights violations. Societies that choose the pursuit of truth do so, oftentimes, with the hope of beginning a process of healing, including both individual

and social restitution. Truth commissions, although separate from criminal prosecution or legal bodies that have the power to impose punitive measures against wrongdoers, also encompass an element of justice that is grounded in acknowledgment, acceptance, and collective responsibility sharing. The Updated Set of Principles for the Protection and promotion of Human Rights released by the UN in 2005 and produced by Diane Orentlicher states:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violation, to the perpetration of those crimes. (II/Principle 2)

Unpacking this statement, it is important to note a couple of different points. First, The Orentlicher Principle frames truth-seeking within a rights-based context – one that is, in theory, enjoyed by both individuals and collective groups. Second, she argues that not only is it necessary to acknowledge that “heinous crimes” were perpetrated but it is also, perhaps equally, if not more, important to understand through truth-seeking why such crimes were perpetrated and what conditions made their perpetration possible. In other words, understanding the motivations and actions that resulted in gross human rights violations is part and parcel of truth-telling and prerequisite to collective healing as well as the creation of an accurate record. Moreover, understanding how and why is central to preventing the future repetition of such crimes. Too often, truth commissions fail to fully grasp this element that is called for; there is insufficient attention paid to the causes of crimes and disproportional attention to their consequences. In doing so, the broader political, socioeconomic, and historical context of crimes risks being overlooked.

What the principle does not mention here, but is critical to note, is how truth commissions are at once backward-looking and forward-looking. Although they investigate and expose the past, they are also future-oriented in that they are meant to not only heal old wounds but also to deter the reopening of those wounds or the perpetration of heinous crimes. This future-looking dimension of truth commissions is especially important for advancing women in and through transitional justice. Because transitional justice creates opportunities to reformulate power relations, including gender relations, there is an impetus on truth-seeking institutions to facilitate the participation of women in a way that not only deals with the past but also prepares for the future. “Feminist

optimism about truth processes is grounded in perceived informality, or at least the lesser formality, of truth processes compared to criminal processes” (O’Rourke, 2013: 101). This is particularly important for women who tend to be marginalized by legal systems in politically volatile situations, both in terms of the protection of their rights as well as their ability to access traditional justice apparatuses.

Truth processes are important to consider because, like reparations, they have a transformative potential for women’s lives; truth-seeking creates opportunities to not only identify physical and non-physical harms suffered by women but also allows collective reprimands for harm suffered and the chance to secure an apology. Truth processes, which are not bound by the codification of crimes in international or domestic laws, can encompass structural disparities that make women inferior to men and expose ways in which women are especially susceptible to harm because of their gender. At the same time, truth commissions, because they are participatory and based on truth-telling, can help demonstrate women’s agency, even if they are victims and survivors of harms. Truth commissions, in theory, can also encourage a culture that respects human rights, including women’s rights, and promote social reconciliation.

Gendering truth commissions, like other mechanisms of transitional justice, is complicated by the cultural and normative environments of transitioning societies where women’s voices are traditionally excluded or undervalued. This, however, does not mean that women do not want to participate in truth commissions, and it is important to make a distinction between equal gender access to truth commissions, willingness of witnesses to testify, and the willingness of a commission to listen to or value gendered perspectives of conflict and peacemaking. Furthermore, the way in which preconceived notions shape the kinds of testimonies collected from women versus men in truth commissions can distort the experiences of both genders. For example, a survey of truth commissions from around the world in the last 20 years reveals a propensity to concentrate almost exclusively on sexual violence experienced by female witnesses, as though that were their only form of suffering or that women’s identities are limited to their sexualized bodies, in contrast with a reluctance to give men who are victims of sexual violence the same due process (Dal Secco in Pankhurst, 2012; Gardam and Charlesworth, 2000). The negative effects of these trends are twofold: they are detrimental to the sense of self-worth and healing process for those directly participating in a truth commission and at the same time, underestimate

the agency of women as contributors to political struggle and their capabilities as agents of change, as well as the suffering experienced by men who may identify as both victims and victors.

Women constitute half the population of any society and, as such, their participation in truth-seeking and truth-telling processes is essential to creating an accurate record of conflict, human rights violations, and, in general, history. When women are excluded from truth commissions or they are strikingly underrepresented, this undermines the most basic function of the process: to establish a more truthful, participatory, collective record of a people's experiences. Most truth-telling engaging women, and scholarship surrounding it, has focused on victimhood, recounting of harms suffered, experiences of bodily harm – in particular sexual violence – and loss of loved ones. However, even as victims, women can experience suffering and loss in various forms, including the loss of shelter, forced displacement, loss of income, loss of opportunities, loss of health, and others. At the same time, women's experiences in conflict – as scholars and practitioners increasingly acknowledge – are not only as victims. Women can be spoilers of conflict, perpetrators of violence, agents of peace, combatants, and play a multitude of other roles. Therefore, when advocating for women's presence in truth commissions, it is important to not only ensure a balanced gender ratio but also an accurate representation of both men and women's experiences, as victims, perpetrators, and other stakeholders.

6

The Truth, Justice, and Reconciliation Commission of Kenya: A Well-Intentioned “Gender Policy” Threatened by Structural, Cultural, and Political Challenges



Abstract: Contested presidential elections in 2007 triggered mass violence throughout Kenya, resulting in a national crisis. When a political settlement was brokered through international mediation, a national dialogue led to the establishment of the Truth, Justice and Reconciliation Commission of Kenya. Genuine efforts were made to be gender-sensitive, to ensure gender balance, to encourage the participation of women, and to provide redress to women and men based on their experiences and suffering. However, the TJRC was plagued by controversy from the outset and, as this chapter demonstrates, the robust set of recommendations provided by the Commission to promote gender equality, redress for sexual and gender-based crimes, and the increased political participation of women remain unrealized because of a shortage of political will and resources.

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A former colony of the British Empire, the Republic of Kenya was established in 1963. In the almost 50 years since independence, Kenya has been governed by only 4 different presidents and hosted the first multiparty elections as recently as 1993. To outside observers, Kenya may have seemed like a beacon of stability and prosperity in an otherwise volatile region. In reality, however, the political history of Kenya is punctuated with violent conflict, saturated with ethnic tensions, and characterized by extensive corruption at the highest level of government. Leah Kimathi asserts that, “the postcolonial state refined and sharpened the art of oppression and control bequeathed by the colonial state” (2010: 12). The political elite, through creative and obtrusive maneuvers, also worked to consolidate power in the hands of a few individuals, rehashing the Kenyan Constitution almost three dozen times toward this purpose. Human rights abuses against citizens were common throughout the murky political history of the country, many committed based on tribal affiliations. In the 1990s, when multiparty elections were held, ethnic cleavages continued to form the basis of political mobilizations and shaped the allocation of budgetary resources as well as the country’s judicial functions. Consequently, “while there was an expanded democratic space for the citizenry, it did not translate into a more egalitarian state” (Kimathi, 2010: 12).

Political instability in Kenya reached a climax point in late 2007, when mass violence was triggered by contested elections. The incumbent President Mwai Kibaki was declared the winner amidst widespread accusations of ballot tampering and corruption by a large portion of citizens as well as his main opponent, Raila Odinga. What followed the end-of-year elections was a month-long descent into violent chaos throughout the country and the heavy damages were not only in human lives but also destroyed infrastructure, pervasive fear, inter-group mistrust, and general disenchantment with the political establishment (Mueller, 2011). Violence perpetrated largely along ethnic cleavages resulted in the death of more than 1,000 people while as many as 1 million were displaced, hundreds of women were raped, and Human Rights Watch (2008) accused the police of employing a “shoot to kill” approach. In addition, there was mass property damage suffered by small business owners and rural farmers alike because of looting, banditry, and vandalism. Both political camps accused the other of perpetrating ethnic cleansing. The political conflict was only resolved after internationally mediated negotiations, led by former UN Secretary General Kofi Annan, to a power

sharing agreement that manifested in a new government of national unity comprising the incumbent Kibaki as president and Odinga as prime minister (Kimathi, 2013).

The broad and ambitious mandate of the TJRC

The Truth, Justice and Reconciliation Commission was established in late 2008 through the Truth, Justice and Reconciliation Act, which emerged out of the national dialogue process and was stipulated in *Agenda Four* of the National Accord. Although the post-election violence galvanized the establishment of the Commission, which civil society organizations and members of the public encouraged, the mandate reached well into the country's history. Unlike the International Criminal Court's initiative on Kenya, which brought charges against a group of prominent politicians, the TJRC was a locally driven process that – in theory – would help repair the broken social fabric, promote national unity and political reconciliation. The goals of the TJRC were as follows:

[T]o investigate, analyze, and report upon all of the following that occurred between 12 December 1963 and 28 February 2008:

- ▶ Gross violations and abuses of human rights including abductions, disappearances, detentions, torture, sexual violations, murder, extrajudicial, killings, ill-treatment and expropriation of, property;
- ▶ Economic crimes including grand, corruption and exploitation of natural or public resources;
- ▶ The irregular and illegal acquisition of public land;
- ▶ The marginalization of communities;
- ▶ Ethnic violence and tensions; crimes of a sexual nature against female victims;
- ▶ Investigate the context in which and causes and circumstances under which the violations and abuses occurred;
- ▶ Inquire into, investigate and provide redress in respect of;
- ▶ Educate and engage the public on issues around its work. (TJRC Act No. 6, 2008)

As is sufficiently clear from the list, the mandate was very ambitious in its scope. According to one individual¹ who was interviewed for this study on the condition of anonymity, “[the mandate] was hurriedly

constructed in an atmosphere of extreme pressure with Kenya literally burning in the wake of the 2007–2008 electoral violence.” But the mandate’s breadth is only one of the many challenges that the TJRC faced. The TJRC was given limited resources by parliament to fulfill its functions and designated a two-year period within which to complete its work and deliver a final report. This proved to be impossible, unsurprisingly, and so an extension was requested and granted. During its lifespan, the TJRC collected 42,465 statements and 1,828 memoranda from Kenyans, and conducted public hearings all over the country (Kenya Transitional Justice Network, 2013). Eventually, the final report of the TJRC, which is a comprehensive set of documents detailing the Commission’s work, findings, and recommendations, was released in May 2013.

