

# Transitional Justice as Global Project: critical reflections

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*ABSTRACT* This article critically reflects on the ways in which the global project of transitional justice is channelled or streamlined in its scope of application. Using the categories of when, to whom and for what transitional justice applies, it argues that transitional justice is typically constructed to focus on specific sets of actors for specific sets of crimes. This results in a fairly narrow interpretation of violence within a somewhat artificial time frame and to the exclusion of external actors. The article engages themes of gender, power and structural violence to caution against the narrowing and depoliticisation of transitional justice.

Transitional justice as a field and practice has grown tremendously over the past 15 years or so to include: the institution of international criminal tribunals, hybrid courts and the International Criminal Court (ICC); the development of a ‘right to truth’ and ‘right to reparation’ under international law; the transnational proliferation of truth and reconciliation commissions (TRCs); the expansion of transitional justice scholarship such that it now has a dedicated journal, research centres and academic programmes; and the birth of international and regional transitional justice NGOs. In other words, transitional justice has become a well established fixture on the global terrain of human rights. It entails an insistence against unwilling governments that it is necessary to respond to egregious violence and atrocity. The international community provides fragile new governments with important financial, institutional and normative support for reckoning with the past, attending to the needs of victims, and setting the foundations for democracy, human rights and the rule of law.

Yet there also appear worrisome tendencies of the international community to impose ‘one-size-fits-all’, technocratic and decontextualised solutions. To what extent does transitional justice appear from on high as ‘saviour’ to the ‘savagery’<sup>1</sup> of ethnic, especially African ‘tribal’, conflict? Steeped in Western liberalism, and often located outside the area where conflict occurred, transitional justice may be alien and distant to those who actually have to live together after atrocity. It is accused of producing subjects and

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truths that are blind to gender and social injustice. And, in a post-9/11 world, transitional justice may increasingly be shaped by ‘the appropriation of the language of “transition” and “democratization” in furtherance of an apparently global project [that has] few effective international legal constraints’.<sup>2</sup>

All this suggests a timely need to reflect critically upon transitional justice as a global project. By ‘global project’, I refer to the fact that transitional justice has emerged as a body of customary international law and normative standards. I call it a ‘global’ project rather than an ‘international’ one in order to capture the three-dimensional landscape of transitional justice (local, national, global) and its location within broader processes of globalisation. It is a ‘project’ by virtue of the fairly settled consensus—a consensus that has largely moved past the initial debates of ‘peace versus justice’ and ‘truth versus justice’—that there can be no lasting peace without some kind of accounting and that truth and justice are complementary approaches to dealing with the past. The question today is not *whether* something should be done after atrocity but *how* it should be done. And a professional body of international donors, practitioners and researchers assists or directs in figuring this out and implementing it.

In the first section of this article I critically introduce the way the scope of transitional justice is typically defined and implemented. In the remaining sections I employ the categories of *when*, to *whom* and for *what* transitional justice applies in order to challenge troubling features of its standardisation. I do not wish to deny that national governments and local actors are active agents in their own transitional processes. Rather, my concern is to call attention to the ways in which their horizon of options may be channelled or streamlined. Engaging themes of gender, power and structural violence, the article offers a cautionary investigation of the worrying ways in which the scope of transitional justice can be depoliticised and narrowed. The reflections undertaken here are intended to be suggestive in nature and to raise questions for further research. For the sake of convenience, I presume a fairly singular (Westernised) international community, acknowledging here its rather nebulous and frequently divided nature.

