

# Seeking gender justice in post-conflict transitions: towards a transformative women's human rights approach

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## Abstract

*This article critically examines the prospects for achieving a comprehensive vision of gender justice in post-conflict transitional contexts. It is divided into three main sections. The first reviews the gendered limits of mainstream approaches to transitional justice and highlights gender biases in related dominant discourses, which shape how conflict, and transitions from conflict, are understood and enacted to the detriment of women. The second focuses on the benefits and limitations of engendering wartime criminal justice with particular reference to the International Criminal Court. The third considers the prospects for a more comprehensive approach to gender justice that shifts the emphasis from 'women as victims' of conflict to women as agents of transformation, through an examination of the significance of Security Council Resolution 1325. Ultimately, the author argues that achieving gender justice in transitions is inextricably tied to wider bottom-up efforts by women's movements to realise a comprehensive vision of women's human rights within a framework of critically-interpreted, universal, indivisible human rights.*

## Introduction

The need to examine war and conflict from gender perspectives has become more evident as conflicts are increasingly internal and fought amidst civilian populations. Between 1990 and 2000, for example, an estimated 118 conflicts around the world resulted in approximately six million deaths, three quarters of which were civilian (Abeysekera, 2006, p. 3). These developments have put women at the centre of conflicts in unprecedented ways: as combatants, as grassroots peace advocates, as targets of physical and sexual violence, as the bearers of contested communal identities, and as the group in society that is expected to sustain everyday life, even under catastrophic conditions. Recognising these realities, women clearly have a major stake in how justice and human rights are conceptualised and enacted in transitional contexts and how a society reinvents itself in the move away from violent conflict.

Yet, with the exception of wartime sexual violence, mainstream transitional justice scholarship has paid little attention to women's wider experiences of conflict, their extensive contributions to peace initiatives, or the significance of pervasive gender inequalities and biases in limiting women's meaningful participation at every level and stage of post-conflict transition. A substantial body of feminist writing examines women's experiences of conflict and the gendered nature of mainstream war and security paradigms (Cohn, 1987; Yuval-Davis, 1997; Enloe 1990). In addition, a sizeable literature in comparative politics focuses on the role of women and gender relations in transitions from authoritarian to democratic regimes (Alvarez, 1990; Waylen, 2000). More recently, a body of law-oriented work has begun to emerge that interrogates women's experiences in transitions from

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conflict (Chinkin and Paradine, 2001; Coomaraswamy and Fonseka, 2004) and, more particularly, the ways in which gender biases operate in transitional justice discourses (Bell, Campbell and Ní Aoláin, 2004).

This article builds on the foregoing literatures with a particular focus on feminist critiques of justice discourse in post-conflict transitional situations (Bell and O'Rourke, 2007; Rooney, 2006; Bell, Campbell and Ní Aoláin, 2004). More specifically, my study originates in a wider interest in thematising the role that transnational feminist advocacy can play in advancing the claims of women's movements, from local to global levels. I am especially interested in exploring the significance of feminist engagement with international law as a mode of transformative praxis, something which has been a defining feature of global feminist advocacy since the 1990s (Reilly, 2007). A central line of inquiry running throughout this article, therefore, concerns the potential use of international commitments to women's human rights and gender mainstreaming in defining and advancing a comprehensive vision of gender justice in post-conflict transitional contexts.

From this point of departure, the article focuses on two recent areas of feminist engagement with international law that are particularly salient to the project of seeking gender justice in transitions. These are campaigns to ensure the inclusion of gender-sensitive definitions and provisions in the statute and procedures of the International Criminal Court; and to secure the adoption and implementation of Security Council Resolution 1325 on women, peace and security.

Ultimately, I argue that these examples of transnational feminist praxis endorse a broader and deeper account of bottom-up, gender justice – one that expands the boundaries of traditional (quasi)legal notions of justice and the rule of law, while nonetheless retaining their radical promise. Such an account is grounded in critically-interpreted global women's human rights norms, which contest and potentially transform male-centric definitions and practice of transitions and transitional justice. As such, it resonates with critiques in feminist legal scholarship that expose the gender biases and exclusions that are (re)produced by traditional models of 'ordinary', 'liberalising' and 'restorative' transitional justice (Bell and O'Rourke, 2007). Moreover, it demonstrates the inescapable links between achieving gender justice in transitions and extending the scope of transitional justice to encompass consideration of social, economic and cultural inequalities (Chinkin and Charlesworth, 2006).

### Overview of sections

The article is divided into three main sections. Section I provides an overview of the theoretical and analytical framework that informs this study and notes pervasive discursive obstacles facing efforts to achieving gender justice in transitions, both within mainstream transitional justice discourse and related discourses, such as security and nationalism. Section II reviews successful feminist interventions to remedy the previous exclusion of gender-based crimes from international humanitarian and criminal law with a focus on international criminal tribunals. I argue that these efforts offer important insights into balancing two fundamental concerns of women's human rights advocates: first, to minimise the risk of re-victimising women within adversarial legal proceedings; and second, to retain a critical commitment to 'objective' values of fairness, transparency and accountability towards the advancement of gender equality and human rights for women.

Section III examines UN Security Council Resolution 1325 as a potential vehicle to achieve a more comprehensive account of gender justice in transitions. By purposively shifting the focus from 'women as victims' of conflict to women as agents of transition, SCR 1325 signals an important contribution to expanding the definition of transitional justice beyond (quasi)legal responses to past harms. In this sense, it resonates with an emerging consensus among feminist legal scholars and advocates that transitional justice must be framed within a wider process of forward-looking social transformation (Chinkin and Charlesworth, 2006; Abeysekera, 2006; Bell, Campbell and Ní Aoláin,

2004). I consider the potential role of SCR 1325 in contributing to such a transformative approach and ask what more is needed to underpin the necessary paradigmatic shift from the perspective of women. Finally, in section IV, I conclude that the prospects for realisation of a comprehensive, gender-sensitive vision of justice in transitions are integrally tied to the wider, bottom-up drive for implementation of international commitments to women's human rights.

## Section I: problematising gendered discourses

### The gendered limits of traditional approaches to transitional justice

The terrain of transitional justice has evolved considerably since the post-Second World War II period when the prosecution and punishment of war criminals (mostly individual state/military actors on the defeated side) was established as the principal mode of pursuing post-war justice. As will be discussed below, even within this narrow purview, gender bias has ensured that war crimes against women did not enter the equation until very recently. At the same time, the nature of war and conflict has altered dramatically since the Second World War. Most conflicts are now internal rather than interstate, involve non-state as well as state parties, and are fought amidst civilians. In such divided societies, criminal prosecutions of individuals on one side or another may not be the best way to underpin the transition to 'peace'. Instead, 'justice operates pragmatically... when it functions to facilitate the workings of the political sphere by absolving the need for absolute accountability' (Ní Aoláin and Turner, 2007, p. 3). The core problematic for most engaged in the field of transitional justice, therefore, has become one of balancing the normative imperatives of justice against the pragmatic requirements of peace and reconciliation (Bell, Campbell and Ní Aoláin, 2004, p. 14).

This balancing act usually entails a shift away from formal retributive to informal restorative models of justice. The latter are generally oriented toward 'resolving the original conflict, integrating all affected parties, healing the pain of victims through apologies and restitution, and preventing wrongdoing through community-building measures' (Anderlini, Pampele and Conway, nd). While, there is now a well-developed feminist critique of traditional approaches to post-conflict criminal justice (Askin, 1997; Ní Aoláin, 1997), very little attention has been paid to the gendered impact of alternative transitional justice processes and mechanisms. On the surface, because they appear to be non-adversarial, holistic, and inclusive, informal approaches to transitional justice might seem more amenable to recognising women's experiences and needs in conflict and transitional contexts. Recent research, however, indicates that this is not the case (Ní Aoláin and Turner, 2007; ICTR, 2007; Ross, 2003).

Examining the construction and operation of truth commissions in Chile and Guatemala, for example, Ní Aoláin and Turner expose the ways in which gendered discourses have operated in these contexts to exclude female subject positions (Ní Aoláin and Turner, 2007). Other scholars note a similar outcome regarding the Truth and Reconciliation Commission (TRC) in South Africa, despite considerable efforts by women's NGOs to ensure the comprehensive inclusion of women and gender perspectives in TRC hearings (Ross, 2003; Grenfell, 2004). In explaining such patterns, Ní Aoláin and Turner underline the gendered exclusions produced by the uncritical incorporation of traditional international human rights hierarchies into transitional justice practices. Hence, despite the Chilean and Guatemalan commissions both having broad mandates to effect social reconciliation and restitution, in practice they took a very narrow 'civil and political rights' view of the harms that needed to be addressed (Ní Aoláin and Turner, 2007). In doing so, both processes closed off consideration of the forms and locations of women's conflict-related harms, including, for example, domestic violence or conflict-induced impoverishment.

While, the gendered exclusions of different approaches to dealing with the past are important concerns, it is also vital from a gender perspective that the scope of transitional justice should not be

confined to consideration of legal, institutional and procedural aspects of dealing with past abuses. Doing so, limits exploration of the potentially transformative role of the law during a highly formative moment of renewal in transitional societies, including the role of international human rights standards and related transnational solidarity links. Under such conditions, there are opportunities to revisit inequalities, not only in relation to the dominant fissures around which the conflict has ostensibly revolved, but also in relation to other patterns of discrimination and marginalisation, especially along lines of gender that are often rendered invisible in the wider conflict meta-narrative (Rooney, 2006; Bell, Campbell and Ní Aoláin, 2004, p. 320).

Recognising the complexity and transformative potential of transitions, Bell, Campbell and Ní Aoláin (2004) have called for a multilayered transitional justice paradigm that investigates the interplay of law, politics and gender broadly defined. The present article builds on this model by considering the role of bottom-up, feminist engagement with international law in the political process of achieving gender justice in transitions.

### **Contesting gender bias in dominant discourses**

Understanding and contesting gender bias in mainstream accounts of transitional justice builds on critiques of other gendered narratives that mediate understanding of war, conflict and the objectives of transition. If transitional justice is to take women seriously, the gender biases underpinning discourses of nationalism, war/peace/security, human rights, liberalism, and so on must also be called into question. This means asking with respect to each: whose experiences matter, in what ways, under what conditions, and with what concrete effects, especially for women? A commitment to achieving gender justice in transitions, for example, calls for an understanding of how patriarchy, militarism and nationalism (including different forms of racism) interact to produce gendered identities and experiences that are inimical to women's human rights in both conflicts and transitions. This process also demands critical scrutiny of top-down, minimalist, liberal models of the 'rule of law', democracy, and human rights as the uncontested end-goals of transitions.

Feminist scholars have effectively demonstrated the ways in which war, conflict and the processes that surround them are deeply gendered and experienced differently by women and men (Enloe, 1990; Cockburn and Zarkov, 2002). Simplistic binaries, however, that cast women solely as pacifist victims of war and men as its belligerent perpetrators fail to capture the complex ways in which gender structures how we represent, understand and experience war, conflict and the human rights abuses that arise therein (Bos, 2006, p. 999). While war and security discourses are dominated by men and the logic of masculinity, women's labour and bodies have always been integral to war-making in multifaceted ways – whether as combatants, 'army wives' and munitions factory workers (Enloe, 2000) or as wartime 'booty' (Copelon, 2000, p. 223). Exposing the myriad ways in which women are affected by and involved in conflicts is an important part of debunking the myth that war and security issues, including the orchestration of transitions 'from war to peace', are the 'natural' preserve of men.

Others have shown how nationalisms promote regressive visions of women's roles in the ongoing construction of national or ethnic identity and how this produces particular patterns of violence against women, especially in times of conflict (Yuval-Davis, 1997; Lentin, 1998; Nikolic-Ristanovic, 1998). Feminist commentators have also called into question gender biases in the war-peace dichotomy per se and highlighted instead the continuities that prevail for women in transitions from 'conflict' to 'peace.' For example, women can experience increased and new forms of domestic violence as a result of the general normalisation of violence during conflict situations (Kesic, 2003, p. 2). But equally, domestic violence can escalate following a conflict when soldiers rejoin civilian life and continue to be violent in the private sphere (ibid.). Such analyses challenge male-defined notions of 'peace' as the cessation of certain forms of violence (Ní Aoláin, 2006) and underline instead the interrelation of all forms of violence; that is, the 'continuum of violence

running from bedroom, to boardroom, factory, stadium, classroom and battlefield' (Cohn and Ruddick, 2004).

