GENDERED SUBJECTS OF TRANSITIONAL JUSTICE

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Transitional societies must contend with a range of complex challenges as they seek to come to terms with and move beyond an immediate past saturated with mass murder, rape, torture, exploitation, disappearance, displacement, starvation, and all other manner of human suffering. Questions of justice figure prominently in these transitional moments, and they do so in a dual fashion that is at once backward and forward looking. Successor governments must think creatively about building institutions that bring justice to the past, while at the same time demonstrate a commitment that justice will form a bedrock of governance in the present and future. This is no easy task, and shortcuts, both in dealing with the past and in building a just future, often appear irresistible. In Martha Minow's words, justice at this juncture amounts to replacing "violence with words and terror with fairness," [1] and steering a "path between too much memory and too much forgetting."[2]

The template of mechanisms available to undertake transitional justice are familiar to those who work in this field: prosecutions (domestic and international); truth and reconciliation commissions; lustration (the shaming and banning of perpetrators from public office); public access to police, military and other governmental records; public apology; public memorials; reburial of victims; compensation or reparation to victims and/or their families (in the form of money, land, or other resources); literary and historical writing; and blanket or individualized amnesty. In most cases, justice demands the deployment of a number of these tools, given that no one of them can adequately address and repair the injuries of the past nor chart a fully just future. Transitional justice will always be both incomplete and messy.

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[1] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 2 (1998).

[2] *Id*. at 4.

Justice is, of course, a very complex ethical, legal, institutional, and emotional problem, and its aspirations are rendered all the more difficult in transitional societies that are struggling with unstable governance, security, and economic institutions. To better illuminate these complexities, particularly as they relate to gender, I will borrow a framing device from political scientist Nancy Fraser. In *Justice Interruptus*, Fraser discusses one of the key dilemmas of justice projects: whether they should be fundamentally committed to redistribution or recognition.[3] Justice as redistribution is a familiar concept entailing the reordering of material and symbolic resources based upon a particular account of culpability, desert, accountability, injury, and fairness. These transitional justice projects could be primarily committed to redistributing money or land (in the form of reparations), but they could also redistribute shame (from the injured to the injurer) or power—resources that might be best understood as symbolic and cultural. By contrast, justice projects that emphasize recognition seek the establishment of official bodies, be they courts, tribunals, officially appointed commissions, or boards of inquest, whose task it is to find facts, and, more importantly, recognize, acknowledge, or call up the *identities* of the parties and acts that are brought to their official attention. The facts to be recognized may be culpability, harm, injury, or causation. Individual identities to be recognized would be that of criminal, victim, conspirator, or rights-holder, while the identity of particular criminal practices may be recognized as well, such as genocidal, gender, or ethnic-based crimes.

Of course, a preference for redistribution over recognition, or vice versa, does not tell you which of the tools of transitional justice to prefer. Courts can both recognize and redistribute, as can truth and reconciliation commissions that possess the power to order reparations. However, I think it fair to say that while transitional justice mechanisms can undertake either or both justice as redistribution and justice as recognition, at the end of the day most of them end up accomplishing more recognition than redistribution. I will elaborate this conclusion at greater length below, but I offer it up front for consideration in order to ask an allied question: what are the particular benefits of recognition-based justice projects for the advancement of the interests of women and of gendered justice? Given that I do not think existing contexts of transitional justice have delivered much in the way of redistributive justice, I do not regard it a less useful exercise

[3] Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" State*, *in* JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 11-39 (1997). *See also* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE (2003).

to compare and then rank recognition and redistribution. So too, under ideal circumstances, I would expect that we would pursue both of these forms of justice simultaneously.

