

Does Feminism Need a Theory of Transitional Justice? An Introductory Essay

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Abstract

This essay surveys feminist scholarship and praxis on transitional justice, examining its ongoing contribution to the conceptualization and design of transitional justice mechanisms. We examine some of the gender implications of a specifically 'transitional' theory of justice. The essay concludes by proposing that feminist theory should focus on how transitional justice debates help or hinder broader projects of securing material gains for women through transition, rather than trying to fit a feminist notion of justice within transitional justice frameworks.

This essay provides a short examination of feminist perspectives on transitional justice, illustrating both interventions seeking to reform its practice and a growing feminist unease with the 'from' (male-defined political violence) and 'to' (liberal democratic frameworks) of transitional justice discourse. We set out this multi-level feminist engagement with transitional justice in terms of a three-part question: where are women, where is gender, and where is feminism in transitional justice?¹ The first part of the question – 'where are women in transitional justice' – highlights the visible exclusions of transitional justice: women have been largely absent from forums that settle on the nature and design of transitional justice mechanisms. The second part – 'where is gender in transitional justice' – addresses the deeper conceptual exclusion of women in transitional justice projects and asks how these projects might be reconfigured to better accommodate women's diverse experiences of conflict, human rights violations and post-conflict demands for justice. The third part of the question – 'where is feminism' – leads to an examination of the deep normative feminist critique of transitional justice. Here we point to a growing feminist unease with transitional justice discourse, and argue that this is due to the difficulty of constructing a feminist account of a specifically

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¹ We are indebted to Julie Mertus for her assistance with this categorization. See further Julie Mertus, 'Teaching Gender and Feminism in International Studies' in *International Studies Perspectives* (forthcoming 2007). See also Hilary Charlesworth, 'Feminist Methods in International Law,' *American Journal of International Law* 93 (1999): 379–394. We would like to thank Professors Julie Mertus and Fionnuala Ní Aoláin for comments on an earlier draft.

'transitional' form of justice. We illustrate this unease by examining the gender implications of current theoretical accounts of transitional justice. In conclusion we ask whether feminists need a theory of transitional justice. We suggest that feminist theory should focus on how transitional justice debates help or hinder broader projects of securing material gains for women through transition, rather than try to fit a feminist notion of justice within transitional justice frameworks. We argue that reform of transitional justice mechanisms to address the justice demands of women remains important both as an interim matter, and to inform theory.

Adding Women?

Transitional justice is typically described as a package of measures which societies emerging from violent conflict use to pursue accountability.² Whilst the field of transitional justice is widely accepted as having its origins in the Nuremburg trials, the term has more recently emerged with reference to post-1990 moves from authoritarian to liberal regimes.³ The definition above is indicative of a new phase of transitional justice initiatives as responsive to an increasing variety of situations, including '[w]ar, in a time of peace, political fragmentation, weak states, small wars, and steady conflict.'⁴ While transitional justice post-1990 emerged as a notion of extending accountability into a post-conflict terrain where it was missing, the more recent 'normalization' of the discourse has come to be seen by critical theorists (including feminists) as much more ambivalently connected to exceptionalism, the justification of international intervention and even US hegemony.⁵ All three phases, however, have as their central focus the dilemma over the relationship between accountability and the political needs of transition. As the word 'transitional' suggests, 'transitional justice' is both justice with an instrumental political purpose (to effect transition) and a differentiated form of justice for a peculiar and time-limited period.

Both the legal standards which transitional justice mechanisms draw on, and the processes by which they have been designed, have tended to be exclusionary of women.⁶ The current widening notion of transitional justice, which we primarily

² International Center for Transitional Justice (ICTJ), <http://www.ictj.org>; African Transitional Justice Research Network, <http://www.transitionaljustice.org.za>. See for example, International Center for Transitional Justice.

³ Ruti Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal* 16(2003): 69–94; see also Colm Campbell and Fionnuala Ní Aoláin, 'The Paradox of Transition in Conflict Democracies,' *Human Rights Quarterly* 27 (2005): 172–213.

⁴ Teitel, supra n 3 at 90. Cf. also ICTJ definition, supra n 2, which bears out the breadth of the current application, noting that it works 'in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices of systematic abuse remain unresolved.'

⁵ Martti Koskeniemi, 'Between Impunity and Show Trials,' in *Max Planck Yearbook of United Nations Law* 6 (Leiden and Boston: Brill, 2002), 1–32; Teitel, supra n 3; cf. Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'The Battle for Transitional Justice: Hegemony, Iraq and International Law,' in *Judges, Transition and Human Rights Cultures: Essays in Honour of Stephen Livingstone*, ed. Kieran McEvoy, John Morrison and Gordon Anthony (Oxford: Oxford University Press, forthcoming 2007).

⁶ For example, the international tribunals in Nuremberg and Tokyo made no mention of rape, Sanam Naraghi-Anderlini, 'Women and Peace through Justice,' *Development* 48 (2005): 103–110, 104. The continued exclusions of truth commissions and reparations programmes are examined infra text at n 38–43.

engage with here, serves as an example. Many transitional justice mechanisms now emerge as a consequence of negotiations among protagonists and mediators to bring violent conflict to an end. These negotiations give rise to compromises affecting the extent to which accountability can ensue. However, waging wars and negotiating peace agreements are both predominantly male affairs. The processes that produce contemporary transitional justice mechanisms tend to be negotiated by state and non-state protagonists to the conflict and by international mediators who are overwhelmingly male.⁷ Negotiation processes are also gendered at a deeper level in that they typically focus on ceasefires followed by complex divisions of power between divided groups through innovative electoral and governmental arrangements and/or divisions of territory.⁸ Matters that address underlying issues of discrimination, domination and improvement of physical, social and legal security, particularly with regard to gender, are often addressed as secondary, or not at all.⁹

The structuring of negotiations around narrow conceptions of ‘the problem’ and the male bias at the negotiating table reinforce each other, with women moving all too easily from being ‘pawns of war’ to ‘pawns of peace.’ Even where the input of women is achieved at the peace agreement stage, there is often a further battle to be won in securing participation in the negotiation of the details of transitional justice mechanisms.¹⁰

However, the absence of women from these formal negotiations does not equate with the absence of women’s demands for accountability. As civilians, women suffer disproportionately from armed conflict.¹¹ Women are disproportionately represented in civil society initiatives to sustain communities during conflict and to bring conflict to an end.¹² Furthermore, women predominate as household-heads

⁷ Harriet Martin, *Kings of Peace, Pawns of War: the Untold Story of Peace-making* (London and New York: Continuum, 2006), xi, noting that 99% of those who negotiate in peace processes are male.

⁸ Ní Aoláin reveals the very circumscribed and gender-biased understanding of key terms in these negotiations, such as disarmament, security, and accountability. Disarmament is understood to remove arms from the public rather than the private sphere, security is understood as state based rather than as a broader notion of human security and the prevailing notion of accountability obscures the persistence of gender-based violence through transition and post-transition. The privileging of elite male actors in these negotiations both creates and reinforces these gendered shortcomings. Fionnuala Ní Aoláin, ‘Political Violence and Gender During Times of Transition,’ *Columbia Journal of Gender and Law* 15 (2006): 829–849, 846.

⁹ In their detailed analysis of the Dayton Agreement, Chinkin and Paradine note that issues of political participation and representation, the sexual division of labour, violence against women, prostitution and trafficking, which were of priority importance to women in Bosnia and Herzegovina, were not addressed by the agreement. Christine Chinkin and Kate Paradine, ‘Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords,’ *Yale Journal of International Law* 26 (2001): 103–178, 127.

¹⁰ Cf. Vasuki Nesiah, ‘Gender and Truth Commission Mandates’ (paper presented at Open Society Institute (OSI) forum on Gender and Transitional Justice, February 7, 2006) for a discussion of the sustained feminist mobilization throughout the drafting, interpretation and implementation of the mandate of the Peruvian Truth and Reconciliation Commission.

¹¹ United Nations Development Programme, *Human Development Report*, (UNDP, 1995): 45, cited in Charlesworth, *supra* n 1 at 385.

¹² Christine Chinkin, ‘Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women,’ (United Nations Division for the Advancement of Women Expert Group Meeting, November 2003), <http://www.un.org/womenwatch/daw/egm/peace2003/documents.html>; Christine Bell, ‘Women and the Problems of Peace Agreements- Strategies for Change,’ in

in many post-conflict societies,¹³ making women integral to post-conflict reconstruction and reconciliation. Therefore, while the post-conflict environment tends to be landscaped and run by men, it is structured to a great degree by gender. As illustrated below, women have addressed their exclusion by seeking reforms to both the legal standards and the processes of transitional justice.

Adding Gender?

To Accountability Mechanisms

Efforts to 'add gender' to transitional justice have been most prominent with respect to the legal treatment of sexual violence in conflict. In the course of the 1990s the major focus of transnational feminist mobilization concerned the need to end impunity for violence against women.¹⁴ This mobilization had a very clear relevance to transitional justice, as it sought to expose the widespread and systematic occurrence of sexual violence in situations of violent conflict. It stood on theorized notions of the relationship of gender to violence, and of the use and limits of law as a tool with which to address such violence.¹⁵ Advocacy advanced on three primary grounds: firstly, to secure the recognition of women's experiences of gender-based violence in armed conflict as amongst the most serious crimes of war; secondly, to bridge the gap between legal standards and their enforcement by securing prosecutions for these war crimes; and thirdly, to secure reforms in courtroom procedures in order to ensure that victims of sexual violence were not re-victimized by the adversarial legal process.¹⁶ Central to these changes was the recognition of women's experiences of sexual violence in armed conflict as amongst the most serious crimes of war by including rape within the definitions of a 'grave breach' of the Geneva Conventions,¹⁷ of crimes against humanity¹⁸ and

Peace Work: Women, Armed Conflict and Negotiation, ed. Radhika Coomaraswamy and Dilrukshi Fonseka (New Delhi: Women Unlimited, 2005).

¹³ Hilary Charlesworth and Judith Gardam, 'Protection of Women in Armed Conflict,' *Human Rights Quarterly* 22 (2000): 148–166, at 156.

¹⁴ Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, New York: Cornell University Press, 1998), 165–198. But see Julie Mertus and Pamela Goldberg, 'A Perspective on Women and International Human Rights after the Vienna Declaration: The Inside/Outside Construct,' *New York University Journal of International Law and Politics* 26 (1994): 201–234, arguing that this focus has been led by Northern funders.

¹⁵ This literature is too vast to cite fully, but for examples see Rhonda Copelon, 'Surfacing Women: Re-engraving Crimes Against Women in Humanitarian Law,' *Hastings Women's Law Journal* 5 (1994): 243–266; Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (The Hague: Martinus Nijhoff, 1997).

¹⁶ Julie Mertus, *Women's Participation in the International Criminal Tribunal for the Former Yugoslavia (ICTY): Transitional Justice for Bosnia and Herzegovina* (Women Waging Peace, July 2004).

¹⁷ *Prosecutor v. Tadic*, No. IT-94-1-T (May 7, 1997) [hereinafter *Tadic*].

¹⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, annex, Art. 5(g) (May 25, 1993), 32 ILM 1203 (1993), available as amended at <http://www.un.org/icty> [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, SC Res. 955 (Nov. 8, 1994), 33 ILM 1398 (1994), <http://ohchr.org/English/law/itr.htm> [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, July 17, 1998, Art. 8, 2187 UNTS 3 [hereinafter Rome Statute]; Statute of the Special Court for Sierra Leone, annex to Agreement on the

of genocide.¹⁹ The Rome Statute of the International Criminal Court (ICC) codified these developments and went beyond them by explicitly recognizing rape, sexual slavery, enforced prostitution, pregnancy and sterilization and other forms of sexual violence as crimes against humanity and as war crimes.²⁰ Trafficking is included as slavery, and gender-based persecution is included as a crime against humanity.²¹ With respect to bridging the gap between legal standards and their enforcement, reforms have occurred in the investigation of war crimes to improve the detection of gender-based human rights violations²² and provision has been made for prosecutors to have access to expertise in the prosecution of gender-based crimes.²³ In addition, the International Criminal Tribunal for the Former Yugoslavia (ICTY) made significant changes to the rules of evidence, significantly limiting the extent to which consent could be presented as a defence to sexual assault, prohibiting evidence of a victim's past sexual conduct and removing the requirement of corroboration of a victim's testimony of sexual assault.²⁴ These precedents have been continued through the operation of the International Criminal Tribunal for Rwanda (ICTR), the Sierra Leone Special Court, and the ICC.²⁵ In order to make the procedures of international criminal tribunals more

Establishment of the Special Court for Sierra Leone, Jan. 16, 2002, UN-Sierra Leone, Art. 2(g), <http://www.sc-sl.org> [hereinafter Statute of Sierra Leone Special Court].

¹⁹ *Prosecutor v. Akayesu*, No. ICTR-96-4-T (Sept. 2, 1998).

²⁰ Rome Statute, supra n 18, arts. 7 and 8. See further Naraghi-Anderlini, supra n 6; Barbara Bedont and Katherine Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court,' *Brown Journal of World Affairs* 6 (1999): 65–85.

²¹ Rome Statute, supra n 18, art. 8. The Statute of Sierra Leone Special Court, supra n 18, makes similar provision.

²² The failure of the UN fact-finding mission in Rwanda in 1994 to detect the systemic sexual violence against women until nine months after the genocide when women began to give birth in unprecedented numbers highlighted a grave need for improvements in investigating human rights abuses of women. Anne Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System,' *Human Rights Quarterly* 19 (1997): 283–333, 292 n31. To this end, a number of developments have occurred to increase the number of women involved in the investigation of gender-based crimes, with unprecedented numbers of women involved in the ICTY and ICTR as investigators and researchers, and to further the requirement that appointments to the ICC ensure the 'fair representation' of men and women (Bedont and Hall-Martinez, supra n 20).

²³ For example, in 1995 the Chief Prosecutor for the UN, Richard Goldstone, appointed a legal advisor for gender-related crimes to the Office of the Prosecutor. This precedent was continued with Article 47 of the Rome Statute, supra n 18, which requires the appointment to the Court of staff with legal expertise on violence against women and children, and Article 15(4) of the Statute of Sierra Leone Special Court, supra n 18. At the time of writing, the position of Senior Legal Advisor on gender issues at the ICC has not yet been filled.

²⁴ *Tadic*, supra n 17, produced a landmark decision outlining the criteria for keeping the identities of witnesses confidential from the public and, under special circumstances, anonymous even to the defence. In *Prosecutor v. Zejnil Delalic*, Decision on the Prosecution's Motion for the Redaction of the Public Record, ICTY Trial Chamber (5 June 1997), Case No. IT-96-21, the chamber reaffirmed the rule prohibiting the introduction of prior sexual conduct evidence. These developments are codified in the amended ICTY, Rules of Procedure and Evidence, UN Document IT/32/Rev.38 (2006). For an account of these developments, see Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law,' *McGill Law Journal* 46 (2000): 217–240.

²⁵ ICTR Statute, supra n 18 art. 14; International Criminal Court, Rules of Procedure and Evidence, U.N. Document PCNICC/2000/1/Add.1 (2000), Rule 70 & 71; Intl Criminal Court Court, supra n 18 art. 14(1).

accommodating to the testimony of survivors of sexual violence, special units have been established to provide survivors and witnesses with counselling and support,²⁶ and the number of women working in these institutions has been increased.²⁷

In terms of securing accountability for gender-based violence through truth commissions (TCs), significant advances have also been made. Nesiiah notes that even though their mandates were formally gender neutral, commissions in Guatemala, South Africa and Peru interpreted mandate language regarding torture and ill treatment as the legal channels to address sexual violence. In Haiti, Sierra Leone and East Timor/Timor Leste, gender or sexual violence was explicitly incorporated into commission mandates.²⁸ Analysis of more general developments in the mandates of TCs indicates a positive trend, whereby the 'gender-neutral' stance of the early Latin American commissions of Argentina and Chile can be contrasted with the comprehensive understanding of harms demonstrated by the recent East Timor/Timor Leste commission.²⁹ A recent World Bank study echoes this positive finding, noting the incremental improvements made by the decision of the South African Truth and Reconciliation Commission to hold gender hearings, the establishment of a gender unit in the Peruvian Truth and Reconciliation Commission and, most recently, the integral role played by the United Nations Development Fund for Women (UNIFEM) in providing technical advice, training and other support to staff and those who testified before the Sierra Leone Truth and Reconciliation Commission.³⁰

International standards aimed at regulating the content of peace agreements are beginning to emerge.³¹ These call for the recognition of harms inflicted on women in the fabric of peace processes and transitional justice mechanisms. The 2004 United Nations Secretary General's Report on the Rule of Law and Transitional Justice identifies addressing women's experiences of domestic violence and targeting violence in the public sphere as priority for 'filling the rule of law vacuum.'³² UN Security Council Resolution 1325 calls 'all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.'³³ The Updated Principles on

²⁶ ICTY Rules of Procedure and Evidence, IT/32/Rev.38 (13 June 2006), Rule 34; ICTR, Rules of Procedure and Evidence, U.N. Document ITR/3/REV.1 (1995), Rule 34; Rome Statute, supra n 18, art. 43(6); Statute of Sierra Leone Special Court, supra n 18, art. 16(4).

²⁷ Bedont & Hall-Martinez, supra n 20.

²⁸ Nesiiah, supra n 10.

²⁹ Ibid.

³⁰ World Bank, *Gender, Justice and Truth Commissions* (Washington DC: World Bank, 2006), 29, <http://www.ictj.org/static/Gender/0602.GenderTRC.eng.pdf>.

³¹ See further Christine Bell, 'Peace Agreements: Their Nature and Legal Status,' *American Journal of International Law* 100 (2006): 373–412, 373 n3.

³² 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,' Report of the Secretary-General, UN Document S/2004/616 2004, para. 33 [hereinafter Rule of Law and Transitional Justice Report].

³³ SC Res. 1325 (Oct. 31, 2000), para. 10.

Impunity identify the need for commissions of inquiry to address violations of the fundamental rights of women.³⁴ There have also been some moves in peace agreements to provide for violence against women to be addressed post-settlement. The Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region (2004) included a commitment to establish regional mechanisms for support and assistance to women and girl victims of sexual exploitation.³⁵ The Arusha Peace and Reconciliation Agreement for Burundi (2000) included gender-based violence in the section dealing with principles and measures relating to genocide, war crimes and other crimes against humanity.³⁶ Actions and Measures for Chiapas Joint Commitments and Proposals from the State and Federal Governments of Mexico and the Ejército Zapatista de Liberación Nacional (EZLN) (1996) includes a commitment to review and update penalties imposed for sexual crimes and intra-family violence.³⁷

Feminists continue to engage at a policy level with the exclusions of transitional justice and seek to 'add gender' to its processes. For example, the two studies on gender and TCs cited above continue to push for improvements in making TCs more accessible to the input and justice demands of women. In addition, an ongoing project by the International Center for Transitional Justice (ICTJ) examines gender and reparations programmes across a number of transitional contexts and has highlighted a series of shortcomings common to these programmes.³⁸ These shortcomings concern the exclusion of women from the process of designing reparations programmes, the definition of violence to be repaired,³⁹ the criteria for defining beneficiaries,⁴⁰ the benefits given by way of reparations⁴¹ and the

³⁴ Diane Orentlicher, 'Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,' Report of the Independent Expert to Update the Set of Principles to Combat Impunity, UN Commission on Human Rights, 61st Session, Item 17, UN Document E/CN.4/2005/102/Add.1, Feb. 8, 2005, Principle 12 [hereinafter Updated Principles on Impunity].

³⁵ 'Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region,' (November 20, 2004), para. 67, <http://www.reliefweb.int/library/documents/2004/icpsdd-gr-20nov.pdf>.

³⁶ 'Arusha Peace and Reconciliation Agreement for Burundi,' (August 28, 2000), art. 6; the full text of the peace agreements is available at: <http://www.usip.org/library/pa.html>.

³⁷ 'Actions and Measures for Chiapas Joint Commitments and Proposals from the State and Federal Governments, and the EZLN,' (February 16, 1996).

³⁸ ICTJ, 'Research Project on Gender and Reparations,' <http://www.ictj.org/en/research/projects/gender/index.html>.

³⁹ Although rape is generally included, this does not extend to a broader understanding of gender-based violence. Secondary damages, e.g., unwanted pregnancy or sterility, are seldom included. Internal displacement of civilians, which predominantly affects women, is not included, *ibid*.

⁴⁰ For example, relatives are compensated for the dead and disappeared, but not for injury suffered by survivors. This affects mothers in particular who seek to cope with the violence and trauma suffered by their children who survived the conflict, *ibid*.

⁴¹ Benefits provided by reparations do not generally extend to the training and education of adult women in order to strengthen their economic position, despite the highly disproportionate number of female heads of households in the aftermath of violent conflict, *ibid*.

implementation of reparations programmes.⁴² The ICTJ project, and the smaller-scale 'Gender Justice' project examining reparations programmes in Sri Lanka and Colombia,⁴³ are being conducted with a view to identifying best practices and to strengthening reparations programmes to attend to the diverse needs and experiences of women.

To Broader Negotiation Processes

These efforts to add women and gender to transitional justice have been accompanied by efforts to add women and gender to the settlement processes that produce transitional justice mechanisms. Feminist scholarship and advocacy have sought to secure the participation of women in decision making according to the familiar arguments referred to here.

The first argument emerges in response to the question of 'where are women?' This justice argument contends that as women comprise one-half of the population, they deserve to participate in peace processes on an equal basis with men.⁴⁴ The second argument arises from the desire to add gender to transitional justice, asserting that women have gender-specific experiences of conflict that give rise to gender-specific needs that are unlikely to be addressed without the participation of women.⁴⁵ The improved sensitivity of the ICTY and ICTR processes to the concerns of women has been attributed to the greater representation of women on the staff of those bodies⁴⁶ while the significant developments secured in the Rome Statute have been attributed to the considerable feminist mobilization around its drafting.⁴⁷ Similar claims have been made as regards specific mechanisms such as reparations.⁴⁸ The argument for representation is not just aimed at the inclusion of women, but at transformative feminist engagement with international politics. The hope is that, by changing the players, the nature of the game will change in turn, thereby allowing a different set of priorities to emerge. As Chinkin has argued, the '[f]ailure to include [women's] views and ideas can lead to an impoverished understanding of peace and security that focuses on militarism and power supported by force.'⁴⁹ She supports this argument by pointing to the very different

⁴² Given the higher levels of illiteracy amongst women, they are disadvantaged in accessing reparations programmes. The general mistrust of public institutions which marks post-conflict societies is often compounded for women by the male chauvinism of personnel, *ibid.*

⁴³ 'Gender Justice: Reparations and Armed Conflict, A Research Project,' <http://www.genderjustice.org>.

⁴⁴ Charlesworth and Gardam, *supra* n 13 at 165; Christine Chinkin, 'Gender, Human Rights and Peace Agreements,' *Ohio State Journal of Dispute Resolution* 18 (2003): 867–886, 871.

⁴⁵ See further *infra* text at n 75–76, discussing hierarchy of abuses constructed by transitional justice mechanisms; see also sources cited *supra* n 12; cf. Krishna Kumar, 'Civil Wars, Women, and Gender Relations: An Overview,' in *Women and Civil War: Impact, Organizations, and Action*, ed. Krishna Kumar (Boulder, Co.: Lynne Rienner Publishers, 2001), 5, 7, arguing that women have gender-specific experiences of conflict due to their role in sustaining families where male household heads are displaced.

⁴⁶ Bedont and Martinez-Hall, *supra* n 20.

⁴⁷ *Ibid.*

⁴⁸ ICTJ, *supra* n 38.

⁴⁹ Chinkin, *supra* n 12 at 10.

set of priorities that tend to emerge from women's parallel (or 'track two') peace processes, in contrast to the priorities imprinted on formal peace negotiations.⁵⁰ She observes, for instance, the prioritization of socio-economic rights in the agendas emerging from track two processes in Afghanistan, East Timor/Timor Leste and Burundi.⁵¹ A more instrumentalist argument contends that the full and equal inclusion of women at the design stage offers better solutions for all to the dilemmas of transitional justice. It has been argued that presuming the support of women for transitional justice mechanisms, without consulting women on the creation and design of these mechanisms, risks undermining their effectiveness,⁵² particularly given the predominance of households headed by women in many post-conflict societies.⁵³

The feminist emphasis on the participation of women needs also to be understood as a response to the problems of articulating common political goals in the context of deeply entrenched differences amongst women, both locally and across global divides. Locally, conflicts are characterized by a 'meta-conflict' – that is 'multiple disagreements over what kind of conflict it is, and as to whether it is "one" or "many"'.⁵⁴ Different meta-conflict stances will be underwritten by different experiences of the conflict and will produce different ideas as to the necessary ingredients for resolving the conflict. Transitional justice mechanisms are overt sites of meta-conflict negotiations. Women in conflict situations will not stand outside this meta-conflict, but will reflect it – albeit in ways that are different from those of men. Unified feminist agendas across global divisions have further been charged with implicating western feminists in imperial projects.⁵⁵ The absence of an easy feminist agreement on the content of a 'women's agenda' has resulted in a focus on the process: women agree that they should at least be included in the debate.⁵⁶

In this area also, emerging soft law standards suggest growing international recognition of the importance of women's participation in decision making. The Beijing Platform for Action (1995) identifies 'Women in Power and Decision Making' as a critical area for concern, setting out strategic objectives around women's participation in power structures,⁵⁷ leadership and decision-making processes.⁵⁸ In 1997, the Committee on the Elimination of All Forms of

⁵⁰ See *infra* text at n 6–10.

⁵¹ Christine Chinkin, 'Peace Processes, Post-conflict Security and Guarantees of Women's Rights: the International Context Considered,' (9th Torkel Opsahl Memorial Lecture, Queen's University of Belfast, December 1, 2004).

⁵² Cf. Chinkin and Paradine, *supra* n 9.

⁵³ Charlesworth and Gardam, *supra* n 13 at 156.

⁵⁴ John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Oxford: Blackwell, 1995), 1.

⁵⁵ Anne Orford, 'Feminism, Imperialism and the Mission of International Law,' *Nordic Journal of International Law* 71 (2002): 275–296.

⁵⁶ Cf. Michael Walzer, 'The Civil Society Argument,' in *Dimensions of Radical Democracy: Pluralism, Citizenship, Democracy*, ed. Chantal Mouffe (London and New York: Verso, 1992), 89–107.

⁵⁷ World Conference on Women, (UN/Doc.A/CONF.177/20 1995), G.1.

⁵⁸ *Ibid.*, G.2.

Discrimination Against Women formulated General Recommendation 23 on women in political and public life⁵⁹ and, most recently, the UN Division for the Advancement of Women held an expert group meeting on 'Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership' (2005). Most notable has been the adoption by the United Nations Security Council of Resolution 1325 on 'Women, Peace, and Security,' which has as its centrepiece the need for women's increased participation in all stages of peace processes.⁶⁰ The increasing recognition of the important role of civil society organizations in the operation of the UN⁶¹ can also be seen to offer an important opportunity to increase the participation of women, as the male-dominated nature of formal politics has worked to ensure that women are most often excluded from high-level political negotiations even though they predominate in grassroots initiatives.⁶² This relatively new development of international standards asserting the importance of women's political participation is evident also in standards that specifically address transitional justice. For example, the Updated Principles on Impunity contain six principles concerning women, no fewer than four of which emphasize the importance of women's participation in decision making around mechanisms to deal with the past.⁶³

The requirement of participation by women is also reflected in more recent peace agreements. Examples of such provisions exist in peace agreements arising from conflicts in the African Great Lakes Region (2004), Bougainville (2001), Burundi (2000), the Chiapas (1996), the Chittagong Hill Tracts in Bangladesh (1997), Guatemala (1996), Liberia (2003), Northern Ireland (1998), and Somalia (1993).⁶⁴ The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement) (2001) and the Iraqi Interim Constitution (2005) both established gender quotas for election to the national legislature.⁶⁵ With specific reference to transitional justice, provisions in the Arusha Peace and Reconciliation Agreement for Burundi,⁶⁶

⁵⁹ 'United Nations Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation 23, Political and Public Life' (16th session, 1997, U.N. Document A/52/38/Rev.1 at 61).

⁶⁰ SC Res. 1325 (October 31, 2000) It also calls for gender training in peacekeeping operations, the protection of women and girls in conflict and gender mainstreaming in the reporting and implementation systems of the United Nations relating to conflict, peace and security.

⁶¹ 'A More Secure World: Our Shared Responsibility,' Report of the High-level Panel on Threats, Challenges and Change, UN GAOR Council, 59th Session, Agenda Item 55, UN Document A/59/565 2004, *passim*; 'In Larger Freedom: Towards Development, Security and Human Rights for All,' (Report of the Secretary-General, UN GAOR Council, 59th Session, Agenda Items 45, 55, UN Document A/59/2005) [hereinafter In Larger Freedom], *passim*; Rule of Law and Transitional Justice Report, *supra* n 32, *passim*.

⁶² See sources cited *supra* n 13.

⁶³ Updated Principles on Impunity, *supra* n 34, Principles 6, 7, 32 and 35; two others emphasize the importance of recognizing and addressing the experiences of women.

⁶⁴ The full texts of the peace agreements are available at <http://www.usip.org/library/pa.html>.

⁶⁵ Georgina Waylen, 'Constitutional Engineering: What Opportunities for the Enhancement of Gender Rights?' (UK Political Studies Association Women and Politics Annual Conference, February 2006).

⁶⁶ 'Arusha Peace and Reconciliation Agreement for Burundi,' *supra* n 36, art. 8, para. 2.

the Comprehensive Peace Agreement in Liberia⁶⁷ and the Lomé Agreement in Sierra Leone⁶⁸ provided for the participation of women in transitional justice mechanisms established by the agreements.

Adding Feminism?

Responses to feminist demands to add women and gender to the processes of transitional justice have secured a significant degree of reform, as illustrated in the foregoing discussion. However, these changes have not received uncritical feminist endorsement. As regards the reform of transitional justice legal concepts, the experience of engagement has produced the phenomenon noted in the domestic context as ‘running hard to stand still’⁶⁹ – that is, the questionable capacity of institutional reform to deliver feminist transformation and the tendency of interim reforms to produce new obstacles for women. For example, some feminist commentators have criticized the specifics of the handling and judgements of individual cases before international criminal tribunals,⁷⁰ while others have questioned the efficacy of ‘courtroom justice’ for gender-based violence, pointing to a disillusionment of survivors of sexual violence with adversarial processes.⁷¹ Mertus contends that adversarial legal forums subject witnesses to repeated attempts to undermine their credibility, prevent the complete expression of their individual accounts (‘the legal counter-narrative’) and reify their position as women victims lacking agency.⁷² Some of these critiques tentatively propose TCs as potential alternatives to trials, because TCs can give voice to women’s individual narratives.⁷³ However, concerns have been expressed that here too women’s accounts can be sidelined in such processes in favour of the promotion of elite nation-building narratives.⁷⁴ More generally, these criticisms point to a gendered

⁶⁷ ‘Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia and Political Parties,’ (Aug. 18, 2003), art. XXXI(3).

⁶⁸ ‘Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone,’ (July 7, 1999), art. XXVIII.

⁶⁹ Carol Smart, ‘Feminism and Law: Some Problems of Analysis and Strategy,’ *International Journal of the Sociology of Law* 14 (1986): 109–123, at 116.

⁷⁰ For a summary of these criticisms, see Karen Engle, ‘Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina,’ *American Journal of International Law* 99 (2005): 778–816, text at n 26–31. These criticisms include arguments that the sentences handed down by the ICTY for sexual crimes have been too short, that the ICTY has not gone far enough in delineating specific crimes of sexual violence against women and that ‘lesser’ crimes have been prosecuted when the facts of individual cases would have supported prosecution for sexual slavery and genocide.

⁷¹ See especially Julie Mertus, ‘Shouting from the Bottom of a Well: the Impact of International Trials for Wartime Rape on Women’s Agency,’ *International Feminist Journal of Politics* 6 (2004): 110–129; see also Kirsten Campbell, ‘The Trauma of Justice: Sexual Violence, Crimes Against Humanity and the International Criminal Tribunal for the Former Yugoslavia,’ *Social and Legal Studies* 13 (2004): 329–350.

⁷² Mertus, *supra* n 61 at 112.

⁷³ *Ibid.*; cf. Christine Chinkin, ‘Women’s International Tribunal on Japanese Military Sexual Slavery,’ *American Journal of International Law* 95 (2001): 335–341.

⁷⁴ Fionnuala Ní Aoláin and Catherine Turner, ‘Gender, Truth and Transition,’ *UCLA Women’s Law Journal* 16 (forthcoming 2007); Fiona Ross, *Bearing Witness: Women and the Truth and*

hierarchy of abuses constructed by transitional justice mechanisms. Injuries related to narrow understanding of 'political violence' are privileged at the expense of socio-economic injuries suffered predominantly by women as internally displaced persons, heads of households and refugees.⁷⁵ It has been argued that reforms have concentrated on women's experiences of sexual violence, and silenced other important aspects of women's experiences of conflict.⁷⁶

As regards the battle for inclusion in broader peace processes, there is a clear feminist unease with the terms on which inclusion is offered. It increasingly appears that the link between inclusion and feminist transformation is being lost in translation, with women being included in preset processes in which there is little scope to reconsider and reshape the end goals. As Orford notes, providing for participation in situations where international agendas on conflict, peace and security already operate on the basis of given assumptions, threatens to obscure many of the issues that feminist and women's groups have attempted to raise, such as the relationship between insecurity and economic liberalization, or the ways in which the international division of labour is itself a violent process.⁷⁷

Moreover, securing the basic participation of women has proved somewhat elusive, with increasing scepticism as to the capacity of the United Nations to deliver.⁷⁸ In addition, as feminist political theory acknowledges and as the existence of women on all sides of the (meta)conflict attests, the desirability and effectiveness of descriptive representation (women representing women) is contentious.⁷⁹ In short, the increased participation of women does not equate in any simple way with a feminist reshaping of either peace processes or transitional justice mechanisms.⁸⁰

Reconciliation Commission in South Africa (London and Sterling, VA: Pluto Press, 2003); cf. Anne Orford, 'Commissioning the Truth,' *Columbia Journal of Gender and Law* 15 (2006): 851–882. Cf. also Rosalind Shaw, *Rethinking Truth and Reconciliation: Lessons from Sierra Leone* (Washington DC: United States Institute of Peace, 2005), arguing that in Sierra Leone, where a process of 'social forgetting' [emphasis in original] underpinned post-conflict recovery and reconciliation, the assumptions of international donors combined with a vocal minority locally led to the establishment of a TC with little popular support.

⁷⁵ Nesiah, supra n 10; Ní Aoláin, supra n 8; Katherine M. Franke, 'Gendered Subjects of Transitional Justice,' *Columbia Journal of Gender and Law* 15 (2006): 813–827; Fionnuala Ní Aoláin and Catherine Turner, supra n 74; Charlesworth and Gardam, supra n 8.

⁷⁶ Ibid.

⁷⁷ Orford, supra n 55.

⁷⁸ For an example of the trajectory of this scholarship, compare Hilary Charlesworth, 'Transforming the United Men's Club: Feminist Futures for the United Nations,' *Transnational Law and Contemporary Problems* 3 (1993): 421–451, with Hilary Charlesworth and Mary Woods, 'Mainstreaming Gender' in International Peace and Security: The Case of East Timor, *Yale Journal of International Law* 26 (2001): 313–317.

⁷⁹ See for example, Jane Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes",' *The Journal of Politics* 61 (1999): 628–657; Anne Phillips, *The Politics of Presence* (Oxford: Clarendon Press, 1995); Hannah Pitkin, *The Concept of Representation* (Berkeley: London University of California Press, 1967); Iris Marion Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990).

⁸⁰ Nevertheless, improvements in international legal responses to gender-based violence have been attributed to the increased presence of women, see Bedont and Hall-Martinez, supra n 20.

Accordingly, feminists have also engaged in deeper normative critiques of international systems, and these critiques are beginning to be seen in relation to transitional justice debates. One such example has been a 2006 special issue of the *Columbia Journal of Gender and Law* arising from a workshop hosted by the ICTJ in March 2005. In a practical attempt to revisit the boundaries of transitional justice, the workshop was not structured according to the traditional pillars of transitional justice (prosecutions, TCs, reparations, institutional reform, and reconciliation initiatives); rather, it examined themes of official truth, women's testimony, sexual violence, engaging with courts, victim identity, and transitional justice and nation building.⁸¹ It also challenged any limitation of the notion of 'transitional justice' to the conflict-peace setting: Orford's essay examines the transitional justice dimensions of 'Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.'⁸² Orford considers whether transitional justice institutions involve a particular form of reconstituting participants as 'reliable subjects of the capitalist democratic order.' She does this by considering the language of TCs 'as performances which accomplish the reconstitution of a unified nation and a liberal state.'⁸³

Feminist unease with the struggle for inclusion is rooted in more fundamental questions about what exactly transitional justice is transiting 'from' and 'to'. As Gray has noted, theories of a specifically 'transitional' justice tend to revolve around explaining and justifying the 'justice gap,' whereby transitional justice is partial justice. Broader scholarship (often not articulated theoretically) suggests three alternative theories of justice underpinning contemporary transitional justice: theorization of transitional justice as ordinary justice; theorization of transitional justice as liberalizing justice; and theorization of transitional justice as restorative justice.⁸⁴ These accounts view the central dilemma of a specifically 'transitional' theory of justice as inevitably linked to a notion of what the transition is 'from' and 'to'. These theories can be mediated by feminist engagement. However, they also link to definitions and an understanding of the past and thus to prescriptions for the future that can be problematic from a feminist viewpoint.⁸⁵

⁸¹ Vasuki Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice,' *Columbia Journal of Gender and Law* 15 (2006): 799–812.

⁸² Orford, *supra* n 74.

⁸³ *Ibid.*, 853–4.

⁸⁴ See David Gray, 'An Excuse-centered Approach to Transitional Justice,' *Fordham Law Review* 74 (2006): 2621–2693, who works with these different theorizations in his articulation of a need for a defence based on actions being in accordance with the 'public face of law' as providing the possibility of a normative concept of transitional justice which enables the 'justice gap' to be theorized 'as the best, not just the best possible, justice in transitions.'

⁸⁵ See *infra* text at n 99–102; see further Ní Aoláin and Turner, *supra* n 74.

Transitional Justice as Ordinary Justice

The theory of transitional justice as ordinary justice views transitional justice as an imperfect version of ordinary criminal justice.⁸⁶ It views tradeoffs (such as truth as a tradeoff for amnesty, forgiveness for punishment, and prosecution of only the most serious offenders for the most serious of offences) as being unable to be rationalized as building a distinctively 'transitional' theory of justice: the 'justice gap' is viewed as a political gap to be tolerated, rather than illustrative of a specifically 'transitional' conception of justice. Transitional justice as ordinary justice can view the justice gap as pragmatically justified on the basis that some justice is better than none. The difference between transitional justice and ordinary criminal justice is one of degree – after all criminal justice is always somewhat partial, yet we don't renounce our view of murder as a crime simply because many perpetrators are not caught. However, 'transitional justice as ordinary justice' can also be used to critique the shortcomings of transitional justice as unacceptable. A negative view of transitional justice mechanisms would argue that it is fundamentally unjust: so partial that in violating basic notions of justice the mechanisms are perhaps worse, rather than better, than no justice at all.

This theory of transitional justice in its positive form has attractions for feminists. Women as activists have been at the vanguard of attempts to ensure accountability—most vividly emblemized by *Las Madres de Plaza de Mayo*.⁸⁷ Their strong point was to choose a clear violation and push for accountability in specific cases. These cases became a symbol and catalyst for a broader need for accountability to remain on the post-conflict agenda. Theorized as 'ordinary justice,' transitional justice can affirm the deontological 'rightness' of accountability in all circumstances.⁸⁸ This theorization can acknowledge instrumental values such as facilitating 'reconciliation' or 'liberalization,' but does not depend on them and therefore does not fall apart when they are demonstrated to be illusory or mistaken. The 'justice gap' is not justified, merely tolerated in recognition of the need for justice to be pursued. Within this conception of transitional justice, women can define their injuries for themselves and can push for accountability, albeit with the conceptual and practical difficulties addressed above. However, there are also difficulties for feminists with this conception of justice. In particular, given the extensive feminist critique of domestic criminal justice processes,⁸⁹ it would seem some-

⁸⁶ Cf. Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' *Yale Law Journal* 100 (1991): 2537–2615; Eric Posner and Adrienne Vermeule, 'Transitional Justice as Ordinary Justice,' *Harvard Law Review* 117 (2004): 777–825, arguing that 'ordinary justice' in consolidated democracies must handle 'small-scale' transitions. Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission,' *Journal of International Affairs* 52 (1999): 647–667.

⁸⁷ See further Marysa Navarro, 'The Personal is Political: Las Madres de Plaza de Mayo,' in *Power and Popular Protest: Latin American Social Movements*, ed. Susan Eckstein (Los Angeles: University of California Press, 1989).

⁸⁸ Cf. Gray, *supra* n 84.

⁸⁹ These critiques focus on the inadequacy of prevailing criminal justice models to criminalize gender-based violence, to enforce existing criminal law and to secure prosecutions of perpetrators of

what strange for women to point uncritically to a need for traditional forms of accountability such as punishment.

Transitional Justice as Liberalizing Justice

The theory of transitional justice as liberalizing justice recognizes the partiality of transitional justice mechanisms, but views this partiality as theoretically justified by the peculiar nature of the transitional moment and the liberal end goals of the transition. Teitel, for instance, argues that the nature of the rule of law in transition requires that justice be understood as ‘extraordinary and constructivist’ of the transition. Rather than being located in an ‘ordinary social function’ of law as providing order and stability, transitional justice depends on a notion of law as transformative and enabling. From this theoretical perspective, conventional notions of the rule of law and individual responsibility are reconceived of in terms of a project of liberalization.⁹⁰ The ‘justice gap’ is therefore rationalized in terms of a set of rule of law requirements that can be attenuated where they can be shown to undermine, rather than assist, the transition to a liberal democratic future where a more conventional notion of the rule of law prevails. Thus, ensuring a transition, it may be argued, requires some mediation of the rule-of-law requirements of consistency, fairness and universality.

This theoretical conception of transitional justice lurks in many accounts, but is plagued by conceptual difficulties (acknowledged by Teitel herself).⁹¹ These arise from the fact that the liberal end goals of transition seem paradoxically to require that liberalism’s rule-of-law process requirements be attenuated during the transitional period.⁹² The difficulty for any theoretical conception of transitional justice is that once an end goal of liberalism is separated from liberalism’s process requirements, it is unclear what the end goal actually comprises. It can be argued that the transitional period constitutes a period of ‘progressive realisation’ of civil and political rights,⁹³ which will give way to full realization. However, as Teitel originally pointed out, there is a core tension ‘in the use of law to advance transformation as opposed to its role to conventional legality,’ which plays out in questions over how far an extraordinary conceptualization of criminal justice is permissible and what it is that determines the boundaries of its extraordinary manifestations.⁹⁴ Moreover, transitional justice as liberalizing justice does not

gender-based violence. See for example, Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987); Helena Kennedy, *Eve was Framed: Women and British Justice* (London: Chatto & Windus, 1992).

⁹⁰ Ruti Teitel, *Transitional Justice* (New York & Oxford: Oxford University Press: 2000).

⁹¹ Teitel, *supra* n 3; Gray, *supra* n 84.

⁹² Roland Paris, ‘The Perils of Liberal International Peacebuilding,’ *International Security* 22 (1997): 54–89.

⁹³ Gro Nuystuen, *Achieving Peace of Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Leiden and Boston: Martinus Nijhoff Publishers, 2005).

⁹⁴ Teitel, *supra* n 90 at 27.

necessarily deliver a coherent theory of justice, because '[t]he question remains whether there are any transitional justice baselines or any threshold minimum beyond which historical, psychological, or religious inquiry ought to be characterized as justice seeking.'⁹⁵

The danger also persists that once liberalism as a procedural safeguard is removed in the name of an aspirational liberal future, the liberalism being talked about is little more than a loose set of communitarian 'values,' easily manipulated and therefore capable of enabling the co-option of the transitional justice discourse.⁹⁶ Thus, a sinister side to transitional justice as liberalizing justice enters the picture. Justification of transitional justice as an extraordinary application of justice can start to move beyond the specifically transitional terrain toward justifying on-going international involvement until the recipient state reflects the 'values' of western liberal states – or looks more like the 'civilizing nations.' Fairly recent scholarship on transitional justice has acknowledged transitional justice as liberalizing justice, but the weight of this scholarship seeks to challenge it rather than endorse it. These criticisms view liberalizing justifications of transitional justice mechanisms as amounting to devices for international self-justification and as enabling hegemonic co-option of the discourse, such as with the U.S. de-Ba'athification process in Iraq.⁹⁷

Transitional justice as liberalizing justice contains some possibilities for promoting the inclusion of women as part of the liberal project. Liberal feminists have a tradition of working to make liberalism deliver its commitments on equality.⁹⁸ However, there are also difficulties within the feminist engagement with this conception of justice. The first difficulty is the starting point: feminists view the conflict that they are transiting from in a broader way than international mediators and local political actors do.⁹⁹ While feminists acknowledge that 'the' conflict is significant, and may indeed be at the vanguard of movements to end the conflict, they also tend to ask questions about the nature of political conflicts: whether there is one conflict or many and how levels of public and private conflict intertwine in women's lives, about the silences around the sexualized dimensions of war and about the gendered fall-out of the consequences of war.¹⁰⁰ In contrast, attenuating justice during transition with reference to a goal of liberalization in practice tends to narrow rather than expand the 'crimes' under consideration – with reference to thresholds such as the most serious offenders and the most serious offences, which often make the job of battling for inclusion more difficult.

⁹⁵ Teitel, *supra* n 3 at 89.

⁹⁶ Cf. In *Larger Freedom*, *supra* n 61, para. 128 (uses term 'values' to describe rule of law and human rights, which seems to be a deliberate watering down of these notions as legal standards).

⁹⁷ Koskeniemi, *supra* n 5 at 1–32; Teitel, *supra* n 90; cf. Bell, Campbell and Ní Aoláin, *supra* n 5; Orford, *supra* n 55.

⁹⁸ Julie Mertus, 'Liberal Feminism: Local Narratives in a Gendered Context,' in *Making Sense of International Relations Theory*, ed. Jennifer Sterling-Folker (Boulder and London: Lynne Reinner Publishers, 2006).

⁹⁹ See for example, Ní Aoláin, *supra* n 8.

¹⁰⁰ See for example, Ní Aoláin and Turner, *supra* n 74.

The second problem is that of the ‘end point’ of any theory of transitional justice as liberalizing justice. Feminist theory has produced several decades of critique of liberalism, which has systematically problematized liberalism’s neutrality, its construction of a public/private divide and the implicit patriarchal nature of its social contract.¹⁰¹ There are additional difficulties in the transitional setting. Women have documented how ending ‘the’ conflict will stop some forms of violence against women, but the post-conflict setting will enable other forms of violence to emerge, such as those perpetrated by peacekeepers or returning partners.¹⁰² As regards the ‘sinister side’ of transitional justice as liberalizing justice, internationally imposed liberalism-as-value-promotion runs afoul of feminist anti-imperialist aspirations.¹⁰³ Rhetoric of equality for women has been at the heart of imperialist battles in Kosovo, Afghanistan and Iraq and these have been linked to the need to ‘enforce’ liberalism-as-value-promotion. Feminists, particularly those sitting and writing outside conflict zones, cannot ignore even the most tangential links between the tools they promote and wider imperialist agendas operating to the disadvantage of women in conflict zones.¹⁰⁴ As has been noted, liberalizing notions of transitional justice in linking transitional justice to concepts of repression and liberalization, or conflict and peace have served to obscure its relevance to stable liberal democracies, where it may also be necessary.¹⁰⁵ Internationally promoted liberalism has been charged with liberating the western feminist as ‘international expert’ at a price of ‘de-civilizing’ feminists in developing countries.¹⁰⁶

Transitional justice as liberalizing justice would therefore seem to be a particularly problematic conception of justice from which to build a feminist theory of transitional justice, even for liberal feminists. Constructive critique is, of course, still possible and herein may lie some basis for its engendering. Nesiah, for example talks of the need for feminists to move beyond limited ‘liberal vocabularies regarding law’s redemptive promise’ and ‘default “leftist” arguments that the return to law is always regressive.’¹⁰⁷ In place of this dichotomy, she suggests a more nuanced examination of when and how liberalism has operated positively to empower – and negatively to disempower – vulnerable groups.¹⁰⁸ This could be useful in decisions over when and how women should engage with liberalizing projects.

¹⁰¹For the classic statement of this critique, see Carole Pateman, *The Sexual Contract* (Cambridge: Polity, 1988).

¹⁰²Chinkin, *supra* n 44.

¹⁰³Orford, *supra* n 55.

¹⁰⁴*Ibid.*; Thérèse Murphy, ‘Feminism Here and Feminism There: Law, Theory and Choice,’ in *International Law: Modern Feminist Approaches*, ed. Doris Buss and Ambreena Manji (Oxford: Hart Publishing, 2005), 67–86.

¹⁰⁵Campbell and Ní Aoláin, *supra* n 3 at 172–213; cf. Orford, *supra* n 74.

¹⁰⁶Orford, *supra* n 55, citing Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999).

¹⁰⁷Nesiah, *supra* n 81 at 811.

¹⁰⁸*Ibid.*, 808.

Transitional Justice as Restorative Justice

The theory of transitional justice as restorative justice argues that transitional justice, rather than reflecting theoretically justifiable compromises, in fact finds its theoretical justifications in an entirely different conception of justice altogether. This is a conception of justice which rejects a necessary relationship between accountability and criminal law processes, but views justice as restoring broken relationships and communities.¹⁰⁹ This conception of justice can find theoretical roots in Habermasian traditions of 'communicative ethics' and notions of justice as constructed through dialogue.¹¹⁰ What appear to be compromises with liberalism's rule of law requirements, such as 'truth for amnesty,' are hereby reconceptualized, away from a notion of a problematic 'justice gap' and towards a notion of an innovative 'bottom up' mechanism capable of squaring the circle between strict punishment and total amnesty. Transitional justice as restorative justice posits mechanisms such as TCs as proffering alternative forms of accountability, through flexible processes of conversation and negotiation. These, it is argued, are capable of delivering a broad range of possible end goals, including national and personal reconciliation (although definitions of reconciliation are difficult to find).¹¹¹ These mechanisms, rather than being 'softer' on accountability than courts, are argued to deliver a differently textured accountability by moving beyond overly proceduralized forms of adversarial justice as adjudications of individual guilt toward a more complex account of individual, communal and institutional accountability.¹¹²

Transitional justice as restorative justice has some attractions for those seeking to construct a feminist theory of transitional justice. Restorative justice would seem to enable a move beyond the rather masculine discourse of crime and punishment towards a notion of repairing relationships.¹¹³ Restorative justice approaches embodied in TCs can also be argued to be more accessible to women in the flexibility of their processes¹¹⁴ and because they can address survivor needs for public acknowledgement.¹¹⁵ The capacity of restorative justice to square the

¹⁰⁹See for example, 'Amnesty and Reparation in International Law' in *Truth and Reconciliation Commission of South Africa Report, Volume 6*, Section 2, Chapter 2, para. 40 (2003).

¹¹⁰Jürgen Habermas, *Theory of Communicative Action* (London: Heineman, 1984), contends that all interpersonal communication occurs with a goal of mutual understanding, and through speech acts, such understanding can be achieved. While this account is not specifically applied to transitional justice mechanisms, it provides a basis for their theorization as legal processes with a communicative ambition.

¹¹¹International Institute for Democracy and Electoral Assistance, *Reconciliation After Violence Conflict* (Stockholm, 2003), section 1.2.

¹¹²Van Zyl, *supra* n 86.

¹¹³See Amanda Dissel and Kindiza Ngubeni, 'Giving Women their Voice: Domestic Violence and Restorative Justice in South Africa,' XIth International Symposium on Victimology, Stellenbosch, July 2003.

¹¹⁴For example Fiona Ross analyses the different styles and textures of women's testimony to the South African Truth and Reconciliation Commission, although she questions the extent to which the Final Report captured the subtleties of these different styles, Ross, *supra* n 74 at 27–50.

¹¹⁵Mertus, *supra* n 71.

amnesty versus punishment circle through innovative processes appears to offer women practical and conceptual inclusion; the intertwining of process and end goal holds out the possibility that engagement can be constructive of end goals and that women may be able to radically shape the types of transformation being sought.

Yet, this conception of justice can also prove problematic from a feminist viewpoint. As feminist critiques of restorative justice in domestic law settings have addressed, the notion of ‘restoring’ that lies at the heart of this conception of justice speaks of a return to a set of relationships that for women may have been fundamentally unjust.¹¹⁶ For women in transitions an emphasis on post-conflict restoration without challenging uneven gender power relations can mean giving up the perverse equality gains of war and returning to the home and perhaps other forms of abuse.¹¹⁷ Restoration or reconciliation can also seem to be particularly ‘soft’ options in a context where impunity for crimes against women is already endemic. In the domestic violence setting, for example where enforced ‘reconciliation’ was the routine approach of police, a move to restorative justice mechanisms in the absence of having established a need for accountability can seem to concede the need for change at the outset. While the informality that transitional justice brings can enable the participation of women, there is also evidence that in operating without the safeguards of formal processes, informal legal processes can be more vulnerable to bias.¹¹⁸ Informal processes in Afghanistan and Rwanda have been charged with reinstating the gender biases of traditional justice mechanisms.¹¹⁹ Woolly-sounding goals such as ‘reconciliation’ may also hide a concept of restorative justice that is in fact liberalizing transitional justice in disguise, because it remains linked to nation-building imperatives. These imperatives can limit the conversations that are permitted and can destroy any open texture to the dialogue.¹²⁰ These criticisms have resonance in the transitional context that are beginning to play out, particularly given the struggles and gains of feminists in placing violence against women on the mainstream transitional justice agenda.

¹¹⁶See further Kathleen Daly and Julie Stubbs, ‘Feminist Engagement with Restorative Justice,’ *Theoretical Criminology* 10 (2006): 9–29.

¹¹⁷Chinkin, *supra* n 12 at 11.

¹¹⁸Richard Delgado, ‘Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,’ *Harvard Civil Rights – Civil Liberties Law Review* 17 (1982): 133–181, looking at informal justice processes in the context of race.

¹¹⁹Sarah Wells discusses the legal, structural and cultural obstacles surrounding gender and sexual violence in Rwandan gacaca courts, Sarah L. Wells, ‘Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda,’ *Southern California Review of Law and Women’s Studies* 14 (2005): 167–196. See also Mark A. Drumbl, ‘Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan,’ *Columbia Journal of Transnational Law* 42 (2004): 101–140, discussing the opportunities and limitations of restorative justice approaches in Afghanistan.

¹²⁰Brandon Hamber and Richard A. Wilson, ‘Symbolic Closure through Memory, Reparation and Revenge in Post-conflict Societies,’ *Journal of Human Rights* 1 (2002): 35–53.

Toward a Feminist Theory of Transitional Justice?

It is difficult to articulate any explicitly 'transitional' theory of justice that is not tied up with rationalizing Gray's 'justice gap' within the prevailing understanding of the 'from' and the 'to' of transitional justice. This is a 'from' and a 'to' that is arguably becoming increasingly problematic as transitional justice continues on its current phase of 'expansion and normalization.'¹²¹ This project of theorization can risk relegating feminist theory to the role of commentary and critique. What then is the future of feminist theorization of transitional justice?

We suggest that it lies in understanding the feminist theoretical engagement with transitional justice in terms of a broader feminist theory of transition. Feminism has its own ongoing analysis and critique of justice and the wider questions of transition. As Ahmed writes, '[t]he transformative potential of feminism – its inability to simply inhabit other discourses which marginalize questions of gender, signals the potential of the debate to move us elsewhere.'¹²² Transitions as periods of extreme political flux represent a unique conjuncture of public and private, law and politics, of international law and domestic law. Feminism has generated a wealth of scholarship dealing explicitly and implicitly with transition, analysing it variously through the prism of international law, international politics, peace and conflict studies, and theories of democratic participation. This analysis emphasizes the importance of prioritizing socio-economic issues in feminist interventions into processes of transition, both by influencing the definitions of 'harms' to be addressed post-settlement¹²³ and by challenging the capitalist development which generally unfolds.¹²⁴ As regards women's political activity, this analysis points to the need to include non-elite actors,¹²⁵ and cautions against assumptions that women's mobilization during transition guarantees a sustained political presence post-transition.¹²⁶ Feminist interventions highlight the need to secure effective feminist engagement with the newly (re)formed state.¹²⁷ Integral to this analysis is a refusal to conceive of transition as

¹²¹Teitel, *supra* n 3 at 89–90.

¹²²Sara Ahmed, *Differences that Matter: Feminist Theory and Postmodernism* (Cambridge: Cambridge University Press, 1998), 15.

¹²³Kumar, *supra* n 45.

¹²⁴Sonia Alvarez, *Engendering Democracy: Women's Movements in Transition Politics* (Princeton: Princeton University Press, 1990); Jane Jaquette, 'Feminism and the Challenges of the 'Post-Cold War' World,' *International Journal of Feminist Politics* 5 (2003): 331–354; Julie Mertus, 'Human Rights of Women in Central and Eastern Europe,' *American Journal of Gender and Law* 6 (1998): 369–484.

¹²⁵For discussion, see Georgina Waylen, 'Women and Democratization: Conceptualizing Gender Relations in Transition Politics,' *World Politics* 46 (1994): 327–54.

¹²⁶See especially Maxine Molyneux, 'Mobilization without Emancipation? Women's Interests, State and Revolution,' *Feminist Studies* 11 (1985): 227–254; see also Tracy Fitzsimmons, *Beyond the Barricades: Women, Civil Society, and Participation after Democratization in Latin America* (New York and London: Garland Publishing, 2000).

¹²⁷Alvarez, *supra* n 124; Georgina Waylen, 'Democratization, Feminism and the State in Chile: The Establishment of SERNAM,' in *Women and the State: International Perspectives*, ed. Shirin Rai and Geraldine Lievesley (London and Bristol: Taylor and Francis, 1996).

a purely 'public sphere' phenomenon, or a period in which the move from violence to peace is linear and inevitable: feminist engagement with transition has highlighted the impact of transition on 'private sphere' issues of the family and reproduction,¹²⁸ prioritized analysis of changes in gender roles¹²⁹ and drawn attention to ways in which violence against women often alters in form, rather than prevalence, post-transition.¹³⁰

This analysis points to the need to approach transitional justice projects from the question of how best to pursue the inevitably internally contested political project of securing material gains for women through periods of transition. From this perspective, interventions with respect to transitional justice may best be viewed as involving dilemmas that are primarily strategic rather than theoretical. In other words, whether and how to engage in transitional justice mechanisms, and what issues to place within their purview, can be addressed as part of a larger question of how best to secure material gains for women. For example, in settled western states, articulating a need for transitional justice may be a way of articulating a need for radical change to issues of equality and inclusion and of feminist questioning of the nature and legitimacy of the state. The articulation of justice through the Women's International Tribunal on Japanese Military Sexual Slavery as a contemporary 'transitional' justice issue illustrates the capacity to destabilize and therefore open up that which is viewed as long-settled.¹³¹ In other cases, most notably Iraq, transitional justice mechanisms may be linked too problematically to the justification of international intervention to be made the subject of feminist engagement at all.¹³² In Northern Ireland, where the absence of a transitional justice mechanism reflects a lack of 'agreement' at the heart of the peace deal,¹³³ women engaging to secure justice for women could use transitional justice debates to subvert the limits of the 'agreement'. They could use transitional justice debates to open-up a political accommodation revolving around binary identities of British-Unionist/Irish-Nationalist to much broader on-going accommodation of marginalized groups.

Taken out of this wider context, arguments for making transitional justice more responsive to the diverse needs of women recognize transitional justice as an important site of feminist struggles; grounded empirical research into the gender implications of current transitional justice mechanisms can inform best practice in setting the mandate, composition and rules of operation of future transitional justice mechanisms. These continue to be important and immediate goals. This is practice that has informed current theoretical insights. However, we conclude

¹²⁸See especially Mala Htun, *Sex and the State: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies* (New York: Cambridge University Press, 2003).

¹²⁹See for example, Kumar, *supra* n 45; Alvarez, *supra* n 124; Fitzsimmons, *supra* n 126.

¹³⁰Chinkin, *supra* n 51.

¹³¹Chinkin, *supra* n 73.

¹³²Bell, Campbell and Ní Aoláin, *supra* n 5.

¹³³Christine Bell, 'Dealing with the Past in Northern Ireland,' *Fordham Journal of International Law* 26 (2003): 1095–1017.

with our conviction that transitional justice is best understood in the broader context that views contests around transitional justice in terms of their strategic value to a larger political project of securing substantial material gains for women in transition. It is in articulating a 'larger dream'¹³⁴ of substantive and material justice for women that feminist interventions into transitional justice are at their most compelling.

¹³⁴Cf. Anne Phillips, *The Politics of Presence* (Oxford: Clarendon, 1995), 178–190, advocating arguments for descriptive representation to be located within the 'larger dream' of a more profound set of issues of democracy and representation.