The above analyses are also linked to well-honed feminist critiques of the liberal rule of law and the public-private divide (Smart, 1989; Pateman, 1988). Mainstream accounts of transitional justice generally accept top-down notions of the 'rule of law', formal equality, and minimal representative democracy, as the uncontested end-goals of transitions (Dyzenhaus, 2003, p. 165). It is well known, however, that even under such conditions, in established liberal democracies, women are marginalised in political life and gender inequalities in social, economic and cultural spheres persist (Young, 2000). In particular, the liberal public-private divide has meant that domestic abuse and sexual violence usually go unrecognised and unpunished. Further, gender equality in the liberal public sphere (i.e. equal access to political power) is directly impeded by gender inequalities in the private sphere (i.e. women's disproportionate responsibility for childcare).

Such deep-seated inequalities invariably reassert themselves in transitions. Even when women are integrally involved in conflicts or play key roles in peace initiatives, they are routinely cut out of political power after peace agreements are put in place (Bell, Campbell and Ní Aoláin, 2004, p. 320-1). In effect, therefore, models of transitional justice, which accept a traditional, territorially-bounded, liberal public-private divide and male-dominated public sphere as the outcomes of transition, fail to operationalise transitional justice as if women's equality and human rights mattered. In doing so, they dissipate a valuable opportunity to frame transition as a process of bottom-up transformation underpinned by critically interpreted human rights norms.

The following sections II and III address the achievements and wider implications of specific advocacy initiatives by women's movements to tackle the gender gaps and exclusions outlined here. Both exemplify engagement with international law as a site of contestation and potential transformation in the effort to foreground gender and women's experiences in post-conflict contexts. The first focuses on efforts to remedy the previous exclusion of gender-based crimes from international humanitarian and criminal law while the second addresses obstacles to women's full and equal participation in transitions from conflict to peace. As such, these initiatives reflect significant practical contributions and offer valuable insights vis-à-vis the challenge of achieving gender justice in transitional contexts and the role of transnational, bottom-up approaches to international law therein.

## Section II: Gender crimes in post-conflict tribunals

### Wartime sexual violence

The increased vulnerability of women to rape and sexual violence has always been a feature of war (Chinkin, 1994). There are well documented accounts of many thousands of women being raped during conflicts by both enemy and 'friendly' forces, for example, during World War II (Bos, 2006), the 1971 Indo-Pakistani war (Menon and Bhasin, 1998), wars in the former Yugoslavia (HRW, 1993, p.163-5) and Rwanda (HRW/FIDH, 1996) as well as in internal conflicts in Peru, Liberia, east Timor (Chinkin, 1994, p. 2). The impact of such sexual violence in women's lives is profound. In addition to the immediate physical and emotional harm inflicted, the trauma produced can be prolonged and exacerbated if the violence also results in pregnancy or sexually transmitted disease (*ibid.*, p. 5).

Despite the prevalence and gravity of different forms of violence against women in contexts of militarisation, war and conflict, these issues did not begin to receive serious international attention until the 1990s. A variety of factors contribute to the impunity of perpetrators of sexual violence and the failure to date to achieve justice with respect to gender-based war crimes. These include deeply-engrained perceptions that rape and other forms of sexual violence are unavoidable aspects of the breakdown in social order that accompanies war (Chinkin, 1994, p. 4) as well as women's own fears of social stigma and/or rejection by spouses, families and communities (Chinkin, 1994, p. 5; Grenfell,

2004, p. 533). Even if these kinds of barriers can be surmounted, intimidation of women who report abuses, legislation preventing the prosecution of war crimes, or amnesties under peace agreements can all militate against the prosecution of wartime rapes and sexual violence.

Shortly, I look in more detail at feminist efforts to mainstream gender in the ICC as a way of countering some of the obstacles noted here and address the persistent limitations of a criminal justice approach to achieving gender justice in post-conflict situations. To contextualise that discussion, the following subsection highlights entrenched gender biases in international humanitarian law vis-à-vis crimes against women, which the ICC women's initiative directly challenged.

### Gender-based crimes in international law

Prior to the 1990s, the treatment of wartime rape and sexual violence in international humanitarian law was very ambiguous. Article six of the Nuremberg Charter (1945) establishes the core concepts used in the prosecution of war criminals after World War II.<sup>1</sup> It defines 'war crimes' as 'violations of the laws or customs of war' including '*but not limited to*, murder, ill-treatment or deportation to slave labour' (my emphasis). Article six also defines the category of 'crimes against humanity', which is primarily concerned with violations against civilians within a wider context of conflict. It encompasses 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war' and expressly outlaws 'persecutions on political, racial or religious grounds'.

Notwithstanding the 'not limited to' caveat, the fact that rape and sexual violence were not explicitly listed as examples of 'violations of the laws or customs of war', or as forms of crimes against humanity, ensured that wartime rape and sexual violence did not feature in the Nuremberg trials (Copelon, 2000, p. 227) and received very limited attention in the International Military Tribunal for the Far East.<sup>2</sup> Likewise, the failure to list gender-based persecution along side political, racial and religious persecution both reflected and reinforced the invisibility of women and gender-specific experiences not only in war and conflict situations and post-conflict justice processes, but in society more generally.

In the Geneva Conventions, patriarchal notions of the role of women in society also serve to understate the gravity of wartime sexual violence. This is evident in art. 27 of the Fourth Geneva Convention protecting civilians in international conflict, which asserts 'women shall be especially protected against *any attack on their honour*, in particular against rape, enforced prostitution, or any form of indecent assault' (my emphasis). Hence, sexual violence is recognised as a breach of social mores (i.e. damaging to a woman's reputation or her value from the perspective of men) but not as an expressly prohibited war crime that demands prosecution.

In contrast, art. 3, common to all four Geneva Conventions, unambiguously prohibits other egregious acts against non-combatants including: murder of all kinds, violence to life and person, torture, the taking of hostages, and 'outrages upon personal dignity, in particular humiliating and degrading treatment.' Similarly, enforcement of the conventions relies on a requirement that states enact legislation and ensure punishment of 'grave breaches' of the conventions (art. 49). However, wartime rape and sexual violence are not explicitly enumerated in the list of grave breaches given in

1 The same definitions appear in art. 5 of the Charter of the International Military Tribunal for the Far East.

2 In the judgment of the International Military Tribunal for the Far East, rape is mentioned as a recurring element of conventional war crimes committed by Japanese forces under the direction of the men charged. In particular, the metaphorical 'rape of Nanking' involved actual rapes of more than 20,000 women and is documented in some detail in the judgment documents. Responsibility for rapes, however, is only mentioned in the verdicts of two out of 28 war criminals prosecuted and does not form the primary basis of any indictment: <http://www.ibiblio.org/hyperwar/PTO/IMTFE>.

art. 50, which includes 'willful killing, torture or inhuman treatment, [and] . . . wilfully causing great suffering or serious injury to body or health . . .'

Even though it is not difficult to see how rape and sexual violence could be interpreted as war crimes and/or crimes against humanity under the existing provisions, this did not begin to happen in a significant way until women's movements mobilised around the issue in the 1990s. Ultimately, in the case of World War II, because the impact on women was not expressly included as part of the post-war justice agenda, violations against women were ignored. At the same time, gender bias permeated the processes established to prosecute World War II criminals. In particular, some have argued that the fact that wartime sexual violence was perpetrated with equal ferocity by all sides, and not only by German and Japanese militaries, created incentives to downplay the gravity and extent of violence against women during the war (Chinkin, 1994, p. 9; Copelon, 2002, p. 222).

## Mainstreaming gender in the International Criminal Court

In the early 1990s, the global campaign for women's human rights ensured the unequivocal recognition of women's rights as human rights at the World Conference on Human Rights (Vienna, 1993). This development, together with a growing awareness of crimes against women in the conflict in the Former Yugoslavia, and a burgeoning campaign for justice for 'comfort women' (discussed below) provided a new impetus to challenge past failures to ensure gender justice in international humanitarian and criminal law.

At this juncture, women's human rights advocates were keenly aware that if gender justice was to be effectively pursued in relation to ongoing and future conflict situations, women's movements needed to closely monitor and shape the statutes and procedures of the ad hoc tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), but especially of the proposed permanent International Criminal Court (ICC). Reflecting this imperative, the Women's Caucus for Gender Justice was formed in 1997 to work in tandem with the wider NGO Coalition for International Criminal Court. Importantly, members of the Women's Caucus had participated in previous women's NGO caucuses at UN conferences, especially Vienna, Cairo and Beijing, and used this experience to influence ICC process (Copelon, 2000, p. 219).

The resulting Rome Statute of the International Criminal Court (1999) reflected a major leap forward in the effort to mainstream women and gender-specific concerns in international humanitarian and criminal law. By expressly defining a wide range of gender crimes as crimes against humanity and as war crimes, the statute eliminates much of the ambiguity that had closed off the possibility of prosecuting crimes against women in previous post-war accountability processes. Included in the statute's list of crimes against humanity are 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity' (art. 7). In addition, enumerated war crimes, in both international and internal conflicts, include 'committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' (art. 8).

Importantly, having closely observed the practices of the ad hoc tribunals, the Women's Caucus was aware that, in addition to legal definitions, technical and procedural matters had the potential to limit consideration of gender-specific cases and discourage participation by women (Copelon, 2000, p. 238). In an effort to minimise these obstacles in the operation of the ICC, the Women's Caucus successfully pressed for the codification of a range of gender-sensitive provisions in the Statute and rules of procedure. Most notably, the court is required to establish a Victims and Witnesses Unit to ensure the safety of victims and witnesses and to provide counselling and other necessary services, especially where sexual violence is involved. Furthermore, rules of evidence are also in place to prevent attacks on the credibility of victims or witnesses based on past sexual

behaviour. The Statute also calls for the appointment of legal advisors with expertise on violence against women, and for gender balance among judges and all ICC personnel. Finally, victims can participate directly in court proceedings whether or not they are called as witnesses, thereby opening up potentially less stressful avenues for women's voices to be heard.

Feminist commentators have raised questions about the extent to which the international prosecution of wartime rapes can advance the interests of survivors (Mertus, 2004; Ní Aoláin, 1997). Analysing women's experiences vis-à-vis the Foca<sup>3</sup> case examined by the International Criminal Court for the Former Yugoslavia (ICTFY), Julie Mertus concludes that court testimonies do not allow for the 'production of a narrative that reflects women's experiences, promotes agency, and addresses their need for closure and healing' (ibid., p. 110). Notwithstanding women's best efforts to resist dominant legal narratives, Mertus cautions against the inherent tendency of adversarial legal practices to promote gender and cultural essentialism and reinforce the notion of 'woman as victim' (ibid.). Ultimately, she calls on women's human rights advocates to examine more critically the limits of international tribunals and explore complementary and alternative justice mechanisms (ibid.).

These are very important and valid criticisms. In responding it is important not to create artificial either/or options around the 'best' way to promote and safeguard the human rights and wellbeing of individual women. The failures of the adversarial legal system from a feminist perspective are well documented. Indeed, highlighting and transforming gender biases in traditional legal procedures (e.g. eliminating hostile questioning of rape victims about their past sexual activities), is a core tenet of feminist engagement with the law. Interventions like those of the ICC Women's Caucus, therefore, which challenge procedural as well as definitional aspects of the law and facilitate bottom-up participation in related processes, exemplify critical feminist human rights praxis at the international level.

At the same time, there is no doubt that protecting the interests of individual women in criminal trials is always going to be difficult and requires the ongoing participation and vigilance of women's human rights advocates. In the context of a body like the ICC, therefore, it is imperative that any woman who has been subject to abuses directly or indirectly, and is a potential witness or testifier, is made fully aware of the difficulties and limitations, as well as the wider benefits associated with her participation in the trial and surrounding processes. In addition, comprehensive steps must be in place to ensure the security and wellbeing of all victims and witnesses who chose to participate, especially in cases of sexual violence.