If the platforms of transitional justice were to be evaluated with respect to their structural capacity to deliver "justice," surely formal, legal prosecutions of those responsible for the injustice of the past rank high in most people's estimation. To be sure, the injustice that is of concern in this transitional project is largely limited to violations of human rights, leaving to other fora the problem of less heinous conduct. Law professor Diane Orentlicher is among a group of scholars who has staked out the most emphatic position with respect to the importance of the use of prosecutions in transitional justice, arguing that international law imposes a duty to prosecute a prior regime's human rights violations,[4] and others have argued that prosecution is the optimal method of addressing past atrocities.[5] These scholars argue that the "ethically defensible treatment of past wrongs requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment,"[6] and that prosecution "makes possible the sort of retribution seen by most societies as an appropriate communal response to criminal conduct."[7]

Others have criticized the exaltation of the normative value of prosecutions in the project of transitional justice. After all, the underlying assumption of these prosecutions is that gross violations of human rights are crimes. Miriam Aukerman has offered a very thoughtful critique of Orentlicher and her colleagues, asking whether ordinary crime is really an

> appropriate analogy for massive human rights atrocities, what Kant called 'radical evil?' . . . Yet are genocide and ethnic cleansing really just more egregious versions of premeditated murder? . . . Or are such atrocities qualitatively different from ordinary crime because of the number of victims involved and

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[4] Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2612-15 (1991).

[5] *See, e.g.*, Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321 (1999).

[6] David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43, 53 (1999).

[7] Stephen Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 50 LAW & CONTEMP. PROBS. 81, 84 (1996).

> because they are typically undertaken or at least countenanced by state or quasi-state actors for political reasons?[8]

Without resolving this debate here, it is worth exploring just what prosecutions can deliver in terms of transitional justice, particularly with respect to gender-based violations. I ask this question here in relation to what *has* happened in the messy world we inhabit, rather than what might occur in an ideal world of unlimited resources and stable legal institutions. Of course, sexual violence against women during times of war and social upheaval is an old story, but until quite recently the masculinity of international humanitarian law was unable to appreciate how atrocities committed against women *because* they are women might amount to a violation of international humanitarian legal norms. Traditionally, rape has not been treated as a grave breach or as the *actus reus* of genocide, but rather as a crime against dignity and honor.[9] Indeed, the masculinity of international law has prompted feminist scholars and activists to ask provocatively whether women were human.[10] Rhonda Copelon, among others, has argued vehemently that rape of women be treated under international humanitarian law not merely as inhumane, but "with the same fervor as are the war crimes which happen routinely to men."[11] The last ten years of transitional justice jurisprudence has radically altered the treatment of gendered violence under international law.[12] The International Criminal

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[8] Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 H. HUM. RTS J. 39, 41-42 (2002).

[9] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (declaring that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault").

[10] Lucinda J. Peach, *Are Women Human? The Promise and Perils of "Women's Rights as Human Rights*," *in* NEGOTIATING CULTURE AND HUMAN RIGHTS 153, 153-96 (Lynda Bell et al. eds., 2001).

[11] Rhonda Copelon, *Women and War Crimes*, 69 ST. JOHN'S L. REV. 61, 65 (1995).

[12] While not passed in connection with transitional justice concerns exclusively, watershed moments were the adoption of the Vienna Declaration of Violence Against Women in 1993, the passage of the General Assembly Declaration on the Elimination of Violence Against Women, also in 1993, the Commission on Human Rights' appointment of a Special Rapporteur on Violence Against Women in 1994, and the passage of Security Council 1325 on Women, Peace and Security in 2000. *See generally* Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, 19 NEW ENG. J. PUB. POL'Y 121 (2003).

Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have both issued paradigm-shifting criminal indictments and convictions of men in Rwanda and the former Yugoslavia on the grounds that rape and other forms of sexual and gender violence be recognized as among the most serious offenses over which these tribunals have jurisdiction. The cases have recognized that rape and other sexual violence can constitute genocide, torture, and other inhumane acts.[13] The ICTY's Prosecutor's office has committed substantial resources to thinking through the meaning and manner of prosecuting sexual violence as a war crime, including the appointment of a legal advisor for gender-related crimes and the development of special procedural protections[14] "both in relation to evidentiary rules for prosecuting gender crimes and affording protective measures to safeguard the physical and mental well-being of victims of and witnesses to those crimes." [15] These tribunals have established compelling precedent that led to the ratification of the Rome Statute establishing the International Criminal Court, which explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, gender-based persecution, sexual enslavement, enforced sterilization, and sexual violence as war crimes and crimes against humanity.[16]