There were multiple controversies related to the leadership of the Commission, the extent of public access and participation, and difficult circumstances within which staff had to operate. The most notable controversy surrounded the Chairperson of the Commission, Ambassador Bethuel Kiplagat, who implicated in certain historical conflicts that resulted in mass human rights violations against citizens, including the 1984 Wagalla Massacre (*Daily Nation*, 2013). Ambassador Kiplagat denied any wrongdoing and claimed that he was not responsible for any state-perpetrated abuses. Despite widespread calls for his resignation and public outcry related to his appointment, Ambassador Kiplagat refused to relinquish his chairmanship. This controversy seriously damaged the public’s trust in the Commission and created problems within the institution, including the resignation, in protest, of Commissioner Betty Murungi. Eventually, Ambassador Kiplagat stepped aside and Tecla Wanjala became Acting Chairperson. The government, however, failed to replace Betty Murungi. Therefore, for the remainder of the Commission’s lifespan, only seven commissioners remained active and presided over the functions. According to Kimathi, members of the Commission “should have been selected through a process of consultation, including public input” to ensure diversity, competency, and a “known record and ability to act independently” (2010: 28). In short, deep structural, cultural, and political challenges afflicted the TJRC from the outset and threatened to derail its mission. There were times when it was unclear whether the office would be open or whether staff would be paid their salaries (Jane Smith personal communication, 2013).

Gender dimensions of the TJRC's design and implementation

Gender-related issues were present in the mandate of the TJRC and surfaced frequently throughout the proceedings. All of the objectives of the mandate have gender dimensions to them but the most prominently gendered section of the mandate was the one focused on crimes of a sexual nature, especially against female victims. The Commission made a deliberate effort to be gender-sensitive in its approach by establishing a "Gender Policy" that "enjoined the Commissioners and staff to mainstream gender in all operational undertakings" (*Volume IIc*, 2013: 6). For example, from the topmost level of the institutional structure to the junior staff, there was an effort to have equal – or as close to equal – numbers of men and women. This was evident in the appointment of commissioners, the recruitment of researchers, investigators, legal professionals, and grassroots statement takers.

The visibility of women was important not only because it set an example to the public that men and women could work alongside each other and that both could lead but also because gender balance was intended to be inclusive, diverse, and representative of the country's demographics. Some 132 of 304 – or, roughly, one-third – of the statement takers recruited by the Commission were women because the TJRC wanted to inspire confidence in both men and women to offer their testimonies and have their stories heard (*Volume IIc*, 2013: 7). Especially in the conservative Muslim areas, such as Northeastern Province, women were much more likely to speak with other women about their hardships and needs. Nevertheless, all statement takers – men and women – were trained about gender-sensitivity, addressing sexual violence, and how to anticipate different responses or expectations of men and women. Statement takers were also trained to ask men about the experiences of their wives and female family members in order to facilitate empathy between individuals and sow gender-sensitivity into the consciousness of men about the experiences of female counterparts. Furthermore, women witnesses were asked explicitly about their own experiences so as to ensure that their testimonies were not exclusively focused on the suffering of loved ones. This was a strategic attempt to investigate and demonstrate how women were not only secondary victims of conflict, political upheaval, and systematic marginalization but also primary, or direct, victims, too.

There are multiple explanations as to why women who speak in front of truth commissions choose to focus on the suffering loss of their loved ones, especially their husbands and children. One possible trend that has been recorded in multiple cases is that speaking about others can be easier for women than to speak of their own suffering (TJRC Kenya, 2013). This harkens back to the social stigma, fear of abandonment, and general lack of safety associated with women publicly disclosing the status and nature of their victimhood, especially on instances of sexual violence. Another possible explanation that has been identified by researchers is that it is a calculative choice to re-shift the focus on common suffering and bridge the divisions between different groups through empathy. Kimathi's research found that women were particularly "open to forgiveness and reconciliation, but usually because they felt helpless and overwhelmed by their current situation" (2010: 19). And yet, the power dynamics, which manifested along gender lines and aligned with the patriarchal nature of communities, affected the likelihood and pace of reconciliation. Kimathi argues that commitment to reconciliation at the community level was, "a process driven by male elders as opposed to women and youth" and women were perceived as being, "mere recipients of conflict or peace" who were "never consulted when men undertook critical communal decisions with regard to waging war" (2010: 19).

In addition to the visibility and presence of women alongside men, there were special provisions to ensure gender-sensitivity in both the proceedings of the TJRC as well as the engagement of members of the public with the Commission. Four main components comprised the implementation phase of the mandate. These included: civic education and outreach to the public, statement-taking, collection of memoranda and other materials from representatives in different affected communities, and hearings. Each of these goals had aspects of gender-sensitivity built into them. For example, there were three types of hearings that were conducted: (1) individual hearings that featured individual testimonies of victims, witnesses, and alleged perpetrators; (2) women's hearings specifically for women, attended by women, and conducted by women, and (3) thematic hearings that were devoted to particular types of violations because of their prevalence or seriousness (Kenya Transitional Justice Network, 2013: 3). Women's hearings took place in every location that the TJRC traveled to and special hearings were dedicated to issues that were open to men and women but that were expected to be overwhelmingly more sought after by women, such as sexual violations. More than 1,100 statements were

submitted by adults on the topic of sexual violence and, of these, 103 were from men. Altogether, the statements and memoranda represented some 2,646 women and 346 men (Kenya Transitional Justice Network, 2013: 13). The Commission received numerous reports on sexual violence including mass rapes, gang rapes, sodomy, mutilation, mutilation of genitals of both men and women, defilement, sexual torture, and slavery (Kenya Transitional Justice Network, 2013: 13).

The TJRC established a Special Support Unit and Gender Violence Recovery Centre. Whereas the former, headed by Nancy Kanyago, was created by the TJRC as an in-house tool for counseling and psychological support to men and women who appear before the Commission or work on behalf of the Commission, the latter is an arm of the Nairobi Women's Hospital that is dedicated to treating victims of sexual and gender-based violence. The TJRC forged a partnership with Nairobi Women's Hospital for trauma consultation and patient referrals and even included a provision for collecting testimony from victims, survivors, and witnesses of gender-based violence and sexual crimes via private "on camera" procedures in order to protect individuals and respect their level of comfort. This option was made available to men, women, and children who were unwilling or unable to appear publicly to testify in front of commissioners (Kanyago, 2011: 2 ; TJRC, February 2, 2012). "The thousands of statements received by the Commission revealed that the experiences of victims were inextricably linked to gender. From torture to mass killings to detention to economic crimes, gender featured prominently in both victim and perpetrator narratives." These types of measures led to an elevated awareness of the importance and centrality of gender mainstreaming and women's participation in the operations of the TJRC.

The TJRC reaffirmed what had been, for most people, common knowledge throughout Kenya's history: women occupy a subordinate position to men in society and gender-based injustices are not only expansive but also multifaceted. The findings in the final report of the TJRC argue that, "in sum, the story of Kenyan women is sad, shameful and heart-breaking" (*Volume IIc*, 2013: 2). Women's experiences and struggles have been largely relegated from public consciousness and official accounts of history. The challenges faced by Kenyan women during and long before the post-2007 election violence have direct, structural, and cultural dimensions. These intersect with economic, ethnic, religious, and geographic aspects of their identity, too. And yet, at the same time,

the proceedings of the Commission helped to highlight the many roles that women have played as active members of their community during periods of conflict and violent upheaval as well as during more stable periods in the country's history as agents of peace, security, stability, and prosperity. These positively impactful roles of many Kenyan women, their resilience through the suffering, and the fact that – throughout history – they have constituted more than half of the country's population, are often overlooked or intentionally neglected to maintain the social hierarchy.

The TJRC's final report shows how, “[Women] are involved in bringing peace and reconciliation in their communities. They are reconstructing lives through their own self-initiatives, they are rebuilding trusts. Many have been part of the struggle for justice in this country, risking their lives in the process” (*Volume IIc*, 2013: 3). This is in direct contradiction to the Kenyan Constitution, which in theory, guarantees equal rights and protection to all citizens and, also, to the membership of Kenya to the international community, whereby it is a state party to certain international conventions and treaties, including but not limited to: CEDAW, The Maputo Protocol, and the ICGLR Protocol on the Prevention and Suppression of Sexual Violence against Women and Children.² In other words, as is the case throughout much of the world, the distance between what the State is committed in theory and in practice is troublingly vast. The institutions to ensure the implementation of these principles of equality are weak, the political leadership to improve the practice is lacking, and the sociocultural atmosphere of the nation is not conducive to equality in reality, irrespective of what is agreed on paper.

One woman who testified in Kitui posed to the commissioners:

Is it a crime to be born a woman? What I have gone through is likely to affect my daughter. Will there be justice for women and the girl child in [Kenya]? That is my biggest concern. (TJRC Women's Hearings: December 2, 2011)

Another woman, in Bungoma, spoke of her gratitude and appreciation for the opportunity to testify:

There are many issues about us that are violated and we do not have space and time to talk about them. We appreciate this moment because we are all women and it is good for us to speak about our issues. It is one way of getting healed. (TJRC Women's Hearings: July 9, 2012)

Jane Smith remembers that the women-specific hearings were useful for not only witnesses and survivors seeking redress but also TJRC staff and the public: Jane Smith remembers how the women's hearings, "brought to the fore women and [in doing so] important stories overlooked by the preparation teams." She recalls how the hearings – including but not limited to those specifically for women – revealed that, "Kenyan women are deeply traumatized by a long history of violence and violations. They have been ignored. They have received no redress of any kind." Many of the women who testified or submitted statements also displayed angst and mixed emotions in regards to the TJRC because, in their eyes, it was an apparatus of the very state institutions that had oppressed them for so long (Jane Smith, 2013). As a result, the women's hearings became an important tool for the research and fact-finding goals of the TJRC.

Recommendations of the TJRC provided to the Government of Kenya and the shortcomings in achieving gender justice

The final report of the TJRC provided a set of recommendations related to sexual violence crimes based on the information gathered by the Commission. These seven recommendations included: (1) symbolic gestures, such as a public and unconditional apology to be offered by the President of Kenya on behalf of the state to all victims throughout history; (2) material reparations, including compensation from the British government to those abused in Samburu and Laikipia; (3) improvement of the historical record through further fact-finding; (4) prosecution of certain known perpetrators; and (5) legal or political reforms to institutionalize better practices and mechanisms to prevent sexual violent and prevent its recurrence (TJRC Final Report Volume IIa, 2013). Although the recommendations are broad reaching and comprehensive in their attempt to provide different types of direct or indirect redress, the mechanisms for ensuring their implementation is weak. Of the seven recommendations provided, only three had a timeline attached to them in the TJRC report. Moreover, the first of the recommendations, which was the acknowledgment of violations and the issuance of an unconditional apology by the President within three months of the report's release, has yet to be realized. There is a clear lack of political commitment to the TJRC at the highest levels of government and the failure of authorities

to stick to the TJRC's recommended timeline does little to buttress the credibility of the Commission in the eyes of the Kenyan public.

In addition to the recommendations generated by thematic hearings, statements, and memoranda on sexual violence, the women's hearings also shed important insight on gender-based injustices that are prevalent throughout Kenyan history. These manifest in the political, economic, legal, and social spheres. Key findings of the TJRC, as documented in Volume IIc of the final report (2103), include evidence that women have been subjected to various types of gender-based persecution related to rights of widows, property rights, inheritance rights, sexual violence (during and after conflict), boy-child preference, child marriage, female genital mutilation, and systematic discrimination in professional and public sectors. The economic consequences of this type of marginalization and discrimination are multifold; they not only impact women and their ability to progress but they also affect societies at large and hurt Kenya's economic growth and political stability. Moreover, the report highlights a telling trend: the underrepresentation of women in the decision-making processes related to statebuilding, including related to peace and security issues. Women have, historically, been politically excluded.

A hearing in Bungoma served as an example of the attitude toward women's political participation that was prevalent throughout different parts of the country in different tribal communities:

With regard to leadership, women are being discriminated because they are considered children...If there is a seat being vied for, the one we can get is the position of Treasurer because they know women can take care of property. The men take the decision-making positions. (TJRC Women's Hearing: July 9, 2011)

Women who have sought elected office or other positions of authority that would allow them to shape decision-making related to governance, at the most local and national levels, have faced challenges beyond cultural norms. Inadequate professional training opportunities and the inability to mount a solid campaign because of lack of resources have also contributed heavily to the marginalization of women and their political representation. This is especially true in rural areas but urban populations are also not immune to such problems. The TJRC found that in some places, women who spoke up and strived for leadership positions were threatened with violence or their families became the subject of ridicule (*Volume IIc*, 2013: 81).

The Commission also found that women were targets of certain types of violence, including but not limited to sexual violence, and that the public humiliation of women has been used as a tactic of warfare and the societal breakdown between different groups. Evidence from the Mau Mau war, the Mt Elgon conflict and the 2007–2008 post-election violence demonstrate that the women have not only been primary victims during times of war and political upheaval but they have also been targeted based on their gender and their social roles (Kenya Transitional Justice Network, 2013). As has been long noted by scholars in the field of women, peace, and security, official peace processes – at the national and sub-national levels – have also marginalized women even though women are known to have made “positive contributions at the informal level” (Kenya Transitional Justice Network, 2013: 20). In other words, although women have participated in and led Track II peace processes, their ability to integrate into Track I processes has been barred by structural and cultural barriers. To overcome this marginalization, cross-sectoral cooperation will be necessary and the government will need to work with civil society organizations for not only the advancement of gender equality but for the peace, security and stability of Kenya at large.

Based on the women’s hearings and the investigations that surrounded them that yielded evidence in person, on-camera, and through written statements, the TJRC report produced a set of six recommendations. Like the recommendations related to sexual violence, these include symbolic gestures, further fact-finding, civic engagement and public education, legal reform, and reparations (in the form of social services). Five of these had timelines associated with them but the State has yet to demonstrate a substantive commitment to adhere to the recommendations or the suggested timeline. Any kind of legal action recommended by the TJRC is part of much-needed security sector reform in a country where the army has a notorious reputation for abuse of power and the police have been implicated in staggering corruption scandals. Reparative justice is a crucial component of the restorative justice goals held by the TJRC and reflected in the recommendations of the final report, including calls for providing material and symbolic reparations. The report acknowledges that reparations can be a means to provide redress for men and women, including persons who may not want to engage the truth-seeking process but nonetheless deserve benefits to remedy for harms suffered (2013).

Although the TJRC final report provides a robust set of recommendations on critical issues covered by the proceedings and in

accordance with the goals set out in the Commission's establishing Act, the prospects of transformative change are questionable. There is an atmosphere of political apathy and even dismissiveness amongst many government officials toward the TJRC's findings and recommendations. And yet, without the political leadership of elected representatives, the Commission's recommendations will remain unfulfilled. On December 6, 2013, Kenyan parliamentarians passed a law that, in effect, will allow members of the parliament to scrutinize and alter the findings of the TJRC report. Moreover, in a highly politicized debate and through crafty political maneuvers, parliamentarians rejected an amendment to the TJRC Act that would have protected post-release interference with the report by government officials. The risk of changes to the context, form, and substance of the TJRC report could further undermine credibility of the Commission in the eyes of the public and also hurt the legitimacy of the government officials who may try to challenge conclusions or recommendations for personal reasons. This unfortunate aftermath of the TJRC demonstrates that political will and the commitment of leaders to a transitional justice institution is not only necessary for initiating such a process but doubly essential for the implementation of recommendations that emerge. This phase of the transitional justice process is – ultimately what can make a difference in the lives of people and holds transformative potential for the future. It is also salient to the rectifying of historical crimes and injustices, including but not limited to those related to gender inequality.

Despite the good intentions and thoughtfulness that went into the design of the aforementioned aspects of the TJRC, it was still limited by structural, political, cultural, and financial constrictions. The TJRC was “hampered by ambiguous and limited definitions of concepts³ like compensation, restitution, gender-based injustices, perpetrators and economic and international crimes” (Kimathi, 2010: 25). Implementation flaws and short-sightedness threatened the effectiveness of some of the gender-sensitivity measures that the TJRC had sought to institutionalize. For example, the gender-sensitivity training provided to TJRC staff was only a day long and thus, statement takers “may not have been adequately equipped with skills and knowledge” necessary for filling the deficit between the different needs of men and women who appeared in front of the Commission (Kanyago, 2011: 2–3). At the same time, not all of those who were part of the TJRC found the special gender-related provisions to be useful or appropriate. Jane Smith admits, however, that

not all who worked at the TJRC were pleased with the women's hearings, complaining that they were "unstructured," "unhelpful," "poorly organize[d]," and "something of an afterthought."

Another deep-rooted issue that impedes gender justice achieved through the TJRC process is the traditional patriarchal nature of Kenyan society. The Federation of Women Lawyers (FIDA) in Kenya, a local civil society research and advocacy group like the Women's Caucus, which lobbied for the introduction of a gendered perspective in the Rome Statute, identifies the normalization and propensity to condone gender-based violence that preceded the post-election violence and was heightened in its aftermath (2010). Raw data collected through surveys by FIDA suggest that many women are not only unaware of their constitutional rights but also that men discount the applicability to women of the same rights endowed to both genders by the country's constitution (FIDA, 2010: 7). This problem relating to lack of knowledge and understanding of rights and responsibilities amongst citizens, especially the illiterate or rural residents, partly explains the normative culture that supports gender-based violence and the exclusion of gender analysis in transitional justice. Understanding the standpoints of men and women is imperative to transitional justice and can help to reveal how misinformation is perpetuated and how misconceptions are sustained, which is a prerequisite to building more equitable gender relations.

Moreover, the valuable contributions of women to their families as well as to the country often go unacknowledged or unnoticed. This fact is part of the continuum of violence that extends beyond the conflict phase and carries on into that which is considered a new peace (Kamau, 2010: 9). As the final report notes, for many women in Kenya, the real suffering begins after a massacre or after a rape or other period of violence (TJRC, 2013). This can manifest as exclusion from their community, unprecedented economic hardships, bearing children of abusers, severe mental trauma, impaired physical health, and not least of all, caring for a family without external support. Women's access to transitional justice mechanisms is thwarted by a system not attuned to societal mores that place women behind men and a general pattern of low civic education.

Land dispossession was a pervasive issue throughout most of the hearings, whether as a result of conflict, political gerrymandering, natural disaster, or engrained poverty. Land dispossession was the symptom, effect, and cause of other forms of structural and direct violence. For women, unequal access to land, displacement, and inadequate protection

of rights to inheritance and property ownership doubled the injustices associated with land dispossession. The loss of safe shelter and of livelihoods is especially difficult for women, including those with dependents and those who are unmarried. These issues of land tenure insecurity and poverty are interwoven with a lack of access to legal representation, inability to exercise political voice, inadequate education, and limited social services including healthcare. As one observer by the name of Ms Subow explained, remembering the indiscriminate violence in Kiambaa, where the infamous Eldoret Church inferno took place on January 1, 2008, as well as the paramilitary offensive against civilians in Mt Elgon:

Reparation without justice won't have any impact, [especially when] women's bodies are used as weapons of war. They sell their bodies to fend for their families. Girls who were in school before are now getting pregnant within camps. Even when women are repatriated, conflicts do not end within them. (TJRC Hearings, February 8, 2012)

And yet, reparation, repatriation, and land reform – while recommended by the TJRC in its final report – is unlikely to become a reality in the near future, especially without innovative policymaking, newfound political will, and a comprehensive overhaul of governing apparatuses. At the same time, reparations programming should be done in consultation with civil society groups and should be designed in accordance with the Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation. The 2007 Declaration states that “reparations must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives”. The proof of the process's value to citizens will be in the implementation of reforms, restitution, rehabilitation, and morally responsible remembrance for past atrocities as well as a guarantee for non-repetition or impunity.

Notes

- 1 This individual was interviewed in December 2013 and will hereafter be referred to by the pseudonym Jane Smith.
- 2 CEDAW: The UN Convention on the Elimination of All Forms of Discrimination Against Women (1979); African Women's Protocol: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

Africa (2003); ICGLR Protocol: International Conference on the Great Lakes Region Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (2006).

- 3 For a full list of definitions for terms including “sex and gender,” “gender equality,” discrimination against women,” “traditional harmful practices,” and “violence against women,” please see *Volume IIc* of the TJRC Final Report (2013: 15–16).

Conclusion

Abstract: *Women and men experience political violence differently, peace is not absolute, and transitional justice is not guaranteed after conflict. As Villa-Vicencio (2011) asserts, transitional justice can be compared to walking a tightrope. A collectively undertaken exercise with public and individual repercussions, transitional justice grapples with the challenge of balancing truth, justice, and reconciliation – all while trying to strengthen a fragile peace. Ensuring gender-sensitivity in transitional justice, and – in doing so – ensuring the equal participation, representation, and inclusion of women and their experiences, is an intricate, multidimensional, and arduous process that requires stamina, political backing, local ownership, and mass participation. It is, however, an essential element for building democracy and transforming the lives of citizens who have endured extreme violence, human rights abuses, and political upheaval.*

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Some final thoughts on Bangladesh and Kenya

Trust in institutions, and in the leaders of institutions, is fundamental to ensuring reconciliations. Both case studies on Bangladesh and Kenya demonstrate the importance of public advocacy in the establishment of transitional justice institutions as well as the essentiality of public trust in maintaining the credibility of such a process. In both cases, the credibility of the respective transitional justice institutions was hurt by poor political leadership, inadequate political will, limited financial resources, diminished access to citizens, and deeply divisive political culture. The experiences of Bangladesh, Kenya, Rwanda, and Yugoslavia, which were referenced in this book, also highlight the need for benchmarks to measure success of the overall transitional justice institution, as well as gender-specific benchmarks. Implementing independent evaluations of an institution once its duration is complete is also essential and a means to assess the impact of the transitional justice exercise. Both case studies also show the need for greater and more strategic public participation, and simply the presence of members of the public as witnesses or givers of testimony. At the same time, in Bangladesh and in Kenya, the government ought to have done a better job of managing the public's expectations of the outcomes of the transitional justice processes, especially in relation to the quantity and expediency of reparations.

Whereas in Kenya there was a strategic attempt to implement a gender policy to respect the rights and needs of both men and women, there was no such plan or forethought in Bangladesh. In the implementation of the TJRC as well as the ICT, results were mixed and the redress offered to women was influenced by larger historical, structural, and political factors. Reconciliation seems far from a reality in Bangladesh, especially. If anything, the ICT has brought to the surface many deep-rooted, multidimensional political and social disputes. Bangladesh is at an important crossroads and the polarized political culture, especially between secularists and Islamists, has enormous implications for the future of all citizens but, in particular, women. In both Kenya and in Bangladesh, as with other societies that have experienced extreme sociopolitical disruption, reconciliation, although very difficult to achieve, is appealing because it points to not only the darkest side of humanity but also the brightest. In other words, reconciliation is, at once, a vehicle toward and a promise of transforming conflict into harmony, hate into love, and victimization into survival.

Promoting the presence, participation, and representation of women in transitional justice

If women are to be better represented in transitional justice initiatives, barriers to justice for women must be dismantled so that justice institutions are more inclusive, accessible, and capable. To this end, UNSCR 2122 (Article 10, 2013) “Stresses the need for continued efforts to address obstacles in women’s access to justice in conflict and post-conflict settings, including through gender-responsive legal, judicial and security sector reform and other mechanisms.” Nevertheless, it is not enough for women to participate only in transitional justice institutions. Women’s participation is important – not just based on principles of equality but also in furtherance of sustainable peace and stability – throughout all aspects of building and rebuilding a society and a state. Women’s participation, for example, in transitional justice institutions can help encourage the incorporation of their perspectives in other post-conflict processes including security sector reform, rule of law, good governance, delivery of basic services, allocation of national resources, etc. The more women participate, the clearer it becomes what difference they make and, at the same time, show that women are not a special interest group or a “niche” demographic. The increased participation of women in transitional justice processes, as well as other peace and security efforts, exposes the fact that women are not a monolithic, unified subset of any given population. Gender intersects with other socioeconomic cleavages and every individual’s perspective is shaped by multiple influences including, but not limited to, his or her gender.

Severe socioeconomic turbulence that results from political violence and war can loosen gender norms and, in doing so, create the opportunity for women to occupy public roles that defy gender stereotypes. However, this requires an enabling environment and transitional justice can play an important role in creating political, social, legal, and even economic conditions that are conducive to gender equality. At the very least, the introduction of a gendered perspective must be incorporated into the conceptualization of a transitional framework in order to better understand and illustrate the experiences of both men and women during times of violent conflict.

After all, what is gender equality? Is it simply a blanket assumption that both genders deserve equal treatment under the law and by the norms of the community to which they belong or is it more about a

mutual respect for the different aspects of each gender, an appreciation for the binding human ties and a struggle toward transforming unequal gender relations into more equitable forms? The challenge to introduce gender perspective, to practice gender mainstreaming, and to use gender analysis in transitional justice requires a holistic understanding of the shared and distinct experiences of men and women as victims, survivors, witnesses, perpetrators, lawmakers, policymakers, citizens, politicians, judges, and various other relevant social roles. Gender equality is not an abstract concept that only exists in the theories and postulations of academics nor is it an unrealistic mantra of feminist activists. Gender-based inequalities are lived realities and, accordingly, gender equality is a real-life goal.

There is a need to sustain a level of gender-sensitivity through the duration of a transitional justice exercise that reflects the reality of each transitioning context, including cultural, historical, political, and economic realities. Human rights violations, which are at the center of transitional justice institutions, are perpetrated along all these lines of identity and therefore cannot be divorced from the socially constructed gender roles assigned to and assumed by men and women. Retributive or corrective mechanisms for transitional justice, on their own, rarely suffice in offering redress to victims and facilitating collective, as well as individual, healing for a transitioning society. At the same time, in some contexts, restorative or reparative mechanisms may not quest the thirst for accountability of crimes and serving justice through proportional punitive measures. In both restorative and retributive institutions, however, special attention is required for achieving gender justice and this is, ultimately, about transforming gender relations in a society in a way that not only offers redress for the past but also prepares for the future and transforms the present.

At the same time, the value of gender-sensitivity in conflict resolution and in particular within the realm of transitional justice is not limited to its applicability for providing redress to victims of gross human rights violations and historical structural violence. Introducing a gendered perspective facilitates a more comprehensive understanding of why a type of violence was committed, against whom, and what place that kind of violence holds in the psyche of perpetrators as well as the normative culture of the society in question. Problematizing the issue is a first step, or a diagnosis, which creates the need for a solution to the problem and is not the solution itself. It is the institutionalization of gender-sensitive

principles that breaks the cycle of discrimination against persons based on their gender and the widespread negligence of such discrimination.

Architects and implementers of transitional justice institutions – irrespective of their forms – have a responsibility to incorporate the voices of both men and women in discourse and programming, creating gender balance in representation of decision-making roles, and understanding needs, positions, and interests with a gender-sensitive lens. The implications of this responsibility are multifold: they are not just a question of morality or fairness, although that is at the very core of justice altogether, but also about being strategic, benefiting all members of society, and strengthening humanity. Transitioning societies must recognize that negligence of or discrimination against half the population results in unattended old wounds, further exacerbating broken social relationships between people and between the government and citizens, as well as a severe loss in individual and collective potential to contribute to the rebuilding process. Page, Garlo and Speare (2010: 1) note that although measuring the impact of women in transitional justice is difficult, the following holds true:

Women link official processes to communities and often provide information about crimes. They have knowledge of the distinct, complex violations of rights women suffer that can significantly inform truth commission mandates, judicial opinions, reparations schemes, and proposals for policy reform. Temporary courts and commissions function better when women are included throughout. Witnesses speak more freely to female judges. Male defense attorneys speak more respectfully to female witnesses. When a female judge presides, courts are more gender sensitive and provide more sophisticated witness protection. Moving women to actively participate in consolidating peace ensures that their voices, concerns, and needs are recognized and addressed. (Page, Garlo and Speare, 2010: 1)

There is a dual benefit in terms of alleviating the impact of armed conflict and human rights violations on women as well as augmenting the impact of women on the transitional nation building, statebuilding, peacebuilding, and rebuilding processes. The purpose and potential of creating the space for a gendered analysis of transitional justice context, including the ones covered in this study, broadens what constitutes justice and for whom.

Gender mainstreaming in transitional justice is part and parcel of elevating the presence of women within its processes. This necessitates ensuring that transitional justice initiatives do not re-victimize women

and that they also move beyond a singular focus on sexual violence. The field of women, peace, and security, and in particular the principles enshrined in UNSCR 1325 offer an important framework through which transitional justice can help to empower women who have survived human rights abuses and injustice. A cohesive approach to protecting human rights, upholding justice, and enforcing equality is needed for women in periods of transition, especially in the post-cease fire moment, as well as for societies faced with political deadlock, poverty, social stratification, and inter-group conflicts. Moreover, the transformative effect of incorporating a gender-sensitive lens and sustaining a gendered analysis extends beyond just women, despite the primary focus of this book on women as a subset of gender. And, as the examples in the book highlighted, the prospective beneficiaries of a more gender-sensitive approach to transitional justice extend beyond women and include other marginalized groups including the youth, the elderly, the disabled, and ethnic or religious minorities. In other words, there is a communal value to gendering transitional justice.

A call for more thoughtful, applied feminist scholarship on transitional justice

Quantifying the impact of gendered perspectives in transitional justice and conflict transformation is difficult. Quantitative data are scarce and qualitative data are limited primarily to anecdotes recounted to journalists or researchers, oral histories and official records of courts, commissions, or other local and international institutions. This book is a contribution to the field and covers some of the key debates, tensions, and challenges that impede meaningful progress in both theory and practice. The case studies on Bangladesh and Kenya offer new research and insight into two current, and vastly different, experiences of transitional justice, with varying track records on integrating women into the processes of each country. At the same time, it is an important complement to other feminist transitional justice scholarship. This book, however, does not try to, nor can it cover all the diverse issues related to gendering transitional justice.

Although this book has focused predominantly on the roles and experiences of women in transitional justice institutions, it is important to note that more nuanced gender analyses are required – at large – in order

to better understand the experiences of men *and* women, boys *and* girls. Research, scholarship, dialogue, and growing experience – combined with the momentum generated by the 1995 UN Fourth World Conference on Women and the passage of UN Security Council Resolution 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 2106 (2013), and 2122 (2013) – have begun to deconstruct the false notion that women are perpetually and singularly victims in conflict. Alongside this development, scholarship is also beginning to look more critically at masculinity, the roles of men in preventing and resolving conflict, and male-centered social norms and structures that help to perpetuate gender-based injustice and inequality. Although much progress has been made, there is far more left to understand, implement, and evaluate when it comes to gender mainstreaming in transitional justice, and peace and security efforts more generally.

Advancing gender justice will also require cross-sectoral cooperation, between experts in different fields – from law to politics to economics – and between theorists, policymakers, and on-the-ground practitioners. At the same time, it is important for researchers to reflect on their own work and ensure that the questions that they ask are appropriate, their findings are accurate, their recommendations are practicable, and that – ultimately – their work does more good than harm. This is true for any applied research but, in the field of transitional justice, it is extremely important because peace, security, and the wellbeing of people are at stake.

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