### **Defining the scope of transitional justice**

It is not often remarked that figuring out how to implement transitional justice is necessarily a task of first determining the problem. Transitional justice seeks to redress wrongdoing but, inevitably, in the face of resource, time and political constraints, this is a selective process. Transitional justice thus involves a delimiting narration of violence and remedy. This raises, as Bell and O’Rourke put it, ‘fundamental questions about what exactly transitional justice is transiting “from” and “to”’.<sup>3</sup> Although there is no single definition of transitional justice, I suggest that predominant views construct human rights violations fairly narrowly to the exclusion of structural and gender-based violence. There is a privileging of legal responses which are at times detrimentally abstracted from lived realities. Little attention, if any, is paid to the role that established, Western democracies

have in violence. Together, these tendencies profoundly affect perceptions of the nature of violence, victimhood and perpetration, and they skew the direction of truth, justice and reconciliation. I develop these claims below by first comparing several representative definitions of transitional justice.

In one of the narrower definitions, Teitel explains transitional justice as ‘the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes’.<sup>4</sup> Although Teitel rightly provides a normative challenge to Schumpeterian notions of a successful transition (marked by fair elections), she focuses almost exclusively on (re)establishing the rule of law through legal mechanisms—prosecutions, historical inquiry, administrative justice, reparation, and constitutional justice.<sup>5</sup> Her argument for law’s ‘independent potential’ to shape political change may be an impressive work of legal theory, but gender, customary law, culture, and social justice are virtually absent as categories of analysis. Teitel’s cases are largely confined to post-authoritarian or post-communist regimes, rather than to war-torn societies. Her explicit concern with bringing ‘illiberal’ regimes into the fold of liberal democracy, as well as her argument that transitional justice applies in ‘extraordinary’ periods between regimes, treats established liberal democracies as benevolent models.

Roht-Arriaza, in her introduction to *Transitional Justice in the Twenty-First Century*, widens the context of transitional justice by defining it as ‘that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law’.<sup>6</sup> Although she dismisses Teitel’s ‘problematic’ definition for ‘overvaluing’ law and underestimating periods of flux, Roht-Arriaza nonetheless takes a ‘narrower’ view. The edited collection focuses on truth commissions, criminal prosecution, vetting and reparation; it largely leaves aside things such as memorialisation, police and court reform, or tackling distributional inequities. Roht-Arriaza acknowledges that ‘a narrow view can be criticized for ignoring root causes and privileging civil and political rights over economic, social and cultural rights, and by doing so marginalizing the needs of women and the poor’. But she nonetheless argues that ‘broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless’.<sup>7</sup>

Mani provides one of the broadest understandings and critiques of what she terms ‘restoring justice within the parameters of peacebuilding’.<sup>8</sup> Her prime concern is low-income, war-torn societies, and she argues, contrary to Roht-Arriaza’s position above, that building peace and building a just society are inseparable processes. Drawing on Galtung’s twin objectives of negative peace (cessation of conflict) and positive peace (removing structural and cultural violence), Mani is clear that a holistic approach is necessary. She argues for a three-fold view of ‘reparative’ justice: restoring the rule of law through reforms to prisons, police and judiciary; rectifying human rights violations through trials, truth commissions, reparation and traditional mechanisms; and redressing the inequalities and distributive injustices that

underlie war. Mani is particularly attuned to the importance of drawing on local knowledge and culture for sustainable peace. She also analyses the way that international financial institutions have exacerbated the socio-economic inequalities that underlie conflict. Yet Mani could go further in examining the involvement of Western states in conflict,<sup>9</sup> and gender is surprisingly and inexplicably absent from an otherwise astute and ambitious analysis.

As should become clear, my sympathies lie with an approach that understands violence and its transitional response fairly broadly. However, it is important to note that the prevailing view of transitional justice's scope is largely confined within a fairly specific set of mechanisms. Even Mani explicitly positions her approach as a 'broader conceptual and contextual framework' that does not 'attempt to replace or "overthrow" transitional justice' but would 'include all existing methods of transitional justice'.<sup>10</sup>

According to the UN Secretary General's 2004 *Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, the full range of methods 'may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof'.<sup>11</sup> The International Centre for Transitional Justice (ICTJ), an NGO which is involved in transitional justice initiatives in over 30 countries, defines the major approaches as: prosecution, truth-telling, reparation, institutional reform, promoting reconciliation and social reconstruction, memorialisation and taking into account gendered patterns of abuse.<sup>12</sup>

For reasons of space my analysis will focus on the predominant institutions—trials and truth commissions. International criminal justice operates far more 'from above' than do truth commissions, although the move towards hybrid courts and the provision that the ICC be of 'last resort' have sought to reverse this trend. While truth commissions are more localised in nature, they nonetheless tend to operate with extensive donor and international NGO support or, as in El Salvador, Guatemala, East Timor and Sierra Leone, with UN involvement.

My main concern is how the implementation of trials and truth commissions tends to structure conceptions of violence and justice. Their implementation ought to be assessed within the context of an overarching assumption 'that a focus on legal processes is adequate to resolve individual and social harm', as Fletcher and Weinstein put it.<sup>13</sup> Furthermore, the privileging of legalistic approaches occurs within an international climate where, as Mani notes, 'the prevalent liberal–democratic ideal... tends to favour freedom and liberty over equality'.<sup>14</sup> This means there has been a tendency to underrate the gendered and socioeconomic ramifications of violent conflict, which may include HIV/AIDS, widowhood and poverty. Instead, transitional justice has been heavily influenced by the 'international legalist paradigm', which focuses on generating elite and mass compliance with international humanitarian norms.<sup>15</sup> Notably the international legalist paradigm has extended beyond the push for prosecution. This can be seen in

the emergence of the rights to truth and reparation under customary international law, in the transnational proliferation of truth commissions, which are quasi-judicial bodies mandated to investigate gross violations of human rights, and in the emphasis within the international donor community on 'doing justice' over other forms of development.<sup>16</sup>

Oomen convincingly argues that one of the reasons for the prominence of the legalist paradigm is that law is perceived as a safe, neutral, universal way to engage with other countries.<sup>17</sup> But these are false and problematic assumptions about the law that transitional justice must guard against. The problem is not with law and human rights *per se* but with the depoliticised way in which 'justice' can operate. A technocratic focus on 'the law' abstracts from lived realities. For instance, gendered advances in international criminal law still mean that 'any woman' could serve as a witness in landmark cases because individuals are subsumed under 'larger principles which their testimony helps establish'.<sup>18</sup> Compiling databases for 'trend analysis' of gross human rights violations, as many truth commissions do, or convicting top perpetrators will not necessarily contribute to community-based truth or reconciliation.<sup>19</sup> Furthermore, challenges to Westernised international criminal justice have emerged with Rwanda's neo-traditional *gacaca* courts and a call in Northern Uganda to use *mato oput* and other traditional cleansing ceremonies rather than the ICC. And, as a final example, a narrow fixation on judicial mechanisms in Iraq shields analysts from asking normative questions about the illegitimacy or justifiability of the occupation or about whether 'justice' is even possible in such a context.<sup>20</sup>

In the following analysis I point to general trends and draw on several prominent country examples to illustrate the ways in which the scope of transitional justice is channelled. These cases include the 'standard-setting'<sup>21</sup> South African Truth and Reconciliation Commission (1996–2003), which looms large on the transitional justice landscape as a model or lesson. Sierra Leone and East Timor each represent significant developments in global practice because they pair trials with truth commissions. Moreover, the Special Court for Sierra Leone (established in 2002 and still in operation) and the Special Panel for Serious Crimes in East Timor (1999–2005) are hybrid courts. Sierra Leone's Truth and Reconciliation Commission (2000–05) and East Timor's Commission for Reception, Truth and Reconciliation (2001–05) both demonstrate tentative advances in the ability of truth commissions to provide extensive accounts of gender-based violence, social injustice and external influence. Finally, Iraq and Afghanistan present troubling situations of seeking truth, justice and reconciliation in the midst of occupation and conflict.

I turn now to the categories of *when*, to *whom* and for *what* transitional justice applies. I argue that these categories function to hone transitional justice into a particular kind of solution to address particular kinds of problems. The focus on specific sets of actors for specific sets of crimes channels transitional justice towards a fairly narrow interpretation of violence within a somewhat artificial time frame and to the exclusion of external actors.

### ***When transitional justice applies***

The *when* of transitional justice is tied to the very conception of transition. Whether transiting from authoritarianism to democracy or from war to peace (to democracy), transitional justice has typically appeared salient only after massive direct violence has been brought to a halt. In part, this appearance has to do with the emphasis within the literature on prosecution, truth-telling, reparation, reconciliation and reform, and less so on peace accords, transitional administration, or disarmament, demobilisation and reintegration. Transitional justice also implies a fixed interregnum period with a distinct end; it bridges a violent or repressive past and a peaceful, democratic future. Notions of ‘breaking with the past’ and ‘never again’, which align with the dominant transitional mechanisms, mould a definitive sense of ‘now’ and ‘then’.

This can problematically obscure continuities of violence and exclusion. For example, the efforts of the South African TRC to promote the ‘new’ South Africa met with considerable challenge and resistance in the face of ongoing police violations of human rights, political violence, racialised socioeconomic inequalities, *de facto* geographic apartheid, and general racism and xenophobia.<sup>22</sup> More generally, to construct transition as a break with past violence also neglects the domestic violence that many women face in a militarised society and after male combatants return home. There is some evidence to suggest that violence against women actually increases in the ‘post-conflict’ period.<sup>23</sup> This can occur as a result of post-traumatic stress, of the need of men to reassert control in their homes, which had been headed by women during the war, or because of the sense of dislocation, powerlessness and unemployment that combatants may face upon return.<sup>24</sup>

In Iraq and Afghanistan the transition is constructed as being ‘from’ a repressive police state under Saddam Hussein or ‘from’ cycles of war and repression culminating in the Taliban regime.<sup>25</sup> This neatly avoids the current matter of foreign military intervention and implies that the transitional problem has to do with ‘then’ and not the ‘now’ of occupation, insurgency, and the war on terror. (And, as I discuss below, it implies that the problem has to do with ‘them’, not ‘us’). Although prosecution, vetting, reparation and truth-telling are taking or will take place in the midst of violence and insecurity, the concern of these transitional mechanisms is the history before 2001 in Afghanistan and before 2003 in Iraq. The ‘to’ of transitional justice is thus insulated from the current reasons for instability.

Of course, with the ICC’s indictments in Uganda, the DRC and Darfur, we do see prosecution being purposefully used to address current violence. Yet it appears that the ICC is facing situations where actual prosecution cannot not take place because of difficulties of arrest and, even if trials begin, they may be to little or even detrimental political effect. For instance, some Acholi leaders in northern Uganda have opposed the ICC’s actions because they fear it will jeopardise peace talks<sup>26</sup> (and, as noted earlier, because it contravenes traditional values). This raises questions about what exactly makes a

mechanism or process ‘transitional’ in the first place. However, even if the ‘to’ of the ICC’s contribution to transitional justice is uncertain, the ‘from’ is not: it is a transition from the context of ‘conflict and war’.

The concern with this consistent emphasis on applying transitional justice only *when* there is massive repression, conflict or war is, as Orford argues, that ‘the literature gives the sense that large-scale human rights violations are exceptional’ and that ‘the focus is not on genocide or human rights violations in liberal democratic states’.<sup>27</sup> She ‘unsettles’ this assumption by examining the ‘the everydayness and bureaucratization of genocide and of massive human rights violations’ through a reading of Australia’s (1997) *Bringing Them Home* report on the separation of Aboriginal and Torres Strait Islander children from their families.<sup>28</sup> Similar examples can be found in Canada and the USA: the Royal Commission on Aboriginal Peoples (1996); the planned Residential Schools Truth and Reconciliation Commission; and the Greensboro (North Carolina) Truth Commission. However, while it is important to acknowledge and address systemic human rights abuse, it is also rather awkward to affix the label ‘transitional’ to justice long denied in liberal democracies. To say that the transition to democracy is as yet incomplete or that we are transitioning to a reconciled, more just society, may overly broaden notions of democratisation or transition.

### **To *whom* transitional justice applies**

The more pressing concern, to follow on from the above, has less to do with *when* justice is transitional than with *to whom* transitional justice applies. Because transitional justice almost always applies to non-Western, developing countries, it is vulnerable to the general challenge that critics raise against the supposed universalism of human rights. The general thrust of this challenge is that the West arrogates the universal to itself and then brings all others into its fold of humanity.<sup>29</sup> The case of Iraq is most obviously liable to this charge. As noted above, the artificial time frame of transitional justice applies only to Saddam’s Iraq. This glosses over the illegality of the US-led invasion, the damage caused by the corrupt UN oil-for-food programme, ongoing insurgency, and human rights abuses committed by US soldiers at Abu Ghraib and elsewhere. Furthermore, as Chandler writes, when Paul Bremer created the Iraqi Special Tribunal:

Commentators everywhere insisted on the importance of a fair trial, on ‘justice being seen to be done,’ not so much for Saddam’s benefit as for the political and educational benefit of the Iraqi people. Implicit in this discussion was the idea that the Iraqi people could not move on without a thorough accounting of the past; that without this process they were not ready for the freedom their Western liberators offered them. Here responsibility for chronic violence and instability of the Iraqi people was shifted away from the actions of the intervening powers and placed with the psychological immaturity of the Iraqi people.<sup>30</sup>

Prosecution and other transitional mechanisms are put in place to teach Iraqis, and not the USA and its allies, about the rule of law and human rights.

Neither paternalism nor asymmetry is confined to the Iraqi case. Charges of paternalism have been voiced, for example, regarding the transitional administrations run by the international Peace Implementation Council in Bosnia–Herzegovina and by the UN in East Timor. The different High Representatives to Bosnia have used their sweeping authority to impose legislation that was rejected by democratically elected parliamentarians, to ban political parties, and to dismiss elected officials.<sup>31</sup> In East Timor, Orford documents how postcolonial reconstruction treats the country as a ‘blank slate in terms of existing knowledge and experience, marked by cronyism, incompetence and corruption. The people of East Timor are portrayed as lacking a state, ethics, skills and respect for human rights.’<sup>32</sup> Katzenstein notes that, in the building of the Special Panels for Serious Crimes, ‘many East Timorese in the judiciary felt sidelined by the UN staff’ because of a lack of consultation on institutional design. Mentoring programmes quickly disintegrated when UN personnel entirely took over the tasks at hand, and East Timorese became ‘sick of internationals coming in and conducting “workshops”’.<sup>33</sup>

As for the asymmetrical features of globalised transitional justice, these go right back to the Nuremburg precedent of victor’s justice. In more recent history, victor’s justice has prevailed in the International Criminal Tribunal for Former Yugoslavia’s (ICTY) refusal to investigate alleged violations of international humanitarian law committed by NATO during its bombing campaign in Kosovo and in the International Criminal Tribunal for Rwanda’s (ICTR) halted investigation of the governing Rwandan Patriotic Front (RPF) for war crimes. Furthermore, geographic ‘zones of impunity’<sup>34</sup> are being created thanks to the state-centric nature of international law. For instance, the ICC does not apply to non-state parties except in the instance of Security Council referral, which will inevitably be limited by veto politics. There is also the USA’s active campaign against the ICC. Over 100 countries, some of which have poor human rights records and have shown little ability or interest in domestic criminal procedures, have been induced by the USA to sign bilateral agreements refusing extradition to the ICC.

Third country prosecution can overcome the jurisdictional limits of other institutions or domestic amnesties. But, as Wilke points out, the universality of ‘justice without borders’ is fairly particularistic: ‘either some of the victims have the citizenship of the prosecuting state, or the perpetrators (and some of the victims) are physically present in the country’.<sup>35</sup> The result is highly uneven globally speaking: the likelihood of pursuing justice is largely confined to liberal democracies that have the resources and political interest to mount a case. Even when a case is mounted, the challenges of extradition and lining up different legal systems can result in a watering down of charges, as seen when the British House of Lords reduced Spain’s draft charges against Pinochet from 30 to three.<sup>36</sup> (And, of course, Home Secretary Jack Straw let Pinochet go home.)



International criminal justice also appears frequently unable to respond to violent conflict that spills across borders. Currently, as Sriram and Ross explain, the IC is mandated to investigate human rights violations in northern Uganda but not Lord's Resistance Army (LRA) activities in southern Sudan or support by the Sudanese government to the LRA during Sudan's North–South civil war. The ICC has no jurisdiction in Sudan except in Darfur and only there for Sudanese nationals.<sup>37</sup> As another example, former Liberian leader Charles Taylor is not facing trial for crimes he committed in Liberia, his own country, or neighbouring Côte d'Ivoire, because the Special Court for Sierra Leone does not have extraterritorial jurisdiction.<sup>38</sup>

The pursuit of transitional justice in East Timor is especially illustrative of zones of impunity. From 1974 to 1999 the people of East Timor suffered death and destruction under the illegal Indonesian occupation, with violence culminating during the 1999 plebiscite on autonomy. Under the subsequent United Nations Transitional Administration (UNTAET), the Serious Crimes Investigative Unit was created to investigate and prosecute crimes at the Special Panel for Serious Crimes (comprised of two international and one East Timorese judge). Although Indonesia and UNTAET signed a memorandum of understanding regarding the exchange of evidence, the Serious Crimes Unit was unable to gain access to Indonesian suspects, and thus those with the 'greatest responsibility' remained out of reach of the Dili-based court.<sup>39</sup> The UN did not set up a process to address those responsible in Indonesia, indicating that Indonesia is obligated to do so. Under severe pressure the Indonesian government has established an *ad hoc* court to deal with violations in East Timor, but so far it has acquitted all Indonesians, and some military officers implicated in atrocities have actually been promoted.<sup>40</sup>

The Indonesian president's treatment of East Timor's independence as national humiliation,<sup>41</sup> combined with the limited mandate of East Timor's hybrid court, have resulted in a 'near universal perception within Indonesia that the 1999 violence was the result of conflict between two opposing East Timorese factions, rather than a military-orchestrated terror campaign'.<sup>42</sup> But the problem is not simply Indonesia's intransigence. The problem also lies with the international community. Hybrid courts are touted as a means of doing 'justice on the cheap', and there was a widespread perception among the East Timorese that the international community did not care about their plight.<sup>43</sup> Indeed, the Special Panel was shut down in 2005 because of a lack of international political and donor support. (The UN Secretary-General has since recommended the resumption of the tribunal's investigative but not judicial functions.<sup>44</sup>) The UN Commission of Experts recommended in its 2005 report that an international tribunal be established under Chapter VII of the UN Charter if Indonesia's 'manifestly inadequate' *ad hoc* courts do not improve.<sup>45</sup> Yet, even if an international tribunal were created, which appears unlikely, it would not address the broader injustices of occupation and exploitation. It would say little about Australian, American, British and Japanese support of Indonesia's occupation or how Indonesian control and impoverishment of the East Timor coffee sector (a major reason for occupation) fitted into cold war politics and volatile price shifts after 1989.<sup>46</sup>

The East Timor situation thus points to a further concern that transitional justice operates in such a way that ‘the international community is absent from the scene of violence and suffering until it intervenes as the heroic saviour’.<sup>47</sup> Foreign involvement in violence—through indifference, funding, training, cross-border raids, or conflict economies in arms, diamonds or oil—is largely absent from or negligible in official transitional justice records. This occurs most starkly with prosecution because trials create fairly individualised accounts of human rights crimes. Truth commissions are better equipped to paint the larger picture of violence. But, as Hayner reports, for the most part truth commissions do not investigate the role of outside actors in internal human rights violations.<sup>48</sup> In recent exceptions, the Sierra Leone truth commission addresses quite extensively the role of foreign actors in the conflict, including Liberia’s Charles Taylor, Libya, the diamond industry, and the international community for abandoning Sierra Leone in its hour of need. And, to return to the East Timor case discussed above, the Commission for Reception, Truth and Reconciliation (CAVR) holds the international community accountable for providing military backing to the Indonesian government and holds Indonesia and other states liable for reparation.

### **To *what* transitional justice applies**

Even if truth commissions do investigate the role of outside actors—and the majority do not—their primary focus are the direct perpetrators and direct victims of crimes against humanity and violations of international humanitarian law. The issue therefore is not only to *whom* transitional justice applies, but also to *what* it applies. By and large transitional justice pertains to genocide, torture, disappearance, massacre, sexual violence and other war crimes. In the privileging of legalistic approaches, transitional justice tends to focus on gross violations of civil and political rights (arbitrary or indefinite detention, severe assault, ill-treatment, etc) or on criminal acts (property destruction, abuse of children, etc). Consequently, structural violence and social injustice are peripheral in the ‘from’ and ‘to’ of transitional justice.

The social and political costs of this narrow framing are vividly apparent in the South African experience. Although the TRC clearly recognised apartheid as a crime against humanity, its mandate narrowly defined victims and perpetrators as those who had suffered egregious bodily harm. Apartheid thus featured as the context to crime rather than the crime itself.<sup>49</sup> The everyday violence of poverty and racism—and consequently the ordinary victims and beneficiaries of apartheid—were placed in the background of truth and reconciliation. Because the TRC report largely appeared as a depoliticised chronicle of wrongful acts, it did not sufficiently depict the ways that illegal acts of torture, killing and terror were intrinsic to legally sanctioned apartheid.<sup>50</sup> Admittedly, there were understandable logistical reasons for limiting the scope of inquiry, and the TRC did hold a series of hearings on the role of civil society. But, as I have argued elsewhere, the

overall effect was to relieve beneficiaries of obligations pursuant to national reconciliation and to pass over the suffering of millions in the 'new' South Africa. This has had lasting effects on perceptions of justice and racial reconciliation in South Africa, including the ongoing debate and lawsuit over corporate reparations.<sup>51</sup>

In thinking of the costs elsewhere of a similarly narrow framing of *what* transitional justice addresses, I point to an important speech given by the UN High Commissioner for Human Rights, Louise Arbour. She argues that the failure thus far of transitional justice to pay sufficient attention to economic, social and cultural (ESC) rights or discriminatory practices 'was eminently predictable' given the heavy influence of criminal law in transitional justice and the 'hidden assumption that ESC rights are not entitlements but aspirations'.<sup>52</sup> Arbour makes a powerful call for a significant shift in praxis:

Without losing its *raison d'être*, I believe that transitional justice is poised to make the gigantic leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition. Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices.<sup>53</sup>

East Timor's CAVR shows how a truth commission might widen the scope of *what* transitional justice addresses. CAVR's statistical accounting of fatal human rights violations looks beyond the direct result of military operations to include death from hunger and illness.<sup>54</sup> There is a separate chapter on forced displacement and famine, which affected nearly every person living in that period. (In contrast, the South African TRC could only sneak in findings of specific violations of ESC rights by treating arson as 'severe ill-treatment'. There was considerable criticism of its refusal to treat forced displacement similarly.) CAVR, in its chapter on violations of social, cultural and economic rights, addresses the use of the education system as a propaganda tool, the manipulation of the coffee market, de-development and environmental degradation.<sup>55</sup> It also provides recommendations regarding the rights to freedom from hunger, to an adequate standard of living, education, culture, basic health and to a sustainable environment. Unfortunately, as too often seems the case with truth commissions, the East Timorese government and the international community have largely ignored its report.<sup>56</sup>

Engendering transitional justice will be an important corollary to taking up Arbour's call. Until very recently women and gender have been glaringly absent from transitional justice programmes. Masculinist determinations of the transitional problem have centred on political violence with, as noted above, an emphasis on 'extraordinary' violations of civil and political rights.

This construction disregards and treats as ‘ordinary’ the private or intimate violence that women experience in a militarised, unequal society. It also fails to reflect the myriad of social and economic harms that are disproportionately placed upon women, widows in particular, during and after repression or armed conflict.<sup>57</sup>

When ‘truth’ is structured around extraordinary violence, women predominantly bear witness on behalf of deceased partners, children and grandchildren, that is, as indirect or secondary victims. Consequently women’s stories of violence and suffering do not fully emerge. Jolly remarks in the South African case that ‘the TRC lacked the social and structural context to be able to conceive of these women as victim-survivors, authors and subjects of their own narratives’.<sup>58</sup> When women do appear as victim-survivors in their own right,<sup>59</sup> it is overwhelmingly as victims of sexual violence, something that is incredibly difficult to give public testimony about. Women-only workshops and hearings can alleviate this difficulty, but, as Levine argues in the East Timorese context, women-centred hearings should not neglect other forms of gender-based suffering, such as losing a limb to a landmine when searching for food or facing discriminatory inheritance laws.<sup>60</sup>

Certainly, it is an important advance for women’s rights to recognise that sexual violence constitutes a crime against humanity, war crime, or genocide, rather than simply being a spoil of war or violation of honour. But international criminal jurisprudence, as Franke points out, has problematically created ‘mis-recognition’ or ‘over-recognition’ of women. It pins female victims of sexual violence to an essentialised identity that makes it difficult to ‘script new social possibilities’, particularly where rape is highly stigmatised. Furthermore, ‘it fails to capture the array of manners in which women suffer gross injustice’.<sup>61</sup> As Park puts it, ‘international law is not a silver bullet to alleviate the structural barriers, constraints and challenges that entrench girls’ vulnerability in peacetime and wartime’.<sup>62</sup>

Truth commissions are better positioned to address the marginalisation of women and girls because they look at patterns of violations. For example, the Sierra Leone TRC’s extensive and far-reaching recommendations include the repeal of discriminatory inheritance, marriageable age, and other customary laws, amendments to laws pertaining to domestic and sexual violence, promotion of skills training, education and economic empowerment of women, and setting up of a Gender Commission.<sup>63</sup> These recommendations follow extensive gendered analysis in other sections of the report and reach well beyond a sexualised accounting of gender-based violence to challenge structural inequality. Unfortunately the Sierra Leone government has done ‘next to nothing’ to implement these recommendations, despite being legally bound to do so, and despite the recent provision of external debt relief.<sup>64</sup>

### Conclusion

In the determination of *who* is accountable for *what* and *when*, transitional justice is a discourse and practice imbued with power. Yet, it can be strikingly

depoliticized in its application. Artificial time frames and zones of impunity produce restricted accounts of violence and remedy. A narrow, legalistic focus on gross violations of civil and political rights overlooks the ways in which structural violence and gender inequality inform subjective experiences of political conflict, injustice and their consequences. Where structural violence enters the picture, it is largely in the background. Where gender enters the picture, it is fixated on sexual violence against women, neglecting sexual violence against men and non-sexual violence against women.

Efforts within the global project of transitional justice to retract from one-size-fits-all solutions must guard against the kinds of channeling highlighted in this paper. To do so requires a broader approach that encompasses structural violence, gender inequality and foreign involvement. This challenge speaks to the very legitimacy of a globalized transitional justice as well as to the efficacy and legitimacy of mechanisms designed to help those who must live together after atrocity. International law and transnational norms must have a heightened role in transitional circumstances precisely because national legal and political systems are weak or corrupt. At the same time, remote institutions and narrowly conceived mechanisms and analyses will not change ordinary people's lives for the better.

## Notes

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