So, in many fundamental respects, international humanitarian law has come a long way in acknowledging the gendered components of violence during war. These advances, however, have been more symbolic than revolutionary in nature. Although the ICTR found that sexual violence

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[13] Press Release, U.N. Trial Chamber, Judgment of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, U.N. Doc. JL/P.I.S./566-e (Feb. 22, 2001), http://www.un.org/icty/pressreal/p566-e.htm (finding for the first time that rape can be prosecuted as a crime against humanity and torture); Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-21/1, Judgment Transcript, 6556, 6559 (Feb. 22, 2001) (recognizing that rape could be used as an "instrument of terror, an instrument they were given free rein to apply whenever and against whomever they wished"); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 172 (Dec. 10, 1998) (finding rape to violate the laws and customs of war); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) (finding, for the first time, rape to be an act of genocide when committed with the intent to destroy a particular group).

[14] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, rule 96, U.N. Doc. IT/32 (1994), *reprinted in* 33 I.L.M. 484 (1994).

[15] Goldstone & Dehon, *supra* note 12, at 123.

[16] Rome Statute of the International Criminal Court, art. 27, July 17, 1998, U.N. Doc. A/ CONF.183/9.

could constitute a form of genocide in the *Akayesu* decision, it has done little to follow it up in terms of prosecuting sexual violence. The ICTR's Prosecutor's office has been widely criticized for failing to investigate sexual violence and rape, and for problems with training investigatory staff, providing witness protection, implementing confidentiality protections, and ensuring security in travel back from Arusha, as well as for inappropriate cross-examination, inadequate counseling for victims, and the lack of sanctions for improper judges.[17]

The ICTY has been subject to similar criticisms. Notwithstanding its efforts to be sensitive to the particular concerns that inhere in the prosecution of sexual violence, victims of rape and other sexual violence who have come before the Tribunal have felt themselves more silenced than heard by the Tribunal's judges. In lodging this critique, scholars and activists have argued that rules of relevance, establishment of culpability, efficiency of judicial resources, and protection of the due process rights of defendants all cut against victim-witnesses telling their stories. Forced to testify to their experiences by answering prosecutors' questions in a "yes" or "no" manner, and interrupted by judges when their testimony veered beyond the immediate question of the culpability of the individual defendant, many victims of sexual violence who have testified before the ICTY have found their experiences as witnesses humiliating and disrespectful.[18] Justice for these witnesses entails the public telling of their stories and a sense that they are being heard. But this kind of truth-telling is not within the jurisdiction of formal legal fora. The translation of human suffering into a vocabulary and a form that is acceptable and appropriate to a judicial proceeding can be a dehumanizing experience, not only for victims of sexual violence, but particularly for them. In this regard, Fiona Ross's observations about the dilemmas of testifying before a Truth and Reconciliation Commission apply with equal force to testimony in a judicial proceeding: testifying can be alienating—it demands that you "pose" your story for an outside listener. It appropriates the story from the domain of the intimate interior and externalizes it.[19] In this sense, judicial proceedings,

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[17] *See*, *e.g.*, HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE: BARRIER TO JUSTICE FOR RAPE VICTIMS IN RWANDA § 4 (2004), *available at* http://www.hrw.org/reports/2004/rwanda0904 [hereinafter HUMAN RIGHTS WATCH].

[18] *See, e.g.*, Marie-Benedicte Dembour & Emily Haslam, *Silencing Hearings: Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151, 158-60 (2004); ELIZABETH NEUFFER, THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA (2002).

[19] FIONA C. ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA 162-65 (2003).

like other platforms of transitional justice, "instrumentalize[] memories in its own way, and for its own ends."[20]

I offer this very brief summary of both the accomplishments and the limitations of criminal prosecutions of sexual violence as a form of transitional justice in order to better appreciate the potential for justice as redistribution and recognition in these fora. With respect to redistribution, successful prosecutions are not likely to result in a range of remedies that order the transfer of money, power, or other resources from perpetrators to victims. Even if all of the wealth of the defendants could be made available as restitution to their victims, it would be an offensively inadequate reparation for the harm they have caused to their victims. Whether these prosecutions are successful in redistributing shame from victim to perpetrator is a separate, and quite complex, question. This redistribution project is in many contexts undermined by the stickiness of the shame suffered by female rape victims whose sexual assault during wartime remains permanently materialized in and through pregnancy and the birth of a child. As Naomi Cahn notes, "they are often scorned and treated by their communities as outcasts, while the soldiers who committed the crimes are welcomed home."[21] Surely there should be shame in being found to have committed radical evil, but whether the actual defendants and the larger communities in which they live experience these convictions as shameful is an open empirical question. Of related concern is whether the act of testifying in court and then witnessing the conviction of those who have inflicted gross human suffering can alleviate or diminish the shame felt by the victims of sexual violence, or indeed can shift it from them to their persecutors. While this too is an open empirical question, the form of the criminal trial seems an unlikely vehicle for the redistribution of this species of shame. If, as Giorgio Agamben has argued, the subject "becomes witness to its own disorder, its own oblivion as a subject,"[22] can trials offer the reconstitution of subjective order and escape from oblivion that the redistribution of shame requires? As noted above, some of the women who have testified before ad hoc war crimes tribunals have felt dominated by the Tribunal's efforts to render their testimony relevant and concise when they sought to narrate their pain and their suffering. We must consider whether

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[20] Dembour & Haslam, *supra* note 18, at 170.

[21] Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 STAN. J. C.R.-C.L. 217, 220 (2005).

[22] GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE 106 (1999).

the act of testifying in court shares a dynamic with the underlying acts being testified to, such that in both contexts "women's bodies become sites of the visible enactment of power, [and] shame is produced as the residue."[23] It is no new story that testifying in court can create a second or compound form of victimization for people who have suffered sexual violence.

If the possibility for redistributive justice is limited in the criminal prosecutorial context, what about the values of justice as recognition? The ICTY and ICTR have broken new and important ground in the recognition of rape, sexual slavery, enforced prostitution, forced pregnancy, gender-based persecution, sexual enslavement, enforced sterilization, and sexual violence as among the most serious forms of war crimes. This is no small achievement, and cannot be minimized. It now goes without saying—largely because important legal authorities have said it—that the kind of harm caused by this sort of sexual violence is normatively and legally on a par with the kinds of harm that men have traditionally suffered in war and in grossly unjust societies.

In a sense, however, the recognition of this kind of gender-based harm has come at a cost to the individual women who, as witnesses in *Akayesu*, *Kunarac*, *Furundzija*, and similar cases, provided the judges with the scripts they needed to bridge the old and new understanding of gender and transitional justice. Any women could have done it, and in that sense the witnesses were fungible to a larger project of establishing a gendered dimension to international humanitarian law. In this sense, war crime tribunals as instruments of transitional justice operate best on the wholesale, not retail level. In the context of mass atrocities, the tribunals cannot come close to delivering "perfect justice" by establishing culpability and accountability for all of the actors who caused egregious harm in the past. Instead, the tribunals have to settle for a minority of cases that can be used to establish important precedent, identify important kingpins or masterminds of the violence, or, in many cases, whomever they can get their hands on.[24] Witnesses in these cases are invaluable resources in the

[23] ROSS, *supra* note 19, at 63.

[24] In the ICTY, for instance, the Prosecutor's office has indicted a combination of "Masterminds" and middle level actors, yet two important leaders—Radovan Karadzic, former President of the Bosnian Serb administration, and Ratko Mladic, former Commander of the Bosnian Serb army—have been indicted but not taken into custody by the ICTY. Prosecutor v. Karadzic & Mladic, Case No. IT-95-5-I, Indictment (July 1995). By contrast, the Special Court for Sierra Leone has a mandate to prosecute only those who "bear the greatest responsibility," as opposed to those "who bear responsibility." Statute of the Special Court for Sierra Leone art. 1, Jan. 16, 2002, U.N. Doc. S/2000/915/Annex; Statute of the

production of wholesale justice, but the individuals become less important than the larger principles which their testimony helps establish. The ICTR provides ample evidence of this perverse fact of transitional justice through prosecution. Having established a novel and expansive rule of gendered justice in *Akayesu*, it is an open question what effect the doings in Arusha have had for the retail justice that is struggling to take place in the Gacaca system almost a thousand kilometers away in Rwanda. Some have argued that it has had almost no effect at all, beyond the symbolic level.[25]

Criminal prosecutions, whether in the ad hoc tribunals or by the ICC, must surely be one component of a comprehensive program of transitional justice, yet standing alone they necessarily fall short in delivering full justice for gender-related atrocities of the recent past. The translation of human suffering into the language of law and rights will always satisfy the interests of legal authorities more than those who are called to narrate their pain. The presentation of the injured self in legal fora does not necessarily produce a healed self, for the treatment of witnesses is by its very nature appropriative. In important respects, courts are consumers of the memories of others. Courts "gather" and "collect" evidence, prosecutors "present" witnesses, witnesses "deliver" testimony and "give" proof. To bear witness requires that victims pose themselves and their memories in a way that allows them to be harvested by judicial actors in the service of larger goals of justice. Healing the witness is not and cannot be the court's concern.[26] What is more, bearing witness in the service of healing requires an empathic listener, someone to hear and affirm suffering. Yet, this kind of empathic listening is not the listening of a judge—an

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International Criminal Tribunal for Rwanda art. 1, Nov. 8, 1994, U.N. Doc. S/RES/955/Annex.

[25] *See* Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Genocide Rwanda*, 8 AFR. STUD. Q. 57 (2004); HUMAN RIGHTS WATCH, *supra* note 17, § 4; INT'L CENTER FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE: THE FIRST EIGHTEEN MONTHS (2004).

[26] Some scholars have expressed great doubt about the possibility for forgiveness and healing of domestic violence and sexual assault through mediation and other means through which the victim can confront her abuser in formal settings. *See, e.g.*, Brenda V. Smith, *Battering, Forgiveness and Redemption*, 11 AM. U. J. OF GENDER SOC. POL'Y & L. 921 (2003). This is despite a rich literature that has grown out of the therapeutic jurisprudence movement. *See, e.g.*, Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 351 (2004); Astrid Birgden, *Therapeutic Jurisprudence: The Role of Forensic Psychology*, *in* CONSIDERING CRIME AND JUSTICE: REALITIES AND RESPONSES 166 (Rick Sarre & John Tomaino eds., 2004).

objective arbiter tasked with deciding what happened.[27] Thus, from the victim's perspective, the recognition-based justice that is possible in criminal prosecutions may bear, at best, an orthogonal relationship to the injured person's need to remake the world so as to be "able to recontextualize the narratives of devastation and generate new contexts through which everyday life may become possible."[28] Some scholars have launched an allied criticism of truth and reconciliation commissions to the extent that they privilege certain kinds of memory practices that find their roots in the United States and Europe and do not have cultural resonance in communities that value "forgive and forget" methods of collective healing.[29]

Instead, criminal prosecutions—at their most sensitive to gender issues—recognize women as victims of sexual violence, and the women who come before the court must perform a kind of sexual vulnerability in order to be so seen as victims by the court. Fiona Ross has noted that women's testimony has taken one of two forms. On the one hand, they operate as expert witnesses regarding the treatment of the men in their lives—husbands, sons, etc. They are the repositories of memory, not victims in and of themselves. On the other hand, where women have personally suffered a number of violations, legal authorities tend to focus only on, or principally on, the sexual molestation.[30] It is worth noting that it is rare for criminal tribunals to treat gender-based atrocities as anything other than sexual violence against women. Of course, men too are victims of sexual violence, and women are victims of gendered violence that is not sexual. However, the treatment of gender-based violence has been reduced in many contexts to the incidence of sexual violation of women. The reduction of gender to the sexual and the ignorance of how men can suffer gendered violence is, to be most generous, a form of overcompensation for the years of ignoring women's place in humanitarian law. Yet this

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[27] *See, e.g.*, SHOSHANA FELMAN & DORI LAUB, TESTIMONY: CRISES OF WITNESSING IN LITERATURE, PSYCHOANALYSIS, AND HISTORY (1992).

[28] Veena Das & