GENDER MAINSTREAMING IN TRANSITIONAL JUSTICE:
PROGRESS AND PERSISTENT CHALLENGES IN
RETRIBUTIVE AND RESTORATIVE PROCESSES

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By

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The urgency of gendering transitional justice, and indeed larger peacebuilding exercises, cannot be overstated. How does the introduction of gender perspectives in transitional justice shape the status of women in a transitioning society? And how can gender sensitivity be mainstreamed into retributive or restorative mechanisms? These are the two central questions addressed in this study, which applies feminist standpoint epistemology to analyze transitional justice. I consider transitional justice experiences in Yugoslavia, Rwanda, Bangladesh, South Africa and Kenya, using the gender dimensions of each for illustrative purposes to substantiate my argument. I argue that gendering transitional justice is imperative to fulfilling the functions of transitional justice, not least that of facilitating a transition from conflict to sustainable peace, and as such must be approached from a new direction: one that moves away from gender neutrality, or worse- gender based discrimination, and instead towards gender sensitivity. I interpret gender justice as the idea that men and women deserve equal protection and equal redress and that any redress should be based on their experiences in conflict and their needs in transitioning from conflict to peace. Considering the under-researched nature of gender issues in transitional justice, the analysis and discussion in this study offers descriptive, normative and prescriptive value to the theoretical and practical efforts of improving transitional justice institutions and elevating the status of women in post-conflict societies.
DEDICATION

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The research and writing of this thesis is dedicated to women peacemakers everywhere, who fight against the odds and whose struggle is invaluable (even if at times unacknowledged), and to my parents, Masud and Shahina, for everything.

In peace,

MAYESHA ALAM
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I. Introduction

“There is no agony like bearing an untold story inside of you.” – Maya Angelou

How a state interacts with its past creates the very foundation upon which it builds its future. Where a country’s history, no matter how deep-rooted or recent, is characterized by gross human rights violations and historical injustices - transitional justice mechanisms can help to form new bonds between social groups and between citizens and the government. However, transitional justice has been plagued by an all too common problem throughout the practice of peacemaking, peacebuilding, conflict resolution and statebuilding: the exclusion of women’s voices and the resultant preference for male-centric approaches that uphold unequal gender relations. And yet, any transitional justice institution – irrespective of when and where – that does not recognize and adequately address this problem risks failing half the affected population, thereby undermining the fragile peace that opened the space for transition.

Research and scholarship can help shift the focus to a new direction: from the problem at hand to a workable solution. How does the introduction of gender perspectives in transitional justice shape the status of women in a transitioning society? And how can gender sensitivity be mainstreamed into retributive or restorative mechanisms? These are the two central questions addressed in this study, which applies feminist standpoint epistemology to analyze transitional justice.

I argue that gendering transitional justice is imperative to fulfilling the functions of transitional justice, not least that of facilitating a transition from conflict to sustainable peace, and as such must be approached from a new direction: one that moves away from gender neutrality, or worse- gender based discrimination, and instead towards gender sensitivity. This
distinction between gender neutrality and gender sensitivity in transitional justice, and larger human rights discourse and practice, is central to this study. Gender sensitivity in transitional justice requires gender mainstreaming in the theoretical framework of post-conflict transitions, design of institutions such as tribunals or truth commissions, and in the participatory implementation of processes such as truth-telling, compensation programming or punishment of perpetrators. Furthermore, I argue that 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 done, however, through an intention to transform gender relations, which requires gendered analysis throughout academic, legal, political and grassroots. Gendered analysis in transitional justice creates a path towards more equal gender relations by re-conceptualizing what is meant by victimhood, atrocity, inequality, redress and ultimately, even justice. Moreover, a gendered analysis requires greater participation, inclusion, representation and leadership by women in design and implementation of transitional justice mechanisms. In doing so, gender perspectives are brought to the forefront of transition and in this sense, gendering transitional justice is part and parcel of gender mainstreaming in other processes of conflict prevention, conflict resolution and post-conflict reconstruction.

Why this focus and why now?

My primary contribution to preexisting scholarship on transitional justice and gender mainstreaming in peacebuilding is to highlight how transitional justice can only be effective, and contribute to enduring peace, if gender perspectives are incorporated and gender sensitivity is present throughout the design and implementation of transitional justice initiatives. In doing so,
the focus of my research is situated at the intersection of scholarship on transitional justice and feminist international scholarship. Considering the under-researched nature of gender issues in transitional justice, the analysis and discussion in this study offers descriptive, normative and prescriptive value to the theoretical and practical efforts of improving transitional justice institutions and elevating the status of women in post-conflict societies.

The urgency of gendering transitional justice, and indeed larger peacebuilding exercises, cannot be overstated. Even in the 21st century, the underrepresentation of women and women’s voices from decision-making processes of peacemaking, peacebuilding and statebuilding is a pervasive issue. It is now widely accepted that when the needs and demands of half the population – i.e. that of women - in any post-conflict context are left unheard, or their contributions are left unacknowledged, a very heavy price is paid by not only them but also the whole population collectively. And yet, 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, despite commendable contributions by groups such as the Institute for Inclusive Security or UN Women (previously UNIFEM). Neither the academic community nor political leaders and lawmakers, fully understand the cost of excluding gender perspectives and gender analysis from transitional justice.

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. This study takes an important step in bridging the understanding gap by serving as a tool for research-based advocacy for gender mainstreaming in transitional justice. I focus on creating conditions conducive to gender equality, gender balance and gender justice in transitioning societies that attends to the conflict-related needs and experiences of both men and
women. The research and analysis of this project provides a thorough theoretical discussion of how and why gendering transitional justice has proven to be tricky, what are some of the persistent normative or institutional challenges and what leaps have been taken by thought leaders, judicial bodies and national governments to introduce a gender perspective in transitional justice. I combine 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 my argument. In particular, this study considers the gender dimensions of three retributive cases: the International Criminal Tribunals for Yugoslavia and the International Criminal Tribunal for Rwanda – both of which marked historical shifts in gender mainstreaming in transitional justice and set important legal and normative precedents, albeit with mixed success – as well as the currently in-progress International Crimes Tribunal in Bangladesh, which has attracted widespread criticism for failing to adhere to international legal standards. Furthermore, I explore how two restorative justice approaches, the Truth and Reconciliation Commission of South Africa and the Truth, Justice and Reconciliation Commission of Kenya, have worked towards greater gender sensitivity and with what effects. These cases also serve as a contrast to the processes centered on criminal prosecutions analyzed in this study. The paper, from here onwards, is organized as following:

**Chapter II.** Defining Key Terms and Concepts

**Chapter III.** Overview of Literature and Methodology

**Chapter IV.** Gendering International Law and Retributive Approaches to Transitional Justice

**Chapter V.** Gendering Restorative Approaches to Transitional Justice

**Chapter VI.** Concluding Thoughts and Comments
II. DEFINING KEY TERMS AND CONCEPTS

Before moving forward with the arguments and analysis presented in this study, it is crucial to first understand what is meant by some of the most important terms and concepts discussed herewith. Defining terms sets the theoretical and conceptual parameters for this study, which is especially important because the nexus of transitional justice and gender has been so understudied that confusion and conflation is common. In order to optimize the clarity of my argument as well as to limit the scope of my research, in this chapter I describe how transitional justice, conflict resolution, gender, gender mainstreaming, sexual violence and gender-based violence pertain to my argument and explain why I have chosen the following interpretations.

*Transitional Justice: Redress through Restoration and/or Retribution*

For states in transition, specifically those emerging out of periods of mass political violence and socioeconomic upheaval, undertaking transitional justice initiatives can have transformative powers on the state’s political institutions, economic viability and rule of law as well as individuals’ freedoms and national identity. And yet, there is no single, universally accepted definition of what constitutes transitional justice. The term ‘transitional justice’ was coined by Ruth Teitel and has gained prominence in scholarly and policymaking discourse on human rights since 2000 but in fact, the earliest model of transitional justice is the Nuremberg trials after World War II. (Olsen, Payne and Reiter, 2010, p. 9) There is, however, no universally agreed upon definition of what constitutes transitional justice, or even that such a term is useful and accurate. Some scholars argue that the label ‘transitional’ is unnecessary and even misleading because it distorts the essence of justice while others argue this label is what distinguishes, in concept and in practice, justice in the wake of
conflict from justice during times of peace and stability. (Bickford, 2004) For the purposes of this paper, I rely on the definition offered by the International Center on Transitional Justice

“[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 is, in my opinion, the strongest for making my argument on gendering transitional justice because of its acknowledgement of the political components of undertaking justice, the systematic nature of crimes, the inclusion of transitional justice into larger justice without detracting from the transformative function, and for making the definitional 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 to the wrongful act, the agent of the wrongful act and the sufferer of the wrongful act. Yet, unlike other forms of transitional justice, there are a few exceptional elements which include the extreme nature of the harm caused heightened by the larger sociopolitical context and collective suffering endured. Indeed, in transitional justice, not only are crimes almost always politicized but so too are the institutions and processes of transitional justice. Furthermore, transitional justice initiatives usually address the most egregious human rights abuses and thus is by nature selective in terms of what crimes are addressed, which perpetrators are held accountable and even which victims are offered redress. 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.

On one hand, 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. On the other hand, 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 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.” (2012, p. 2)

Anderlini, Conway and Kays 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.” (2004, p.1)

In doing so, the time dimension added by Anderlini and her colleagues – which some scholars and practitioners agree with while others do not – excludes processes such as the ongoing war crimes tribunal in Bangladesh, a case discussed later in this study because the transitional justice initiative began only some 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. I disagree with this
diagnosis because, in my opinion, transitional justice cannot be boxed into context-blind time frames. I acknowledge that there is certainly a question of ripeness for truth telling, for investigation, for healing, for reconciliation, for acknowledgement, for compensation and all the other possible purposes of transitional justice but my research suggests that each situation is different, the experiences of society – even still, each individual – are unique and while some societies rush into transitional justice, others wait a very long time, if at all, before beginning a collective process of accounting and redressing for the past. The merits of this question on timing are one that cannot be answered here, and for which there may be no answer.

Nevertheless, 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, as defined and discussed above, 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 resolution, as pertinent to this paper, refers to conflicts in international affairs that can arise between or within states, and which encompasses different stages of addressing conflict including conflict prevention or de-escalation, conflict management and conflict resolution or 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. Consequently, it is important to critique and develop transitional justice beyond legalistic approaches, as this study demonstrates, and especially by applying the lens of a conflict resolution practitioner and theorist.

Peace and security are two sides of the same coin but ‘security’ is hardly a monolithic concept that carries the same meaning in all states and for all people. Rather, security is a relative concept and what constitutes security can vary vastly. Increasingly, scholars and political leaders are acknowledging that a continuum of security exists. While a more conventional and realist outlook frames the concept of security in a state-centric manner, referring exclusively to the physical security secured through the norm of sovereignty and the accruement 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 also known as ‘human security’, is particularly relevant to transitional justice and the pursuit of gendering transitional justice processes.

Beyond merely the absence of war or armed conflict, transitional justice seeks to transform states and societies, which can only be doable with a broader perception of both security and peace. Indeed, there is a growing body of evidence that strongly indicates a reciprocal relationship between peace, individual security and state security. Keeping this in mind, peace – as pertaining to this paper, and in general for the field of conflict resolution, 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.
(Ramsbotham, Woodhouse and Miall, 2008, p. 36-38) 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 of 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. The question thus arises: 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, p. 169-170) All three forms proposed by Galtung are pertinent to gendering transitional justice because of the ways in which gender-based and sexual violence are perpetrated, they ways in which such violence is responded to and the ways in which national or international institutions address gender dimensions of gross human rights violations.

**Gender: Gender Mainstreaming, Gender Analysis and Gender Justice**

Women have, as noted by most scholars and practitioners alike, been systematically and historically excluded from decision-making processes in terms of the creation of war and the creation of peace. Within the realm of transitional justice, there has been significant theoretical and practical evolution since the Second World War but one problematic element has persisted: lagging, and in some cases completely lacking, gender mainstreaming and gender sensitivity.
Gendering transitional justice has begun to occupy a growing space in academic debates and political consciousness in the last twenty years but remains a largely peripheral consideration. 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 for example as with peace negotiations or building state apparatuses. Moreover, the experiences of women during violent conflict and sociopolitical upheaval, men share some of which but many of which are distinctly dissimilar, remain excluded from public discourse. Consequently, 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.

For the purposes of this paper, gendering transitional justice should be understood as the determination, acknowledgement and addressing of unequal gender perspectives. Gender, as a social construct, is the categorization that distinguishes men from women and through this categorization shape the roles, wellbeing and influence of each group’s members. Gender categories exist throughout all cultures and all societies of the world; it 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 which thereby makes the perspectives, actions and potential of women less than. (Buckley-Zistel and Stanley, 2012; Valji, 2009; Askin, 2003; Minow, 1998)

Mainstreaming gender should be interpreted as inclusion of men and women in different processes of transitional justice, acceptance of valuable contributions to initiatives irrespective of
gender-membership, and taking a head-on approach to challenges faced by both men and women. Gender mainstreaming should not be interpreted as an excuse to bundle gender-based violations into general categories of harms suffered, thereby rendering the whole concept of gender insignificant in the debate and exposing only an incomplete and distorted account of the country’s past. (Scanlon and Muddell, 2008, p.13) 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 acknowledgement 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.

In formulating my argument, I build upon the idea of gender justice, proposed by Valji, which is “the protection of human rights based on gender equality” (Valji, 2010; Ambos et al., 2009, p.217) While Valji’s contribution is invaluable to transitional justice scholarship and very pertinent to my own research, I go beyond her definition by tackling “gender justice” in new ways. In order to further inform the practice of transitional justice, I consider not only why gendering transitional justice, both theoretically and practically, has proven difficult but also what emerging trends are effective and how to expedite the goal of gender equality in transitional societies through varying and complementary processes.

Gender justice based on gender equality, as proposed by Valji, should not be conflated with gender-blindness in my opinion. Rather, I interpret gender justice as the idea that men and women deserve equal protection and equal redress and that any redress should be based on their
experiences in conflict and their needs in transitioning from conflict to peace. Gender equality, therefore, should not be equated with gender neutrality. This distinction is crucial to my argument but neither thought leaders, nor practitioners, have sufficiently accepted it. As such, misunderstandings of what constitutes gender justice, alongside what constitutes gender equality and gender neutrality, or gender blindness, contribute to inadequate redress. Some of these wrongful assumptions, which will be discussed in greater details in Chapters IV and V, 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-biased and gender-sensitivity lacking legal systems and transitional institutions.

Sexual Violence and Gender-Based Violence

Gendering transitional justice is inseparable from understanding, and adequately addressing, gender-based and sexual violence. From the outset, the distinction between the two must be acknowledged: gender-based violence and sexual violence are not one and the same. While all sexual violence, whether perpetrated against a man or perpetrated 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, while an overwhelming majority of women are victims of sexual violence men too can be sexually attacked. Furthermore, while
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 I will discuss in Chapter IV. And yet, there is almost universal consensus within the international community today that not only is sexual violence inexcusable and therefore should be punished but also that it is not inevitable. Rather, sexual violence can be used as a tactic in warfare and the perpetration of sexual violence is a very complex issue. 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. 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. Nevertheless, some 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. (Askin, 2003)

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 demeaning and dehumanizing in terms of his socially constructed gender role.

In understanding the relationship between gender-based violence and sexual violence within the realm of transitional justice, narrative framing is key. How both sexual violence and gender-based violence fit into international human rights law is addressed in Chapter IV of this study but in terms of the relationship between definitions and narratives, 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 are reduced to little more than passive subjects. Narrative framing such as this, while all too common, is in fact very problematic because it contributes the conflation of gender-based violence and sexual violence. Moreover, such narrative framing influences how gender dimensions are viewed, and addressed, in processes and institutions of transitional justice whereby patriarchy inherent in legal, political and cultural systems are reinforced, in turn fomenting unequal and misrepresentative gender relations.
III. Literature Review and Methodology

In this section, I review the work of some of the most relevant thought-leaders in order to situate my own research in the discipline of transitional justice. In doing so, I not only explicate how this study complements the work of my predecessors but I also highlight the methodological significance of my approach and, accordingly, the value added.

Overview of Existing Relevant Literature

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. For example, Sanam Anderlini, one of the world’s foremost experts on women, peace and war, published her seminal work *Women Building Peace: What They Do, Why it Matters* (2007) in which she claimed that women have always played an important role in peacemaking, albeit in unofficial or oftentimes unacknowledged capacities, through a series of case studies on women’s agency worldwide.

Similarly, the post-Cold War era brought forth a number of important changes in international human rights law, including the creation of the international criminal tribunals for Rwanda and Yugoslavia as well as the establishment of the International Criminal Court. These developments have shaped the practice and theory of transitional justice, in turn spurring greater
academic investigation relevant to this study. Bell and O'Rourke argue that feminism needs a theory of transitional justice and, therein, the focus should be on material reparations for women through transition rather than on imposing a particular feminist notion within transitional justice frameworks. (2007, p. 23) This application of feminist legal theory to transitional justice, which essentially combines legal scholarship with feminist standpoint epistemology, is further discussed in Chapter IV of my study while the use of material reparations for alleviating gender inequalities is explored in Chapter V.

Scholars have noted another complex trend in gendering transitional justice: that, “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.” (Valji, 2007, p.13) Consequently, there are severe consequences in the design and implementation of transitional justice mechanisms. Campbell 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, p.415) Orentlicher (2007), whose research is not exclusively on gender, argues in favor retribution and punishment, claiming that the foundations of the future are built on how the past is dealt with in the present. As such, letting egregious wrongs go unaccounted for, especially in courts of law, undermine not only the sustainability of peace or the potential for prosperity but also the international legal frameworks to uphold human rights that have taken decades to establish.

Copelon’s research suggests that the key to achieving greater gender equality in post-conflict societies is through an inclusive approach to rebuilding. She calls upon transitional justice to go beyond simply trying to right the wrongs of the past and instead, also improves “basic economic and political conditions” that buttress structural, cultural and direct violence
along gender lines. (Copelon, 2000, p. 236) Inclusivity, however, requires changing the systems that perpetuate inequality such as patriarchy. Hamber and Aolain's (2010; 2009) respective arguments for deconstructing the patriarchy and masculinity of internationalized transitional justice contribute to the understanding of both the language of international laws relating to transitional justice and the narratives that dominate decision-making on post-conflict justice, rebuilding, redress and reconciliation. The call for greater inclusivity has not gone unheard throughout the field of practitioners because there have been some recent progresses at both international and national levels such as the attention to gender in the Rome Statute or the creation of a Gender Violence Recovery Center as part of the Kenyan Truth, Justice and Reconciliation Commission. Nevertheless, Moshan argues achievements to date represent “only a partial victory,” especially in the sphere of retributive justice. (1998, p. 154). For example, although accountability for gender-motivated crimes was emphasized in the Rome Statute, the translation of international legal doctrines into actionable progress, in particular material or symbolic benefit for victims has been minimal due to a numerous reasons, including insufficient research and inconsistent political commitment.

Beyond gender dimensions of transitional justice, there are in fact many other complexities around how transitional justice initiatives impact a society, whether there are certain models that are more conducive to redress, reconciliation and reconstruction than others, and who are the winners – and losers – in transitioning societies. For example, de Greiff (2004; 2006), Rubio Marin (2009) and Villa-Vicencio (2010) have, in their individual research, criticized the gap in redress between solely retributive or solely reparative forms of transitional justice as well as the ways in which undertaking transitional justice can create newer political problems or further tear the already broken social fabric in post-conflict societies. These
questions are pertinent to gendering transitional justice and cannot be compartmentalized or simply set aside, without compromising the intended impact of transitional justice initiatives. Staying true to my research methodology, I examine some of these tensions and challenges to show how they relate to gendering transitional justice.

**Research Methodology**

To formulate the argument presented in this study, I employ a feminist perspective, and in doing so, address the challenges, shortcomings and potential for gendering transitional justice from feminist standpoint epistemology. Feminist international scholarship, since its emergence, has 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. While 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, combined Marxist theories on class warfare to the inequalities of women’s public and private experiences, gaining momentum in the 1960s. (de Beauvoir, 1949) It is important to note that as the ‘Second Wave’ spread throughout the world, and 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 twentieth 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, i.e. 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, p. 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, p. 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 et al., 2004) In doing so, according to feminist scholars, qualitative research – which is regarded as generally more inclusive and nuanced than quantitative research for studying social issues – is enriched.

As part of the qualitative approach to social science research, standpoint epistemology is a methodology in its own right founded on a core axiom: the world we live in is hierarchical, socially constructed and necessarily produces different standpoints along ethnic, racial, gendered, economic, political and other cleavages. People, effectively, have diverse and varying viewpoints of the world as a result of their experiences and these viewpoints can not only
become conflictual but are also, inherently, hierarchical and thereby reinforce social relations. Feminist standpoint epistemology centers on the position women occupy that is primarily colored by patriarchal legal, normative, political and cultural systems. According to some feminist standpoint theorists, “women’s vision is not only different but in fact more complete and less distorted because they occupy a position of oppression in which they must come to understand their own social position as well as that of the dominant group.” (Harstock, 1983 and Jaggar, 1989 cited in Hesse-Biber and Leavy, 2006, p. 29) While I do not delve into this assertion on whether or not women’s standpoints are more complete and less distorted, the feminist standpoint epistemology is valuable to research on transitional justice because it offers an alternative and more inclusive approach to understanding how greater gender sensitivity and gender mainstreaming can be secured in post-conflict and transitional settings to maximize human rights and justice.

Feminist standpoint epistemology 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. Burdened by conflict in complex ways, these non-dominant segments of a population include children, ethnic minorities, the elderly or the disabled. In doing so, feminist standpoint epistemology is about diversifying the perspectives that govern decision-making in post-conflict societies and also about creating greater equality based on experience, rather than socially constructed categories for separation. According to Ann Tickner, the value of feminist research agendas lie in “a distinctive methodological perspective” that moves away from andocentric tendencies or prevalent male biases that dominate political
governance and lawmaking, which are both interlinked with transitional justice. (2005, p. 3) My research suggests that therein lies the opportunity for intellectual, normative and practical transformation: by introducing gender perspectives into transitional justice, and thereby augmenting gender sensitivity, unequal gender relations, which are both symptomatic and conducive to conflict and human rights abuses, can be deconstructed.

Another way in which research on transitional justice, as well as the design of transitional justice institutions and their eventual implementation processes can be enriched by feminist standpoint epistemology is the interdisciplinary relevance of this approach. Recall in Chapter II where definitions of key concepts, including transitional justice, were provided: I highlighted the ways in which transitional justice – both by virtue of its conceptualization as well as by its purpose and function – straddles political, legal, economic and socio-cultural spheres. Indeed, transitional justice is meant to offer redress for a wide range of grievances and should, if truly victim-centric, help not only the political establishment move forward but also society at large and even improve the lives of individual citizens. Granted that transitional justice mechanisms cannot offer redress to all persons nor even fully redress each participating person but holistic and future-oriented transitional justice, as is prioritized in this paper, is not simply about punishment of perpetrators. Rather, transitional justice must be practiced with a sense of equitableness if it is meant to serve as a strategy and tool for sustaining peace, transitioning towards a functional democracy and improving the lives of affected people. As such, feminist standpoint epistemology can offer salient nuances to the political, legal, economic and socio-cultural aspects of achieving transitional justice objectives.

The arguments presented in this study are built through qualitative research and analysis using both primary and secondary sources. For example, I analyze and critique the marginal
space occupied by gender in international legal instruments and doctrines such as relevant United Nations Security Council and General Assembly resolutions, the Rome Statute establishing the International Criminal Court and the Genocide Convention amongst others. This, in turn, helps to contextualize the international legal, historical and political backdrops for each of the cases I examine.

Furthermore, I reference data and evidence such as testimonies from witnesses, perpetrators and victims in the five cases I cover, formal correspondences between the government and civil society actors – such as a letter from the Asia Director of Human Rights Watch to the Prime Minister of Bangladesh – and news coverage of transitional justice processes by both local and international outlets to buttress my argument on gendering transitional justice. The cases selected to demonstrate the validity of my argument and to trace the development of gender mainstreaming in retributive and restorative institutions contribute to the analytic value of this project individually but together, side by side, they also offer a more complete, comparative picture of the incomplete nature of transitional justice, even when the best of intentions drive implementation.

Also crucial to my research methodology is an in-depth discussion on relevant secondary literature. This interdisciplinary and holistic approach helps to situate the research and analysis offered in this study alongside preexisting arguments from scholars and practitioners on both where and why shortcomings of gendering transitional justice have been persistent as well as how to improve the status of women and their ability to access material or symbolic redress for past gross human rights abuses. The question of gendering transitional justice has been approached and addressed by different scholars from a variety of angles including, but not limited to, legalistic, anthropological, sociological, political, economic or historical. Irrespective
of how the topic is approached, however, there is at least one common element in scholarship, to date, on gender in transitional justice: the objective to transform the forces of inequality. Keeping in line with this notion of transformation, I add to the body of literature on transitional justice and literature on feminizing human rights by focusing on post-conflict or transitional societies. I apply the feminist standpoint epistemology in order to bring together intellectual discourse on transitional justice with feminist critiques and in doing so, offer lessons for practical application of the two concurrently. In particular, the cases selected for this study – including Yugoslavia, Rwanda and Bangladesh in the chapter on retributive justice followed by South Africa and Kenya in the chapter on restorative justice – serve demonstrative purposes, they trace the progress made and persistent challenges in gendering transitional justice since the end of the Cold War while also highlighting lessons that can be learned and applied to future transitional justice institutions in a context-sensitive manner around the world. Moreover, the discussion on Bangladesh and Kenya are especially contributive to the body of knowledge that exists on gendering transitional justice because these cases are both ongoing and as such can still be improved in their capacity to provide gender justice.
IV. GENDERING INTERNATIONAL LAW AND RETRIBUTIVE APPROACHES TO TRANSITIONAL JUSTICE

How International Law Shapes National and International Prosecutions

Retributive justice falls under the umbrella of transitional justice but refers to a particular kind of mechanisms with a particular set of purposes that exist within legal parameters. The most common form of retributive justice is criminal prosecutions which can be practiced in international, national or local jurisprudence. The distinguishing factor of retributive justice, in contrast with restorative justice, the focus of Chapter V, is the central emphasis on holding the perpetrator accountable for his or her actions through punishment. As such, in retributive justice, the exposure of the truth or the identification of a party’s role in the commission of a crime – for example a victim versus a perpetrator or witness – leads to a punitive measure taken. This punitive element is meant to: a) reprimand the wrongdoer(s) including the offender, the architect of the crime and the facilitators of the crime, b) offer some form of redress to the victim, and c) serve as a deterrent to observers – on an individual and collective scale – from committing the same crime again.

It is important to mention from the outset that not all transitional justice initiatives manifest in the form of retributive justice such as criminal prosecutions or other conventional legal initiatives. Also noteworthy at this point is the fact that in transitioning societies, rule of law is usually absent or impartial – even when there is a legitimate government in place and important steps towards democratization and the building of functional public institutions have been taken, sound judicial practices are not guaranteed. (Paris, 2004) This phenomenon can be explained due to a confluence of drivers of instability in transitioning societies, not least the fragility of peace and the nascence of a post-conflict government, but irrespective of why or how, shaky judicial bodies and shady judicial practices shape retributive transitional justice
approaches and sometimes, even restorative transitional justice approaches. As the this study will demonstrate, all transitional justice mechanisms – such as truth and reconciliation commissions, reparative or compensatory programs, and amnesty deals – are informed and shaped by international legal norms and precedents, even at the national or local level. Consequently, in order to better understand how transitional justice can be more gender sensitive and attend to the needs of men and women, and to formulate innovative solutions, a thorough discourse and definitions analysis is necessary.

This chapter provides a discussion on international law, where pertaining to transitional justice, and the extent to which it is gendered. A critical examination of how international legal instruments and norms address transitional justice and how they are, or are not, gender sensitive is crucial for understanding the gaps and limitations that currently exist. Accordingly this section of the study frames my argument on the need to gender transitional justice more holistically and comprehensively within an international legal context. This chapter of the study also looks at a handful of cases of retributive justice and critiques, as well as commends, how gender perspectives were introduced and to what extent gender sensitivity was practiced in each case. In particular, I consider the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Yugoslavia (ICTY), and the ongoing War Crimes Tribunal in Bangladesh. The former two cases have been selected due to their prominence in international transitional justice and for their roles in setting precedents. All the aspects of these cases cannot be discussed in this study and it is important to note that I have narrowed the scope of this chapter by for example, only considering the work of ICTR and not the hybrid-model gacaca court system, which alloys international legal approaches with indigenous dispute-resolution practice, that

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1 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.
emerged in Rwanda and has played an instrumental role dealing with many “lesser” crimes, including gender-based and sexual violence. The third case, Bangladesh, has been selected as a contrast of what should and can be done versus what hurts the cause of gender justice. Bangladesh, as I discuss later in the chapter, is concerning for a number of reasons but especially so in terms of gendering transitional justice because of its complete lack of attention to sexual violence and in general, lack of incorporation of women’s needs and voices. There are of course, many more cases that can be studied and cited so the selected examples here are not exhaustive.

Before delving into how international law, where relevant to transitional justice, has developed over time, shaped national or local initiatives and led to the creation of the ICC, the patriarchy of the international jurisprudence must be noted. One of the major criticisms lodged against international human rights law and the current normative and legal frameworks from feminist scholars is the patriarchal nature of the international transitional justice system. This is derived from other patriarchal governing structures and the way in which priorities, relationships and objectives are drawn. Part of the problem in both the theory and practice of international transitional justice is the deep-seeded assumption that security, both in definition and experience, are the same for men and women. Only since the passing of Resolution 1325 on Women, Peace and Security, has the international community begun to actively acknowledge that not only do men and women experience peace and war differently but also that direct violence is not the only threat to security. As Ni Aolain 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.” (2009, p. 1064) 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 approached as well as carried out.

*Tracing Gender in International Law and Retributive Justice*

There is a reciprocal and reinforced relationship between the norms, legal structures and practices that constitute international human rights law. Campbell borrows Ringer’s idea that “law functions not ‘as an aggregate of isolated elements, [but as] a configuration or a network of relationship.’” (2007, p. 412) 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 of delineating 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. Here I focus on only a few of those most relevant to the nexus of transitional justice and gender inequity: the Rome Statue of the International Criminal Court; the Convention on the Prevention and Punishment of the Crime of Genocide; U.N. Security Council Resolutions; and the precedents set by the Nuremberg, Tokyo, ICTRY 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 both the First and Second World Wars. 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, therein a recommendation to create an ad hoc tribunal to carry out justice for human rights violations and hold accountable perpetrators of the war crimes was specified but such an institution was later left unfounded.

The horrors of the Second World War, 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, p. 166) Neither of the post-World War II tribunals, however, paid adequate attention to the needs and experiences of women. Rape and sexual violence was treated largely as spoils of war and the voices of Korean and Chinese ‘comfort women’, for example, who had essentially been kept as in sexual slavery by the Japanese, remained unheard. 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, 2003, p. 3) 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 benefactors from rape camps did not have their day in court. 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. 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.

The rights of women, and the incorporation of a gendered perspective were, however, largely left as peripheral issues. 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 gendered element. It is lacking 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; (2) Forcibly transferring children of the group to another group.”

Thus, a critical examination of this monumental piece of international law reveals a misguided and misinformed attempt to be gender-neutral, as is the common tendency in international human rights, by the architects of the Genocide Convention. Ever since, this has in turn made it more difficult for future prosecutors and advocates to provide gender justice and as such, added to the perpetuation of gender inequity under 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 mentioned. 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 broad scale, in the evolving paradigm of gendering transitional justice.

In the 1990s, however, again a renewed sense of multilateralism and a ‘New World Order’ injected political will as well as intellectual weight behind the century-long vision. The breakdown of the Former Yugoslav Republic, which necessitated the creation of the

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\(^2\) Adopted by the United Nations General Assembly on 16 December 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 18 December 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 10 December 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.”
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, were major steps in furthering the theory and practice of transitional justice. (Moshan, 1998, p. 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 Rome Statute was an 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, and states that it, “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)

Thanks to relentless lobbying and determination of some parties present at the 1998 Rome Conference, not least of all from the Women’s Caucus⁵, gender sensitivity in both the language and the scope of the Rome Statute became a point of heated debate but one that could not easily be brushed aside. 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 clauses from the Rome Statute most relevant to this study include:

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⁵ Explain who is the Women’s Caucus and cite.
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)

Despite seemingly good intentions, the shortcomings of the ICC in including gender perspectives go beyond the language of the Rome Statute. According to some theorists, including Alice Edwards, 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. (2011) 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 harm is framed by the Rome Statute, experiences of women in armed conflict are presented as exclusive to sexual violence in accordance with “elements of crime” definitions. (Turano, 2011, p. 1046)
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, p. 1065) This is because suffering is, more often than not, context-dependent and may not fit within peace-time 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 argues that the inclusion of gender motivated crimes in the Rome Statue, albeit an important step is “not enough to ensure gender justice.” (1998, p. 155) In short, she calls the Rome State, “ultimately only a partial victory for gender justice.” (Ibid) This is reinforced by the critique presented by Edwards regarding the relationships between victim and Court set by the structure of the ICC. Campbell, 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.” (2007, p. 413) 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. For example, rape is no longer simply a form of degrading treatment or a crime against family honor and rather, occupies a more deserving space as a crime of utmost horror committed against the victim with conflict-related motivations. From here onwards, the chapter closely examines the struggle to introduce gender perspectives and create conditions for gender sensitivity in three cases of retributive justice. While none are perfect in their approaches, each – through its commendable or condemnable treatment of gender
dimensions in retrospectively addressing their respective conflicts – offers valuable lessons of progress and severe shortcomings in gendering transitional justice.

**ICTY: A Rebirth of Transitional Justice and A Reenergized Effort to Gender Post-Conflict Retribution**

The International Criminal Tribunal for Yugoslavia (ICTY), which was established by the United Nation Security Council after the horror-filled breakdown of the Former Yugoslav Republic, was a monumental step in international transitional justice. The first of its kind, the ad hoc tribunal was an international initiative that brought together judges, lawyers and peace professionals from around the world in a concerted effort to unveil the crimes committed by the Milosevic regime and its agents against Bosnian Croats and Bosnian Muslims. The tribunal was also meant to serve as an outlet of truth for victims and survivors, as well as a lesson to the wider world. Indeed, since the international military tribunals after the Second World War for Germany and Japan, no similar international transitional justice initiative had been undertaken. Moreover, the Tribunal was a formal acknowledgement of the fact that although a peace had been reached on paper, in the form of the 1995 Dayton Peace Accords, peace on the ground and between the people was far from secured. The transition also highlighted the interdependent relationship between peace and justice, especially for victims, that cannot be guaranteed with only a high-level political settlement.

The creation of ICTY was also 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. The numbers of sexual violence in Yugoslavia were truly shocking; 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) Indeed, the language of the Resolution 808 – reminiscent of the Genocide Convention – was a deliberate attempt to stress the severity of well-documented rape, which the international community was aware of since 1992. Interviews with key individuals behind the scenes of the international push towards a negotiated settlement and the creation of a tribunal reveals that gender-based violence was a motivating factor for peacemakers. Resolution 808 specifically expressed “grave concern” caused by the “treatment of Muslim women in the former Yugoslavia.” (Security Council, 22 February 1993) 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. In the design of ICTY’s mandate and selection of cases as well as witnesses, inclusion of gendered perspectives meant the treatment 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. (Patterson and Mertus, 2004, p. viii) However, gaining attention of the judges required cooperation between men and women and indeed, this reinforces my argument on the need for gender balance in order to secure gender justice. Moreover, in accordance with feminist standpoint epistemology, the inclusion of men’s and women’s perspectives helps members of each gender category better understand experiences of the other’s and this is crucial in patriarchal societies, patriarchal systems of governance and for defying the patriarchy of international jurisprudence.
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 towards establish a complete – or as close to complete – truth and thereby holding accountable perpetrators as fully as possible. (Mertus and Van Welly, 2004) For example, while men were kept in concentration camps in windowless rooms, Bosnian and Croat women were not and therefore 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, 2004, p. viii)

Furthermore, the appointment of a gender advisor in the Office of the Prosecutor and women to various positions of authority – even if not in a balanced quantitative ratio – was an important step for changing the perception of women as weak, passive actors as opposed to actors with responsibility and influence. Women’s inclusion and representation as translators, for example, helped reinforce confidence in female witnesses. At the same time, having men and women working alongside each other in 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. Nevertheless, gender mainstreaming has been a struggle in the ICTY and despite commendable choices to be gender sensitive in the
design and implementation of the tribunal, gaps quickly emerged that undermine the larger process of truth-telling, prosecuting and preventing a recurrence of similar horrors.

The International Criminal Tribunal for Yugoslavia presents an interesting case to study in terms of the investigation and prosecution for sexual violence as part of a transitional justice process. Since the creation of the ICTY in 1993, 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, p. 423-424) At first sight, the equal representation of crimes committed against men versus women is commendable because it is a step towards undoing the notion that gendering transitional justice, and international law, is only about women’s representation as well the idea that men cannot be victims of sexual violence. The attention to men as victims of sexual violence by the ICTY helped to undo the invisibility of male victims that is pervasive throughout war and conflict, including the shame borne by men who are sodomized and subjected to sexual assault. Despite this contribution, a closer examination of the gendered pattern of legal practice in the ICTY, suggests a trend that is of some concern.

While 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 is 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 fact of the matter is that when systematic rape is tactic of an armed violent conflict such as during Milosevic’s reign of terror against Bosnian Croats and especially Bosnian Muslims, it is virtually impossible to try and then to punish all those who are
responsible. Consequently, 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 in half the number of cases of sexual violence against men versus women, 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. One case from ICTY, 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) The Bassiouni Report, 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, p. 424)

Data published in 2003 suggests that out of all cases, not just those related to gender-based and sexual violence, men served overwhelmingly as witnesses versus women, with the former outnumbering the latter four times over. (Campbell, 2007 and Jarvis, 2003) And yet, equal numbers of male and female judges has never been reached; at most only three women have served as judges at the same time out of an 18 total. (Mertus, 2004, p. ix) The explanation

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6 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 27 May 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 towards 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](http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf)
for why women served as so fewer witnesses than men has been explored by a number of scholars but there are a number of factors at play: the subordinated position of women in the society in general, the patriarchal legal system, the greater access to the Court for men versus women, the fear of social stigma for women – especially those who suffered direct sexual attacks – and the competing priorities and responsibilities of women that may keep them from investing time in the prosecution process. (Turano, 2011)

By observing and scrutinizing the direction of the ICTY, one can gather the following conclusion: gender mainstreaming is about paying attention to and prioritizing the need to pay attention to the gender dimensions of a conflict and therefore the experiences of both men and women. Yet this is not equivalent to interpreting the experiences of men and women are identical. Indeed, the crux of the feminist standpoint epistemology, which I am a proponent of as a vehicle towards gender justice, makes these distinctions in experience between men and women as well as within groups of men and women. 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.

The limitations and flaws in implementation of ICTY’s attempt to be gender sensitive extends beyond the way in which cases on sexual violence were tried. As a study by Women Waging Peace recognizes, ICTY remains in operation but has failed to fully leverage the capacity and involvement of gendered perspectives in the transitional justice process. Although credit is given to women activists and NGOs engaged in track-II diplomacy on the grassroots level, “little effort has been made to establish links between the Tribunal and local communities.” (Patterson in Mertus and Van Welly, 2004: vii) The experiences of ICTY, within
the sphere of trying to further gender equity through transitional justice and in general, reiterates the need for local ownership and cross-sector cooperation between government, civil society groups, citizens and international stakeholders. Alas, like any post-rebuilding process, whether symbolic or tangible, is easier said than done.

Enormous expectations for success surrounded the establishment of the ICTY. The institution has furthered the study of transitional justice and many criminal agents responsible for unimaginable but very real human rights abuses have been caught, including the former Serbian military’s Ratko Mladic, who was charged with genocide, crimes against humanity, rape torture, murder, forcible deportation, hostage-taking and inciting terror. (BBC News, 3 June 2011) Nevertheless, many questions remain as to how effective ICTY has been in offering redress to victims, helping them to heal and to mend the torn social fabrics in Bosnia and Herzegovina, Croatia, Serbia and Montenegro. Especially considering the distant location of the ICTY, based out of The Hague in The Netherlands, the question remains: can a retributive process in a foreign country address the collective and individual needs of victims in the former Yugoslav countries, let alone extend the progress made in gendering transitional justice to larger society? The record so far suggests that while retributive processes are important for the writing of history and for the conscience of humanity, the benefits to victims may only trickle down and even then, not reach everyone – especially marginalized social groups, including women.

ICTR: Changing the Course of Rwandan History Through International Law

UN Security Council Resolution 955 established the International Criminal Tribunal for Rwanda (ICTR), an ad hoc transitional justice institution in November 1994 after the ethnically based genocide. The genocide in Rwanda marked a historic shift in the international community’s understanding and response to widespread human rights abuses including ethnic
cleansing, genocide, war crimes and crimes against humanity. The systematic killing of some 800,000 Tutsis and moderate Hutus masterminded by extremist government officials in a Hutu-majority government and carried out by political leaders, militia groups and common citizens mobilized into hate-filled violence shocked the world because of the brutality of the harm caused, the expediency of the murderous campaign and the breadth of violence inflicted in the form of mass rapes, torture and indiscriminate massacre of men, women and children. (Magezu-Barthel in Buckley-Zistel and Stanley, 2011) And yet, despite the shock and horror, the international community failed to intervene in a timely manner to end the genocide before the brunt of destruction had been caused. There has been much debate, criticism and analysis for why this happened and what could, and should, have been done differently. However, that discussion is not strictly relevant to the topic of this study or the focus of this chapter. The creation of ICTR, on the other hand, is.

Based out of Arusha, Tanzania, ICTR has been in operation since 1995 with an projected end date for closing all cases set in 2012. It 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. As an internationally spearheaded institution, the ICTR complements the work of the hybrid-model gacaca court systems that combines Rwandan criminal and civil law with traditional methods of dispute resolution. There are numerous elements of the ad hoc tribunal worthy of study and many scholars continue to examine the impact of the ICTR on both the victims and survivors of the genocide but also on the theory and practice of transitional justice. Here, I focus primarily on the treatment of sexual violence in the work of the ICTR and its role in setting precedents that are salient to the struggle for gendering transitional justice. The following sums up the place of sexual violence in international affairs:
“Before the 1990s, 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, the necessary reward for the fighting men.” (Copelon, 2000, p. 3)

However, the 1998 trial of Jean Paul Akayesu, a former politician and member of the right-wing Mouvement Democratique Republiacain (MDR) party, was an important step in furthering gender sensitivity in transitional justice and setting international precedents. After his arrest in and extradition from Zambia in 1995, Akayesu was sent to Arusha to stand trial for 15 counts 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 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)

This definition has been set as a precedent and is customarily the framing definition for what constitutes sexual violence in the space of international law. Moreover, 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, Navanethem 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 byproducts of other crimes such as ethnic cleansing and genocide. (*Akayesu Trial Judgment* para. 416; Walsh in Pankhurst, 2008, p. 39-40) This gendered perspective championed by 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. In accordance with feminist standpoint epistemology, the viewpoint brought by 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 to 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. While 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, in my opinion, is also 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, another ICTR case, then the same standards should be used in weighing each. (para. 149) This argument was rejected during the trial but there has been progress since then, not least in the form of UN Security Council Resolutions 1820 by the Security Council in June 2008 and 1888 in 2009. At the time, the judges did not see the issue on the same terms as the prosecution. Furthermore, if it is simply an issue of consent, then another question arises which challenges this notion altogether: are not all interpersonal or intergroup engagements in violent conflict lacking in consent? Is violence, irrespective of how it manifests and whether it is strictly direct, cultural or structural, ever consensual? The definitive answer to both of these questions is no.

I argue, therefore, that even though the definition of sexual violence as proposed by Akayesu, is gender neutral and so too are similar existing definitions, the fact of the matter is that sexual violence is not gender neutral. By both the motivating intent of the perpetrator and the

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7 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. He is currently imprisoned. (ICTR, 2001)
8 Resolutions 1820 and 1888 were drafted and presented to the Security Council by the delegation of the United States in 2008 and 2009, respectively, before their adoption. 1820 formally acknowledged that conflict-related sexual violence is part of the conflict narrative and can serve as a tactic in armed conflict for opposing parties to weaken the other side, and as such is a threat to international peace and security. 1888 is also on the prevention of and response to conflict related sexual violence; it reiterates Resolution 1820 and goes a step forward by encouraging Member States to strengthen tools for implementing 1820 through political leadership, international and domestic jurisprudence, leveraging technical expertise such as UN Special Representatives on sexual violence and building institutional capacity for monitoring and reporting of sexual violence.
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 in 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 while 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.

Nevertheless, 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. (BBC News, 24 June 2011)

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 acknowledgement 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. In
addition, undoing gender stereotypes is inextricably linked to promoting gender equity; gender justice depends on this and feminist standpoint epistemology supports the breakdown of stereotypes in order to ensure realities are accurately portrayed and a diversity of standpoints – including those that show the darker side of women – are brought to light. 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 convicted for extreme human rights abuses but, as news reports suggest, the courage and momentum at the national level has been partially fuelled by the willingness of the international tribunal to follow through and set an example on a much larger stage. (BBC News, 24 June 2011)

“International” War Crimes Tribunal of Bangladesh: A Travesty of Justice?

The secession of East Pakistan and liberation war of the new country Bangladesh is, to date, one of the bloodiest violent conflicts in modern times and produced a humanitarian catastrophe of astounding proportions. Over the course of nine months, between 26 March 1971 and 16 December 1971, as many as two million Bengalis are thought to have been killed at the hands of the Pakistani military in addition to more than 200,000 women raped and 10 million displaced persons – most of whom fled to India and many of whom eventually returned. (Yasmin Saika, 2011) At the time, in the midst of the Cold War, the prospect of a national transitional justice initiative, let alone an international one, was highly unlikely. The government of Sheikh Mujibur Rahman, the first president of the nascent nation, faced enormous statebuilding, peacebuilding and economic development challenges ahead of itself. This, combined with the

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lack of international legal frameworks and the highly polarized nature of international politics, meant that an international tribunal such as the ones pursued for Rwanda and Yugoslavia since the 1990s was unfathomable. Moreover, shortly after ascending to power, Rahman signed into law an Act that would serve as a political compromise – essentially a pledge to not pursue prosecutorial action against any Bangladeshi abettors, conspirators or sympathizers of the Pakistani Yahya Khan regime and military in the name of national unity and a collective moving forward. Unlike Rwanda or Yugoslavia, where peace and justice were pursued concurrently or within close succession, in Bangladesh a trade off was chosen.

Some forty years later, Sheikh Hasina, Rahman’s daughter and already two-time Prime Minister in her own right, campaigned against the Bangladesh National Party (BNP) on the promise that if elected again, she would bring the perpetrators and traitors of the “genocide” to justice. (Linton, 2010) After her successful election, her government began to do fulfill its promise. It is important to note that at the time of the Liberation War, there was much international hype about the mass atrocities committed in Bangladesh but the conflict was not officially called ‘genocide’ by the United Nations. This can be explained, in part, due to the competing interests of the United States and USSR but shall not be discussed in further detail here. In more recent times, however, the United Nations along with many other states have retrospectively identified the conflict as genocide, in accordance with the terms of the 1948 Convention. This international support and recognition of the extreme injustices committed during the war reinvigorated a push for justice at the national level. 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 raises questions about the feasibility of

10 For further information on the Bangladesh liberation war, refer to Richard Sisson’s War and Secession: Pakistan, India and the Creation of Bangades (1991)
11 See above.
Tribunal realizing its stated objectives or constituting transitional justice as has been conventionally understood. Recall however the discussion presented in Chapter II on the unique experiences in each context, timing, ‘and ripeness’ for pursuing justice and the definition of transitional justice I have borrowed from the ICTJ.

The establishment of the International War Crimes Tribunal in 2010, has, however, been received with much international scrutiny. (Huskey, 2011) As one foreign journalist noted, that 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.” (Joehnk, NY Times, 29 November 2011) Despite being international in name and therefore implying that Pakistani perpetrators would also be brought to trial, it is highly unlikely that this will happen because diplomatic relations between Bangladesh and Pakistan are chilly at best and there is no extradition treaty between the two countries. Furthermore, the foreign governments, including the United States, and non-state actors, including Human Rights Watch, have expressed concern over the arbitrary detention of suspects and the ‘presumed guilty before due process’ attitude of the political elite behind the Tribunal. (Cammegh, 2011; Letter by Adams, 18 May 2011) Since its creation, the Tribunal has achieved little except to exacerbate the already vitriolic relations between Hasina’s government and opposition parties including the BNP and Jaamat-e-Islamii, a hard-line Islamist group with some leading members accused of acting as Pakistani collaborators in 1971. (Bergman, 2010; Bergman, 2011) Local journalists also argue that the institution lacks legitimacy or credibility amongst the national public, not least because of the over-politicized, non-inclusive nature of the

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12 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
proceedings and the barriers to participation for ordinary citizens who want their testimonies heard. (CITE)

Of the many shortcomings of the Tribunal, one is especially relevant to this study: the absence of charges to be brought forth against perpetrators of rape. The mandate of the Tribunal, in fact, completely neglects to mention the mass rapes committed, possibly as many as 200,000, against women and way in which rape, was essentially, used as a tool of genocide. (Yasmin Saika, 2011) Moreover, the Tribunal has done little to incorporate the voices of the survivors of the sexual attacks, most of who have lived for four decades in silence and shame. Bangladesh is a majority-Muslim society where divorce, in the twenty-first century, remains taboo and although there have been multiple female Prime Ministers, gender-based discrimination, including wife battery, within the population is not uncommon. This only compounds the shame and stigma related to rape that is found in most other societies throughout the world. In the context of the War Crimes Tribunal, however, the failure to acknowledge and give due diligence in court to the perpetrators and attempt to offer redress to victims is troubling not only for those directly affected but also for the legacy of the conflict and the Bangladeshi national identity.

In addition to the widespread rape, as many as 25,000 women are thought to have been forcefully impregnated by Punjabi, Sindhi and Pashto soldiers as part of an ethnic cleansing campaign against the Bengalis. (Iliopoulos, 2011) But Pakistani soldiers were not the only culprits, the same tactic were used by “Razakars,” Bengali loyalists of Pakistan, who helped the terrorize civilians against Bengali Muslims and Bengali Hindus. And yet, the omission of crimes such as rape, sexual slavery, indentured servitude, forced pregnancy and even forced sterilization in the 1973 Parliamentary Act, and its 2009 amended version, as well as in the mandate of the current Tribunal is counterproductive to the intended purposes of transitional justice processes,
most importantly redress for victims. Officers of the Tribunal have failed to acknowledge the different experiences of men and women during the war and the legacies carried on by survivors into the present day. Not only has no definition of rape or sexual violence been offered, neither has the one proposed in Akayesu been adopted. As Iliopoulos (2011) points out, the definition in national law for rape is very restrictive, referring exclusively to sexual intercourse, and thereby irrelevant to the extent of gender-based and sexual violence committed in 1971.

The precedents set by Akayesu 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. This is not to suggest that testifying for men or women, about any suffering whether suffered by his or herself or inflicted upon a loved one, is easy. On the contrary, many citizens given the choice may shy away from testifying in open court. However, the issue here is deeper – it is the failure of the government to offer citizens a chance to participate as they see fit, and in accordance with the facts of the human rights violations. The inability, or unwillingness, of the Tribunal to approach gender-based and sexual violence is a disservice to transforming unequal gender relations in Bangladeshi society and it is a political calculation that compromises the telling of the country’s past as well as the creation of the country’s future. Even if initiated after forty years, an undertaking such as the Tribunal serves an important purpose in but the lack of gender mainstreaming is present in various spheres of the transitional justice process. The lack of gendered perspectives in the design and implementation of the Tribunal extends to the lack of any kind of counseling and protection provisions for witnesses, men or women, as well as the
shortage of women lawyers, judges and other appointees. (Linton, 2010; Sara Hussein in Iliopoulos, 2010; D’Costa, 2010)

In light of the politically motivated but highly gender insensitive and victim-neglectful nature of the Tribunal, one can argue that the deliberate ignorance towards sexual violence is a reinforcement of the present-day gender-based cultural and structural violence. Although I do not delve into the larger societal forces that create patterns of gender relations in Bangladeshi society, the words of Mubarak Ali are relevant to the gender inequity in the Tribunal: “History tells us that nations who deny their crimes against humanity are likely to repeat such actions.” (In Paper Magazine, February 2012) Despite ratification to the, the Bangladeshi state has failed to see through with its commitments to its citizens, including both men and women, and at the current rate, risks failing justice and truth as well. Indeed, the failure of Bangladesh to incorporate the principles of the Rome Statute or to learn from the experiences of Rwanda, Yugoslavia and many other countries that have undertaken transitional justice initiatives, albeit imperfectly, leaves the Tribunal as little more than, “a nakedly partisan exercise of justice.” (Joehnk, NY Times, 29 November 2011) Civil society groups been trying to fill the gaping holes left by the Tribunal since it was first proposed and counter the government’s approach since it began functioning. One of the most prominent of such citizen-led initiatives is the War Crimes Fact Finding Committee. The independent group of scholars, lawmakers, activists and war veterans have begun to advocate the creation of at truth and reconciliation commission, modeled after the post-apartheid experience of South Africa. (M.A. Hasan quoted by Al Jazeera News, 4 April 2008) This raises the question of victim-centric restorative justice, and as I explore in the next chapter, how restorative justice mechanisms can serve the cause of gender justice.
In her study of gendered subjects, Franke claims that “transitional justice will always be both incomplete and messy.” (2006, p. 813) What Franke alludes to is in fact a profound diagnosis of the very complex nature of any mechanism of transitional justice. At the end of the previous chapter, I discussed the difficulty in using retributive justice mechanisms to offer redress to victims in all circumstances of sociopolitical transition and especially so in a gender sensitive manner. Shortcomings of retributive justice include but are not limited to a focus that is primarily on perpetrators, not victims, and can for this reason and others, have detrimental effects on victims or lead to revictimization and victimization of the perpetrator. For example, “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.” (Franke, 2006, p. 818) 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. The question, then, is what alternative exists? Restorative justice, while still incomplete in the way Franke describes, provides some answers.

Restorative justice strives to repair “social connections” in order to establish peace instead of “retribution against offenders.” (Minnow, 1998) Thus, by its very nature, restorative justice sets itself apart from retributive justice or corrective justice, both of which can be vengeful or fixated on establishing proportionality between harms suffered and rectifying action taken. “That a person who intentionally or recklessly causes harm or loss should pay compensation or make restitution to his victim may be described as the very essence of corrective justice.” (Andrew Ashworth, 1986, p. 107) Such a principle underlies many justice systems around the world, including the criminal and civil sectors, and in societies that are not
undergoing post-conflict transformation efforts. In fact, it is this very element of restorative justice that makes it relevant throughout humanity and reaffirms the need to restore humaneness into a society that has been submerged in inhumane practices and paradigms.

Restorative justice, in the symbolic sense, should be understood as the establishment of a fairer, more equal relationship. In other words, restoration is “moving relationships in the direction of becoming more morally adequate, without assuming a morally adequate status quo ante.” (Walker, 2006, p. 384) There is, thus, an objective to repair that is part of restorative justice’s function. But, the central tension in transitional justice is persistent even in the real of restorative approaches: what exactly constitutes justice? This is a question that has occupied the interest of scholars of human rights and international law. There are emotional, ethical, institutional, legal and contextual dimensions of justice. (Johnstone and Van Ness, 2011) What is perceived as justice in one place may be very different to another and indeed, this variation extends across societies, across cultures, across periods of history and even between individuals. Frasier posits justice as an issue of either redistribution or recognition in Justice Interruptus. (1997, p. 12)

Reparations as Redistribution?

Reparations can have varied implications in the realm of international law and in a particular programmatic context. de Greiff offers a broad conceptualization of reparations in international humanitarian law, one that encompasses “all those measures that may be used to respond to human rights violations.” (2004, p. 1) This definition is neither exclusive to victims nor does it offer a narrow scope of implementation methods. In contrast, a more constricted version of reparations for programming is explained as “all those benefits that may be given to
victims directly to redress the violations they suffered.” (2004) According to Linda Magarell, 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.” (2009, p. 6) Similarly, the International Center on Transitional Justice (ICTJ) frames reparations as “initiatives [that] seek to address the harms caused by these violations. They can take the form of compensating for the losses suffered, which helps overcome some of the consequences of abuse. They can also be future oriented - providing rehabilitation and a better life to victims - and help to change the underlying causes of abuse.” (2011)

Transitional justice processes have – to date – failed women in offering an adequate semblance of economic justice that is sensitive to the burdens uniquely borne by women in the aftermath-conflict, including combining reparations with economic development programming that matches the gendered reality in transitioning societies. For example, consider the aftermath in the Rwanda genocide where there was a significant distortion in the ratio of men to women as a result of the massacres in 1994 and how this tragic shift affected the livelihoods of women, men and children who survived the genocide. (Kimanuka, 2009) Retributive approaches to transitional justice are often ill-equipped to offer economic justice while at the same time, 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.

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
hour of need. What is more, social polarization usually correlates with economic and political polarization; a trend that can be traced in most, if not all, cases examined in this study and elsewhere. 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 that has been observed at the turn of the 21st century as well as the brighter spotlight on contributions of women to peacemaking, “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, p. 64) The task of mainstreaming gender into reparations programming in order to offer reparative forms of gender justice, while salient, is often not prioritized. Gendering reparations requires 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.

Reparations, when administered with gender sensitivity and reflective of macroeconomic and microeconomic realities – for compensatory programs – or reflective of victimization as well as positive conflict resolution agency – for symbolic initiatives – can have transformative effects on gender relations. What I mean is that there is a unique potential in transitioning societies to leverage the historic moment 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 era of democratization. Different forms of reparation can include 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, including those focused on experiences of all social groups, into textbooks. Indeed, in practice, the relationship between restorative justice and reparative justice is extremely close with some scholars, such as Pablo de Greiff (2008) arguing that restoration is always deficient without some element of reparation.

Consequently, there is a moral as well as material imperative to reparations and reparations have the potential to bridge this moral and material divide. They can be used to address injuries on groups or individuals of a directly violent or structurally violent nature and this is especially true considering the general consensus amongst scholars and policymakers alike in the field of transitional justice that despite its prominence, “criminal prosecution alone is too weak a premise on which to build social stability and redress deep-seated historical conflicts.” (Villa-Vicencio, 2010, p. 47)

*Truth-Telling as Recognition?*

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, which choose the pursuit of truth, do so, oftentimes, with the hope of beginning a process of healing, including individual and social restitution. Truth commissions, while 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 acknowledgement, acceptance and collective values. The restoration
of human dignity, perhaps the ultimate goal of transitional justice, cannot commence without acknowledgement of both suffering endured and suffering caused. (Villa-Vicencio, 2010) It is, thus, no surprise that the quest for truth, the intangible and ubiquitous need to know the truth and share the truth in transitioning societies can be traced through mechanisms of retributive justice, as discussed in the previous chapter, or restorative justice as discussed in this chapter.

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 commission 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 to truth commission from around the world in the last twenty 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, 2008: 67; Gardam and Charlesworth, 2000) The negative effects of these trends are double-fold: they are detrimental to the sense of self-worth and healing process for those directly participating in a truth commission but at the same time, the agency of women as contributors to political struggle and their capabilities as agents of change are underestimated, as is suffering experienced by men who may identify as both victims and victors. Such risks reinforce the need for gendered
perspectives in truth commissions supplemented with gender analysis, which begins with gender mainstreaming in both the design of a truth (and reconciliation) commission as well as gender sensitivity training of officers of the commission.

And What of Reconciliation?

When political negotiations result in a settlement that creates the space for a political peace, there is often a push to follow through with a societal reconciliation in a transitional setting. Reconciliation, however, is at best a contested notion and while bartering and bargaining may offer a political truce to end bloodshed, as is for example discussed below in the case of Kenya, the same settlement is much harder reach at the level of the masses. Truth-seeking, truth-telling and demonstrated commitment to justice are prerequisites for even imagining the prospect of reconciliation, especially for victimized populations. Politically promoting and locally facilitating reconciliation as part of restorative mechanisms in transitional justice are further complicated by a lack of understanding of the gendered experience of conflict and post-conflict transition.

The essentialization of women, the assumption and indifference towards treating all women as the same, is a deep-rooted problem in the realm of human rights and political transition. 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, p. 5) Moreover, the experts at the conference agreed that there is no “aftermath” for women, at least by the same measures 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 in structural, direct and cultural forms. (Meintjes, Pillay and Turshen, 2001, p. 4) Data collected by many researchers in the last two decades suggests 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, depending on the level gender mainstreaming in state-building, nation-building, justice and reconstruction initiatives, can either reinforce or help transform unequal social relations that influence the gendered roles occupied by men and women.

Beyond direct violence is also the problem of structural violence that is inherited from the pre-conflict era and often exacerbated in the transitional phase: women who become the heads of households due to the loss or incapacitation of their husbands, fathers and sons, as a result of conflict are often especially susceptible economic subordination and hardship in post-conflict settings. They can lose their homes, rights to their family’s property and a means to securing income. Their human security – including their human dignity, their freedom from fear and their freedom from want – remains compromised. Consequently, women who may want to participate in transitional justice initiatives may lack the opportunity to do so or have their opportunity to participate obstructed by social stigma, persistent gendered social hierarchies, fear for their lives and the lives of their families.
Racial inequality, widespread poverty, unequal distribution of power, institutionalized racism and inter-group mistrust were all deep-rooted characteristics of the apartheid era in South Africa. The norm of apartheid South Africa was violence in all its forms sustained over decades, inherited over centuries, and perpetuated by a system calculatedly designed by political elite that necessitated participation by ordinary citizens. A report by Women Waging Peace claims that, “apartheid had a dehumanizing effect on all South African’s lives – regardless of whether they were perpetrators, victims, or survivors of human rights violations.” (Gobodo-Madkizela, 2005, p. vi) Taking this a step further, I argue this dehumanizing effect of Apartheid was complex in its nature and manifested along racial, ethnic, economic and gender lines at the intersection of all this socially constructed aspects of identity.

The fragile peace that followed the transfer of power from FW de Klerk to Nelson Mandela hinged on the political settlement that essentially gave former perpetrators amnesty for their crimes. The necessary bartering at the elite level, however, could not be replicated for the general public. To face the past collectively and create a public forum, the new party in power - the African National Congress - passed the 1995 Promotion of National Unity and Reconciliation Act, established the Truth and Reconciliation Commission (TRC). The interim South African constitution which established the TRC specified four main objectives:

“1. to establish as complete a picture as possible of the nature and causes of human rights violations in the period between 1960 and 1994; 2. to give victims of human rights abuses a chance to speak publicly about the abuses they suffered; 3. to grant amnesty to perpetrators of human rights abuses in exchange for full disclosure of atrocities they committed and a demonstration that those crimes were politically motivated; and 4. to lay the foundation for national reconciliation in order to break the cycle of violence.” (Interim Constitution of the Republic of South Africa, 1994)
This milestone initiative was followed by the 1996 Special Pensions Act No. 69 (SPA) and also the creation of the Committee on Reparation and Rehabilitation (RCC), which acknowledged the “principle of legitimate expectation [of victims]” and was entrusted to develop a comprehensive policy for implementation.

The a gendered perspective was introduced in South Africa’s transitional justice experiment on multiple levels thanks to the leadership and foresightedness of certain individuals at the help of the institution as well as external actors offering support to the Commission. For example, data collected from the Commission’s period of existence shows that women, of whom almost two-thirds were black, submitted more than half of all testimonies presented to the TRC. In addition, three-quarters of regional managers to oversaw the daily intricacies of the Commission’s proceedings at the local level were women while women constituted some forty-one percent of commissioners. (Gobodo-Madikizela, 2005) It is clear that at attempt was made to achieve some semblance of gender balance in terms of the ratio of men to women in representation.

In South Africa, the incorporation of women in positions of authority as well as in speaking their truths benefitted not only those women, or women in general, but society collectively. This is a very important consequence that is often neglected or misunderstood by those who think the singular value of gendered perspectives is to include women for the sake of being able to claim that both men and women were consulted. After all, it is difficult to quantifiably measure the impact of women in decision-making positions, alongside men, in transitional justice or in a manner that highlights immediate benefits to all stakeholders. And yet, the standpoints of women with different experiences during the apartheid period as well as during the transition helped bring to light human rights issues that may have otherwise been
ignored by the mainstream or those groups traditionally in powerful and privileged strata. For example, findings from the Truth and Reconciliation Commission reveal that women recollected their own suffering as well as that of their family members such as husbands and children in order to, “gerat[e] empathy and taking on a broader responsibility for the collective sense of national healing.” (Gobodo-Madikizela, 2005, p. 9-11) Such evidence does not suggest that men did not, could not or would not do the same but rather that the ubuntu approach, built on the principle of “I am because we are” resonated with women witnesses in particular and helped sow the seeds of, an albeit slow and imperfect, reconciliatory process. (Villa-Vicencio, 2010)

Often hailed as an exemplary model of a restorative approach to transitional justice, the South African TRC secured some very important successes during its tenure but both in the real of gender justice and vis-à-vis the four founding objectives of the Commission – severe limitations have dogged the redress enjoyed by victims and the pace of reconciliation enjoyed by the country since the end of apartheid. Although women’s rights organizations advocated for greater gender sensitivity in reparations programming as part of the truth and reconciliation process, their role remained largely on the peripheries. (Goldblatt in Rubio-Marin, 2006) The authorities of the TRC and those assigned the task of creating a fair and realistic reparations program failed to fully incorporate gendered perspectives into the design of reparations. As a result, the impact of gendering reparations and securing gendered reparative justice was limited and the price of this shortcoming has been borne by disenfranchised women and their dependents.

The Khulumani Group, the largest post-apartheid victim-support NGO with over two-thirds female membership, reports that only sixteen thousand listed victims and their children were approved by the state which meant that tens of thousands more were deemed ineligible. As
Marjorie Jobson, the director of Khulumani explained, “political reconciliation has not translated into social or interpersonal reconciliation so there is a huge gap and political elites have benefited hugely while ordinary people...who sustained terrible harm, lost property, were dispossessed or even physically disabled have not enjoyed these benefits.” (ICTJ Weekly Podcast, 11 May 2011) Such an exclusionary approach, in effect, continued to marginalize a significant number of individuals while the state had also failed to acknowledge the fact that for many traumatized people, their ability to speak up and ask for what they need is impaired or takes a long time to come into force. What is more, many victims have complained that they were unable to access the TRC and the services of the Committee on Reparations and Rehabilitation due to lack of public knowledge and physical distance from centers of application.

Furthermore, in South Africa, gender based violence soared in the post-apartheid era, which researchers point out is particularly worrisome because the incidences of gender-based and sexual violence were already relatively high, on a global scale, during apartheid. For example, in post-apartheid South Africa, according to quantitative research illustrates that between 2008 and 2009, some 71,500 sexual offences were reported to local police, a figure which excludes all the cases that go unreported. Moreover, South Africa has the highest rate of femicide in the world, with an estimation of one occurring – usually at the hands of an intimate partner – on average every six hours. (Sigsworth and Valji in Buckley-Zistel and Stanley, 2012, p. 116) This continuation of violence in new, and old, forms has had severe repercussions on the transitional justice process, in particular the ability to achieve gender justice. For instance, the perpetration of domestic violence, and the difficulty in holding those accountable or victims enjoying full protection under the law, exposes how the conflict versus peace phases are not necessarily distinct through a gendered lens.
Application of a feminist standpoint epistemology also reveals how the continuum of gender-based violence in “peacetime” in South Africa is inextricably linked to the political construction of race, sex and gender during the apartheid era. The pervasive racism engrained in public, and private, structures reinforced sexism and the South African women’s emancipation movement – the multiple layers of historical injustices. The post-apartheid Constitution of South Africa indirectly reflects this collective experience and, is in fact, relatively equitable for men and women compared to constitutions of many other countries. Testimonies collected by the South African TRC also reveal this recognition but an explicit link between racism and sexism, and how the reciprocal relationship of the two translates into post-apartheid gender-based violence or discrimination is lacking. Consequently, the restorative function of the truth-telling process, from a gender perspective, is undermined and harmful to the memorialization of apartheid as well as the construction of new, more unified national identity. According to Sigsworth and Valji, while violence against women can have varying motivations and manifestations throughout the world, the “net effect” is the same: “to reinforce women’s subordinate and unequal role in society. It is also the crime most likely to be met with silence, shame and impunity.” (Buckley-Zistel in Buckley-Zistel and Stanley, 2012, p. 115)

Despite these criticisms of the TRC in offering gender justice and in addressing the needs of conventionally disenfranchised societal groups, it is important to remember that the restoration of relationships cannot always be realistically expected. Applying a feminist standpoint epistemology exposes the fact that to restore implies returning to a stable or desired state, which may never have existed between two parties in conflict. This is remarkably true for women whose lives during apartheid and in the post-apartheid transitional period were shaped by the intersections of gendered insubordination, race-based exclusion and socioeconomic
instability. In other words, the transitional justice process failed to restore equal gendered
relations in South African society not solely because of the shortcomings of gender
mainstreaming in the TRC but also because equal gender relations had never existed before.
This, however, does not mean that a new, more equal construct of gender relations should not be
pursued; while no precedent exists, the need persists.

The same idea extends beyond unequal gender relations. For example, in South Africa,
no such thing as restoration of relationships between black South Africans and white Afrikaaners
could be achieved because the interactions and exchanges that existed between the two groups
were consistently characterized by inequality and injustice. This, however, does not mean that
new, more equal and more tolerant relations cannot be forged; rather, it means that no such state
can be returned to because no such state of relations existed before. In fact, this creation of new
realities, or what Villa-Vicencio (2011) calls “a new way of being” is the very essence of moving
from de-humanization towards re-humanization.

Kenya: Gender Sensitivity Held Back by Corruption and Normative Culture

The Republic of Kenya was established in 1963 after the British Empire reluctantly
granted independence during the wave of decolonization. In the almost fifty years since then,
Kenya has been governed by only three presidents and hosted the first multiparty elections as
recently as 1993. Despite its history of largely authoritarian regimes, Kenya was hailed as a
beacon of stability and prosperity in the region. This, however, changed during the contested
2007 elections when incumbent President Mwai Kibaki was declared the winner amidst
widespread accusations of ballot tampering and corruption by a large number of citizens as well
as his main opponent, Raila Odinga. (Alam and Anderson, 2011) 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. Violence perpetrated largely along ethnic cleavages resulted in the death of more than a thousand people while as many as a million were displace, hundreds of women were raped and Human Rights Watch accused the police of employing a “shoot to kill” approach (2008). 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 genocide and ethnic cleansing. The political conflict was only resolved after internationally mediated negotiations led to a power sharing agreement that manifested in a new government of national unity comprised of the incumbent Kibaki as president and Odinga as prime minister.

Although the political climate has ostensibly calmed down in the past few years, the broken social fabric and the carnage from the month-long uprising created a crying need within society for some form of concerted effort to address the past and enter the future a new, more peaceful way. Looking to fill this space, the Truth, Justice and Reconciliation Commission was created, consisting of a number of locally and internationally picked commissioners, and assigned the following mandate:

“to 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)

Kenya is at a historic crossroads and the ability of the government to come together with the population and rebuild trust will determine the degree of political and social stability in the future. Emerging from the darkness that consumed the country in late 2007 and early 2008, the obligation to lead the country to light rests with the government but the goal is unattainable without inclusion, participation and support of all segments of society. At the end of the day, social transformation and political transformation are two sides of the same coin.

Violations related to gender in Kenya comprised mainly of different forms of sexual violence under the Kenyatta, Moi and current Kibaki regimes. More specifically, survivors and witness have reported incidents of castration, rape, mutilation of breasts, forced domestic slavery and even deliberate impregnation based on ethnicity. (Kamau in Federation of Women Lawyers-Kenya Research Report, 2010) When persons affected by such violations, whether directly or by association, have come forward to explain their experiences to the Commission, the message has not always been clear because, unsurprisingly, such harms suffered are hardly easy to speak of, even though the TJRC is not a court or body for criminal prosecution. The combination of shame and fear, especially vis-à-vis sexual violence, results in victims and witnesses downplaying their suffering, which also reflects their low expectations for redress. Examples of this include a Kenyan woman who claimed that a soldier “was using me as his wife” (Rose Waititu, Isiolo, 1 May 2011) or a man who claimed that “[he] could no longer sire children.” (Guyo Jilo Dito, Marsabit, 4 May 2011) In such cases, part of gender-sensitivity is essentially about commissioners accurately understanding statements presented to them. The obligation, here, rests upon the six commissioners to read between the lines, respond appropriately during their
opportunities to offer comments and ask questions period, as well as to refer affected individuals to the Special Support Unit and Gender Violence Recovery Centre. While the former 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 address sexual and gender-based violence. The TJRC forged a partnership for trauma consultation and patient referrals for traumatized witnesses and victims and even included a provision for collecting testimony via private in camera procedures in order to be inclusive and sensitive to the needs of certain citizens, irrespective of men, women and children, who are unable or unwilling to appear publicly in front of the Commission. (Kanyago, 2011, p. 2; TJRC, 2 February 2012)

Gender sensitivity in the current model of the TJRC was developed in accordance with the Constitutive Act that established the Commission and incorporated along the three-stage work plan of taking statements, holding hearings and preparing a report based on findings. The TJRC recruited personnel for on-the groundwork as well as the most senior level positions strategically. Half of the commissioners, including the current acting chairperson, are women while there is also gender balance in the legal team, including the leader of evidence, who is a woman. As the gender composition of these appointments suggests, architects behind the TJRC deliberately placed women in positions of authority based on their qualifications and also because, from the get go, Kenyans were intent on not repeating the mistakes of previous commissions. 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.
While not perfect, the TJRC’s attempt to create gender balance in terms of representation and participation of both men and women buttresses the importance of understanding diverse gender perspectives as espoused by feminist standpoint epistemology. The inclusion of three female Commissioners, alongside three male Commissioners, was intended to temper the possible crudeness of ‘adversely mentioned persons,’ a.k.a. the accused, who may later be categorized as perpetrators and, concurrently, reassure female witnesses. These actions reflect the willingness of the TJRC to follow through with the stated intention to learn from other cases of transitional justice around the world. Moreover, some 113 – or, roughly, one-third – of the statement takers recruited by the Commission were women because, according to Nancy Kanyago, the Director of the Special Support Unit, the TJRC wanted to inspire confidence in both men and women to offer their testimonies and have their stories heard. (TJRC, 2011)

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.

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. (FIDA-Kenya, 2010) 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 encouraging empathy. For example, a woman who testified in front of the Truth, Justice and Reconciliation Commission of Kenya about the torture endured by her husband in interethnic violence in the Northeastern Province during the 1980s emphasized the suffering on both sides of the ethnic divide, concluding with a plea to move forward as Kenyans as opposed to Degodian or Adjuran tribe-members. (TJRC Public Hearings, 27 June 2011)

Another plausible trend is the gradation of crimes and the way in which women are perceived and treated by the laws and norms of the transitional society.

Despite good intentions in introducing gender perspectives into the design and implementation of the TJRC, there are some structural flaws and shortsightedness that deserve attention. 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, p. 2-3) Although Commissioners traveled around the country to hear witnesses speak, and tens of thousands of testimonies have been collected so far, the physical presence of the Commission could not – in all cases – overcome the reluctance or inability of men and women to participate equally in the process. Part of this can be explained due to cultural dimensions of gender relations, that is the intersection between the creation of gendered roles and the way in which local ethnic and religious cultures shape this
aspect of social life, as well as the widespread disenchantment and distrust of government amongst the populous.

Another deep-rooted facet that contributes to the gendered perception and legitimacy of transitional justice is that Kenya is a traditionally patriarchal 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 suggests that many women are not only unaware of their constitutional rights but that men discount the applicability to women of the same rights endowed to both genders by the country’s constitution. (FIDA, 2010, p. 7) This problem relating to lack of knowledge and understanding of rights and responsibilities amongst ordinary folk partly explains the normative culture that supports gender-based violence and the exclusion of gender analysis in transitional justice. At the same time, it highlights the argument for incorporating feminist standpoint epistemology because the burden of low civic education, which can be overcome through raising awareness, is exacerbated by a lack of gender sensitivity. As such, understanding the standpoints of men and women need to be introduced into transitional justice to decipher how misinformation is perpetuated as well as how to deconstruct and replace it with gendered perspectives that are conducive to more equal 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, p. 9) As one witness explained to the TJRC, for many women in Kenya, the real
suffering begins after a massacre or after a rape or other period of violence. (TJRC, 2012) 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. Women’s access to transitional justice mechanisms is thwarted by a system not attuned to societal mores that place women below men and a general pattern of low civic education that has plagued the TJRC and therefore excluded participants who are already socioeconomically marginalized.

The TJRC has the power to recommend criminal prosecutions, further police-led investigations and also ask parliament to take necessary legislative action to reform preexisting structures, such as discriminatory or inadequate laws, to help prevent gender-based discrimination. In essence, 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. Part of the Kenyan TJRC’s mandate is to also provide recommendations to parliament on how reparations should be allocated, in what form and to whom. Reparative justice is a crucial component of the restorative justice goals held by the TJRC and providing material or symbolic 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 harms suffered or at least, ease their rebuilding of their livelihoods.

The loss of safe shelter and of livelihoods is especially difficult or women, including those with dependents and those who are unmarried but lack a health support system. This fact, however, has been overlooked by the TJRC and is another example of how the institution has fallen short in maintaining a gender perspective. 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 1 January, 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.” (Kenya TJRC, 8 February 2012)

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 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.” (2007) Furthermore, recommendations for reparations for gender-related abuse victims must be upheld by the parliament, in accordance with the Constitutive Act. The proof of the process’s value 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.
VI. CONCLUSION

Wars do not end simply and transitional justice initiatives do not begin simply; trying to understand and address the gender dimensions of both make each even more complex. Transitional justice can be compared to walking a tightrope. (Villa-Vicencio, 2011) 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. Gendering transitional justice, as this study has discussed, is an intricate, multidimensional and arduous process that requires stamina, political backing, local ownership and mass participation. It is, however, an essential element for maximizing the transformative potential of a transition period. Gendering transitional justice begins with the introduction of a gendered perspective into the conceptualization of a transitional framework in order to better understand the experiences of both men and women during the period of conflict and their role vis-à-vis human rights violations. However, the introduction of a gender perspective, whether through creating provisions for gender balance in staffing of institutions or by giving credence to civil society organizations or by listening and recording, testimonies of women alongside men in transitional justice initiatives, is only the first step.

In addition to gendered perspectives, there is a need to sustain a level of gender sensitivity 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. Furthermore, as Chapters IV and V illustrated in this paper, retributive or corrective mechanisms for transitional justice 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, as is understood in its most conventional sense, within the realm of legally administered punishment. In both restorative and retributive institutions, however, special attention is required for achieving gender justice.

An engendered transitional justice experience is one where gender mainstreaming is practiced in a way that benefits both men and women with respect to their diverse experiences and their needs that are informed by not only their gender but other social, political, economic and ethnic characteristics. In other words, gender mainstreaming is necessary and cannot be accomplished without the equal participation, representation, inclusion and leadership of men and women – even if their roles and responsibilities may differ. Gender mainstreaming helps to inform gender analysis and gender analysis can be useful for improving gender mainstreaming; transitional justice institutions, which are iterative and experimental by nature, should leverage this reciprocal relationship between gender mainstreaming and gender analysis to facilitate gender justice. As discussed previously, transitional justice is complicated and measuring success is difficult, even when the time is ripe and even when there is mass support for a truth-telling, reconciliatory, punitive, memorialization or compensatory processes.

Quantifying the impact of gendered perspectives in transitional justice conflict transformation is difficult. Quantitative data is scarce and qualitative data is limited primarily to anecdotes recounted to journalists or researchers, oral histories and official records of courts, commissions or other local and international institutions. Gender mainstreaming in transitional justice includes increasing the sensitivity to gender-related issues, incorporating 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. In trying to maximize the positive potential of gendering transitional justice, transitioning societies must recognize that negligence of or discrimination against half the population results in unattended old wounds, 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. The Institute for Inclusive Security notes that although measuring the impact of women in transitional justice is difficult, the following holds universal truth:

“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, p.1)

As such 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 in any transitional justice context, including the ones covered in this study, broaden what constitutes justice and for whom. Moreover, the transformative effect of incorporating a gender sensitive lens and sustaining a gendered analysis extends beyond just women. The beneficiaries of gendering transitional justice are many, including women, children, ethnic or religious minorities, the poor and even men. There is a communal value to gendering transitional justice.
One often hears the slogan “women’s rights are human rights” but when digging deeper into the issue, the question arises, what does that actually mean? Indeed women are human beings, just as men, and there are certain common rights that must be protected for both member of either or both gender groups but just because such commonality exists does not warrant an ignorance, both on a theoretical level as well as in practice, of how the two groups’ needs differ and how rights for each should be conceptualized along gendered cleavages. 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.

Nevertheless, cognizance of engendered differences in the experiences of victims and survivors of mass atrocities is only beginning of the long, arduous and dynamic struggle to achieve gender mainstreaming in truth-telling, criminal prosecutions, administering reparations and formulating an inclusive, accurate and people-centric record of the past. 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 makes or breaks the cycle of discrimination against persons based on their gender, widespread negligence of such discrimination and an oppressive silence that keeps those discriminated against quiet. 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 towards 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 other various other relevant social roles.
BIBLIOGRAPHY