It is too soon to evaluate the impact of gender-sensitive provisions in the operation of the ICC and the extent to which they ameliorate the specific concerns raised by Mertus in relation to the ICTFY. Even under optimal conditions, however, arguably, women's participation in international criminal tribunals is better understood primarily as a political act aimed at contesting the gendered exercise of power at a structural level, rather than a process for achieving justice on an individual level. In this regard, close attention must be paid by women's human rights advocates to the mechanisms through which women ultimately opt to participate in international tribunals. In particular, efforts are needed to strengthen women's political agency throughout the entire process.<sup>4</sup> Ultimately, in the wider struggle to secure meaningful justice for women in transitions, formal criminal prosecutions of wartime sexual violence will only be part of the solution some of the time.

Regarding alternative transitional justice mechanisms, there is a growing awareness that quasi-legal, non-adversarial mechanisms, such as truth commissions, are no less gender biased in their operation than traditional court models (Ní Aoláin and Turner, 2007). Feminist scholars and advocates, therefore, must problematise the operation of gender bias and gendered power relations in framing and operationalising both formal and informal modes of justice (ICTJ, 2007). This entails

3 The Hague, 22 February 2001 (JL/P.LS/566-e): [www.un.org/icty/foca/trialc2/judgment/index.htm](http://www.un.org/icty/foca/trialc2/judgment/index.htm).

4 For a discussion of these issues in the context of informal popular tribunals, see Reilly and Posluszny (2006).

challenging the biased premises and parameters, which privilege certain harms in certain contexts, thereby creating exclusions along lines of gender, race, class, and so on. Equally important, it means continuing to pay close attention to the formulation of procedures and practical strategies to redress biases and monitor implementation of gender-sensitive measures on a continuous basis (*ibid.*).

### **Another approach: feminist uses of popular tribunals**

Notwithstanding the persistent difficulties around women's participation in formal legal processes, the radical import of feminist initiatives to establish gender-sensitive legal practices in the ICC (and earlier in ad hoc criminal tribunals) should not be understated. These actions constitute an important practical critique of the gendered exercise of power in male-dominated international legal and political structures. Further, by relying on broad-based participation and solidarity from other women's movements, undoubtedly, they have helped to extend advocacy networks, raise awareness, and enhance capacity among women's NGOs towards further transformative engagement with the law. Furthermore, they established important legal principles and precedents that can be used by women's movements to advance women's human rights in safer 'informal' contexts.

For example, the increasing use of popular tribunals by women's movements is indicative of evolving efforts to reconcile two fundamental concerns of women's human rights advocates. The first is to counter the potential threat of re-victimisation of women victims of gender crimes in the context of formal, top-down, legal proceedings. The second is to affirm nonetheless a commitment to 'objective' values of fairness, transparency and accountability and to appropriate the legitimacy and authority of the law toward the advancement of meaningful equality and human rights for women. Popular tribunals are generally framed in terms of international human rights and/or humanitarian law. They simulate to one degree or another formal legal procedures and practices and often enlist the expertise and support of established legal practitioners and judges. In addition to the Vienna (1993) and Beijing (1995) tribunals of the global campaign for women's human rights (Bunch and Reilly, 1994; Reilly, 1996), more recent examples include the Tokyo Women's International War Crimes Tribunal on Japanese Military Sexual Slavery (Chinkin 2001) and the International Initiative for Justice in Gujarat 2002 (Cockburn, 2007, p. 23).

The Tokyo Tribunal is a particularly striking example of the political impact of the wider campaign for gender justice in criminal tribunals. It was the culmination of several years of advocacy on behalf of 75 former 'comfort women' who were kidnapped into sexual slavery by the Japanese military during World War II (Chinkin 2001). Many of the advocates involved in the tribunal had also been part of the ICC campaign. The former 'comfort women' came from China, East Timor, Indonesia, Malaysia, North and South of Korea, Philippines, Taiwan, as well as Japan. They were among approximately 200,000 women who were raped up to 40 times each day in what has been described as the 'unprecedented industrialisation of sexual slavery' (Copelon, 2000, p. 222).

The Tribunal was notable in replicating a high degree of legal formality, which has served to enhance its legitimacy and impact in the international community. The final judgment<sup>5</sup> found Emperor Hirohito and several high-ranking members of the Japanese military, 'guilty' of crimes against humanity (Tokyo Tribunal Judgment, p. 204). It also found that the current Japanese government has a 'duty to provide reparation' in various forms (*ibid.*, para. 1085). More recently, a climate of backlash and revisionism has seen the Japanese government row back from an earlier tentative acknowledgement of the harms suffered by the 'comfort women' (McNeill, 2007).

Under these conditions, because most of the victims are 80 years old or more, the Tokyo judgment is likely to be the final response they receive. As such, the significance of the formality

5 Tokyo Tribunal Judgment, December 2000, VAWW, Network Japan (<http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgment.pdf>).

employed throughout the proceedings is heightened as the judgment of a popular tribunal becomes de facto an 'official' judgment. This example of the Tokyo Tribunal exemplifies transformative, bottom-up, feminist engagement that innovatively negotiates the nexus between formal and informal uses of the law, within a framework of transnational solidarity, in the pursuit of justice for victims of wartime sexual violence. In this sense, it suggests a third approach to dealing with the past that can inform gender analyses of formal and informal transitional justice mechanisms and the relation between the two.

This section has focused primarily on questions of dealing with past abuses. Developing gender-sensitive formal and informal justice mechanisms to account for particular wartime crimes against women is a vital area of concern that requires sustained feminist analysis and advocacy. However, women's experiences of conflict and transition are complex and a comprehensive vision of gender justice in such contexts cannot be achieved if we stop there. Recognising the need to shift the focus from women as victims of war to women as agents of change in transitions, another major transnational, feminist campaign emerged in the late 1990s. Using international law as a bottom-up tool, it sought the adoption and implementation of a Security Council resolution on women, peace and security. The following section explores the contribution of this initiative to the project to developing a more comprehensive account of gender justice in post-conflict transitions.

### Section III: Women's participation and gender equality in transitions

Ostensibly, transitions offer extraordinary opportunities for recasting societies and transforming pre-existing terms of power – social, economic, cultural, and political – especially for the benefit of those previously denied human rights and access to decision-making processes. Importantly, they offer 'an opportunity to consolidate some of the more positive changes that occurred as a result of the conflict [including] . . . opening up new spaces of life and work for women (Abeysekera, 2006, p. 4). In practice, however, scholars and activists have highlighted the paradox of women's extensive engagement in peace building activities (Bell, Campbell and Ní Aoláin, 2004; Goetz and Hassim, 2003), and in national liberation/pro-democracy struggles (Alvarez, 1990; Basu, 1995; Waylen, 2000), followed by their subsequent marginalisation from formal peace negotiations and newly formed governance institutions and processes (Abeysekera, 2006; Chinkin and Paradine, 2001; Porter, 2003; Chinkin and Charlesworth, 2006).

Achieving gender justice in transitions, therefore, demands interrogation of the causes and consequences of women's marginalisation in high-level political decision making. This is especially critical in the negotiation of peace settlements and drafting of constitutions, which represent particularly important windows of opportunity because they establish the legal and political framework for transition over the long term (Coomaraswamy and Fonseka, 2005). At the same time, seeking gender justice in transitions calls for greater recognition of the vital role played by women through informal peace building activities (Porter, 2003, p. 256). This includes, for example, sustaining grassroots links across divided communities throughout conflicts (Abeysekera, 2006, p. 15; Chinkin and Paradine, 2001, p. 150).

More broadly, research on women involved in peace building activities indicate that they embrace an expansive and multilayered understanding of what is involved in securing a sustainable transition from 'conflict to peace' (Porter, 2003, p. 257). Contesting narrowly-interpreted liberal norms, feminist peace building praxis suggests a vision of justice in transitions that incorporates traditional, legally-framed justice into a more comprehensive account of social justice. This includes: 'gender justice, demilitarization, the promotion of non-violence, reconciliation, the rebuilding of relationships, gender equality, women's human rights, the building of and participation in democratic institutions, and sustaining the environment' (McKay and Mazurana, 2002, cited in Porter, 2003, p. 257).

Implicitly, this account of justice rejects the public-private configuration at the heart of traditional accounts of law and democracy, which conceal a range of abuses in private contexts, especially violence against women. Importantly too, for most women, their participation in peace building work springs directly from their daily struggles to 'meet the urgency of ordinary daily needs' (Porter, *ibid.*). Viewed from this perspective, ensuring gender justice in transitions necessarily means treating socio-economic inequalities and exclusions, which disproportionately affect women (Rooney, 2004), as no less urgent than legal and political issues.

The foregoing critiques underline the need for greater and more nuanced understandings of the ways in which prior gender inequalities shape women's experiences during conflicts and transitions. That is, pre-existing patterns of gender-stereotyping, sex-based discrimination, sexual exploitation, violence against women, and female impoverishment and under-representation in decision making, inevitably shape women's experiences of war and conflict. Hence, in addition to the heightened risk of wartime sexual violence, women are adversely affected by conflicts in a range of everyday ways. For example, women's trauma of losing male family members is usually exacerbated by a loss income or property and the need to assume sole financial responsibility for the care and survival of other family members (Turpin 1998 p. 7). Further, conflict-induced poverty means that women are often forced into prostitution or become victims of trafficking (*ibid.*, p. 6). More generally, because of their traditional gender roles as carers, women bear the brunt of coping with the destruction of basic amenities as they struggle to procure food, water, accommodation and healthcare for their dependents.

Realising gender justice in transitional contexts calls for an understanding of the specificity of the hardships that women encounter in violent conflicts, how these are linked to 'peacetime' gender inequalities, and why women may be more interested in transformation than 'reconstruction' in moments of transition (Bell and O'Rourke, 2007, p. 41). Viewed from this perspective, achieving justice for women in transitions entails actively contesting underlying and often invisible inequalities (Rooney, 2006). To do so, the architects of transitions must work closely with local women's movements to underpin and institutionalise a broader shift toward gender equality and respect for women's human rights. As will be discussed below, however, at present the opposite is true.

Security Council Resolution (SCR) 1325 on women, peace and security is an important example of the innovative use of international law in the effort to underpin women's participation and gender equality in transitional contexts. The following subsection looks at the campaign to adopt and implement SCR 1325 and considers the significance of the resolution and the movement that created it in the wider bid to achieve gender justice in post-conflict situations.

## Security Council Resolution 1325

The story of SCR 1325 begins with the Beijing Platform for Action (UN 1995), which included 'women and armed conflict' as one of 12 critical areas of concern. The UN Commission on the Status of Women (CSW) subsequently met in 1998 to review progress on implementing the Beijing Platform, with a particular focus on its commitments in relation to gender and conflict issues. In this context, the Women's International League for Peace and Freedom (WILPF) began to coordinate the Women and Armed Conflict Caucus and later the NGO Working Group on Women and International Peace and Security,<sup>6</sup> which continued to advocate for the implementation of the Platform provisions beyond the CSW session (Hill 2001).

6 Formed in June 2000, the NGO Working Group included: Hague Appeal for Peace, International Alert (IA), International Women's Tribune Center, Women's Caucus for Gender Justice, Women's Commission for Refugee Women and Children and WILPF (Hill et al., 2003). Over time, the campaign to implement Resolution 1325 has continued to gain support among a wide range of peace, development and human rights NGOs around the world. For more details see the Women Peace and Security NGO Web Ring at: [http://www.peacewomen.org/web\\_ring](http://www.peacewomen.org/web_ring).

Many months of sustained advocacy yielded positive results when Namibia agreed to host an open session on women, peace and security under its presidency in October 2000.<sup>7</sup> In addition to speakers from the NGO Working Group, women from Guatemala, Sierra Leone and Somalia made presentations to the Security Council on the gender-specific impact of conflict in their countries and the need to include women in finding and effecting solutions (Hill, Aboitiz and Poehlman-Doumbouya, 2003, p. 1259). Following the meeting, Resolution 1325 was adopted and greeted by women's movements as a major success; it contained much of the same language as the Draft Resolution produced by the NGO Working Group and circulated previously to Council members (*ibid.*, p. 1260).

Historically, the Security Council has only ever dealt with women peripherally, as victims or as a vulnerable group (Cohn, 2004). Resolution 1325, therefore, marks the first time that the Council focused its attention exclusively on women as subjects in their own right in situations of conflict and transition from conflict. The resolution is significant, therefore, not only for recognising the disproportionate and gender-specific impact of conflict on women but also highlighting the undervalued role of women in the prevention and resolution of conflicts and in peace-building and post-conflict reconstruction. Specifically, it calls for the 'increased representation of women at all decision-making levels... in the prevention, management, and resolution of conflict' (art. 1). Importantly, the resolution also requires all participants in the negotiation and implementation of peace agreements to 'adopt a gender perspective' (art. 8).

Notwithstanding the politicisation and selective enforcement of Security Council resolutions, because SCR 1325 is legally binding, in contrast to the Beijing Platform, for example, it has more potential as a tool to bolster women's human rights claims in transitional contexts. Resolution 1325 is also exceptional in being the product and continued focus of an unprecedented level of women's mobilisation and engagement with the Security Council (Cohn 2004). Since October 2000, participants in the NGO Working Group on Women and International Peace and Security have continued to lobby intensively at state and UN levels and to organise numerous events aimed at progressing implementation of the resolution (Hill et al., 2003, pp. 1261-65). In particular, the Peace Women project ([www.peacewomen.org](http://www.peacewomen.org)) co-ordinated by WILPF, plays a vital role documenting and mobilising initiatives to translate Resolution 1325 into action. Reflecting the impact of these efforts, the Security Council has since convened two follow-up sessions with NGOs (in 2001 and 2005) which have sustained the pressure for concrete actions to realise the resolution.

Resolution 1325 has begun to have some impact on the ground. In particular, to assist its implementation the United Nations Development Fund for Women (UNIFEM) has supported dozens of targeted activities including: establishing women's centres among refugee and internally displaced populations in Afghanistan to improve access to humanitarian assistance (UNIFEM, 2004a, p. 15); building women's coalitions and capacity to influence peace negotiations in the Democratic Republic of Congo, Somalia and Burundi (*ibid.*, pp. 19, 21); and running trainings with peacekeeping personnel on the interrelation of gender, human rights and HIV/AIDS in Sierra Leone (*ibid.*, p. 17).

Despite these and other UN-led initiatives, however, there is a consensus among advocates that the struggle for concrete realisation of Resolution 1325 is in its very early stages and faces myriad obstacles (WILPF, 2007, p. 1). With regard to Iraq, for example, it has been noted that 'women's political participation in... the design of the new political order has regularly been sacrificed to pacify vocal religious groups' (Charlesworth and Chinkin, 2006, p. 939). Similarly, despite the adoption of SCR 1325, subsequent 'peace negotiations in the Middle East, in Burundi and in Sudan either did not include

7 Of all UN forums, the Security Council has been particularly inaccessible to NGO participation and input. However, since 1993 a procedure known as the 'Arria Formula' has been in place, which allows for special open sessions of the Security Council to which NGO guests can be invited to share their views on particular topics.

women or did not ensure that women were represented at high levels (Porter, 2003, p. 254). Over a period of 20 years of intermittent peace negotiations in Sri Lanka: 'in none of these were women a part of the process; nor was there any discussion of their absence or lack of participation' (Abeysekera, 2006, p. 15). Following the exclusion of women from peace talks after the 2002 Ceasefire Agreement, however, autonomous women's groups throughout Sri Lanka, encouraged by SCR 1325, mobilised around the issue and achieved the creation of a Sub-Committee on Gender Issues (*ibid.*).

### **The Limits of SCR 1325**

The difficulties implementing SCR 1325 are similar to those facing any liberal feminist equality agenda. On one level, SCR 1325 reflects a radical departure in the male-dominated context of 'war and security' law and policy at the UN Security Council. Its radical potential is stymied, however, by an overly narrow focus on women's equal participation in public life. The full and equal participation of women in political decision making and policy design and implementation – in transitions or otherwise – requires positive measures to counter gender inequality across the board: economic, social, cultural, legal and political.

Speaking directly to the challenges of implementing SCR 1325 in Burundi, women's rights activist, Schola Harushiyakira<sup>8</sup> acknowledged unprecedented successes in the use of quotas to secure 30% representation of women in national representative bodies. However, she raised concerns about their absorption into mainstream political parties that have little interest in gender equality and the need for greater awareness among the elected female representatives of the issues affecting the majority of women on the ground. Perhaps most importantly, she named extreme poverty as the single biggest obstacle to broad-based civic and democratic participation by women.

Harushiyakira's comments underline widespread doubts about whether women's sustained and equal political participation in decision-making and post-conflict transformation is possible without a radical re-conceptualisation of the kinds of democratic institutions and processes that are needed to achieve justice for women in transitions (Chinkin and Parradine, 2001; Chinkin and Charlesworth, 2006; Rooney, 2006). Equally, however, they highlight the interrelation of denials of human rights in women's lives and the imperative of addressing gender-based social and economic inequalities as major obstacles to the achievement of women's equal political participation in the transformation of transitional societies.

Further, the majority of conflicts take place in the 'developing' world (Abeysekera, 2006). Moreover, it is widely recognised that current patterns of globalisation exert a disproportionate, negative gender impact that disadvantages most women in the globalising economy (Streeten, 2001; Molyneux and Razavi, 2006). From this perspective, the challenge of implementing SCR 1325 and achieving women's empowerment in transitions is integrally linked to tackling deepening global inequalities fostered by neo-liberal globalisation.

### **Towards an integrated approach to justice, equality and human rights for women in transitions**

Recognising the limitations of the remit of SCR 1325 and the failures to implement its provisions to date, sceptics will be tempted to discount the resolution as purely tokenistic. In contrast, I argue, the transformative potential of SCR 1325 relies upon it being understood as an interlocking piece in a growing body of international commitments to women's human rights, gender equality and gender

8 Schola Harushiyakira spoke at an event in Derry, Northern Ireland on 15 March 2007. The event was organised by the Irish development NGO Trocaire as part of its annual speakers' series. In 2007 the series focused on gender equality and implementation of the UN SCR 1325.

mainstreaming. Reflecting this perspective, Chinkin and Charlesworth map the main elements of this international legal framework, which underpins claims for gender equality and women's human rights in transitions to peace (Chinkin and Charlesworth, 2006). In addition, to SCR 1325 and the gender-sensitive provisions of the ICC, they include in this framework, inter alia, the Vienna Declaration and Programme of Action (1993), the Beijing Platform for Action (1995), the Women's Convention on the Elimination of All Forms of Discrimination against Women (1979) as well as the international bill of rights and the conventions on children's rights and against racism.

The potential of international human rights standards to promote gender justice in transitional contexts is multifaceted. On one level, women's groups and others can lobby at the local level for the incorporation of international norms of non-discrimination and sex-based equality can into emerging national legal systems, including customary and religious laws (*ibid.*, 944). This is particularly important in assisting women's movements, which in recent decades have been at the forefront of resisting resurgent traditionalism and new fundamentalisms (Shaheed, 2001; Freedman, 1998).

More broadly, however, there is much undeveloped potential for women's organisations to utilise the entire array of international human rights treaties in seeking gender justice in transitions. Given the traditional neglect of socio-economic rights in mainstream transitional justice and human rights paradigms, treaties like the Women's Convention and the International Covenant on Economic, Social and Cultural Rights, which afford particular protection to the rights to health, decent conditions of work, social security, education and so on, have a particularly pivotal role to play in ensuring women's human rights in transitions (Chinkin and Charlesworth, 2006, p. 946)

Tapping this potential, however, will require sustained engagement by women's NGOs with the treaty-monitoring processes to hold governments accountable for the local implementation of global gender equality and women's human rights standards. Beyond the possibilities of pursuing 'legal' strategies and bringing individual or group complaints under some treaties, all conventions require governments to participate in periodic reviews of their observance of the convention. These reviews create 'political' opportunities wherein women's organisations and individual activists can legitimate their local claims and secure benchmarks that can be repeatedly invoked and revisited. As such, reviews of a government's compliance with human rights standards are important civic/political processes in their own right. They afford women valuable opportunities for political engagement and negotiation with governments at the international level, which might not be available at state level. In addition, they foster transnational solidarity links with non-state and civil society actors who share a commitment to advancing women's human rights.

Significantly, the Committee on the Elimination of Discrimination against Women is increasingly playing a lead role in monitoring implementation of SCR 1325. The Committee now requests governments to report on implementation of SCR 1325 as part of their overall compliance with CEDAW (UNIFEM, 2004b). In 2007, 13 of 36 countries up for review before the Committee are in conflict or post-conflict situations. In this context women's organisations have very real opportunities to use their governments' obligations under CEDAW to reinforce implementation of SCR 1325. Moreover, the existence of well-organised transnational NGO networks that have grown up around both instruments<sup>9</sup> maximise the potential of local groups strategically using these international standards in tandem to achieve 'substantive and material justice for women' in transitions (Bell and O'Rourke, 2007, p. 44)

9 In the case of CEDAW, International Women's Rights Action Watch Asia Pacific, provides comprehensive information as well as international training and capacity building programmes to assist non-governmental groups from every region to participate in monitoring and reviewing their country's compliance with CEDAW. The Women's International League for Peace and Freedom and UNIFEM play a similar role towards the implementation of SCR 1325.

## Section IV: conclusions

This article has explored the prospects for achieving a comprehensive vision of gender justice in transitional contexts with a focus on the potentially transformative role of international norms and transnational feminist advocacy. In particular, I examined the significance of recent feminist initiatives targeting the International Criminal Court and the adoption of Security Council Resolution 1325.

In the case of the former, I reviewed various levels of gender bias, especially in international humanitarian law, which have underpinned failures to account adequately for wartime crimes against women until the 1990s. Ultimately, I argue that efforts to date to engender war crimes prosecution are best understood as part of a wider 'political' process to contest and constitute global legal norms in ways that underpin principles of gender equality and women's human rights, and not *primarily* as avenues to seek justice for individual women.

Further, I argue that the transformative value of such norms is especially evident when they are used in the context of bottom-up, quasi-legal initiatives such as the Tokyo Women's International War Crimes Tribunal on Japanese Military Sexual Slavery. More generally, women's movements and feminist critics must remain vigilant in exposing gender biases in determining what counts as conflict-related harms and in advancing ways and means to eliminate such biases in both formal and informal modes of dealing with past abuses.

Recognising the imperative of extending the purview of justice in transitions beyond dealing with past abuses, I considered the potential of SCR 1325 as a tool of women's movements to capitalise on the transformative opportunities opened up by transitional moments. Despite the exceptional opportunities transitions offer to redefine and re-envision a society emerging from conflict, more often than not, women find themselves sidelined in post-conflict politics and under pressure to return to traditional, subordinate roles. This tendency is exacerbated by the fact that male-centric models of representative democracy, together with the classic liberal public-private divide, are uncritically embraced as the end-goal of transitions.

The effect of these gender biases is to ignore structural social and economic inequalities, including global inequalities, which disproportionately disadvantage women in conflicts and transitions and impede their full and equal political participation. Further, the exclusion of women from the exercise of power is deepened by a widespread willingness – among progressives and conservatives – to discount gender equality claims in the name of respecting collective 'cultural' claims.

UN Security Council Resolution 1325 is an important tool in promoting more comprehensive vision of gender justice in transitions. However, in isolation, it cannot address the deep-seated gender inequalities, which are produced by and reflected in legal, political, social, economic, and cultural practices, institutions and identities. Rather, the transformative potential of UN SCR 1325 is enhanced if it is understood as one among an array of evolving international commitments to gender equality and women's human rights, within a framework of universal and indivisible human rights.

Realising justice for women in transitions, therefore, is integrally tied to the bottom-up implementation of the UN Women's Convention, the Beijing Platform for Action, SCR 1325, the Protocol on the Rights of Women in Africa, and so on. Viewed from this perspective, women's struggles to achieve gender justice in transitions – whether in Sri Lanka, Northern Ireland, or Iraq – have a great deal to contribute to and gain from a vital global movement for women's human rights.

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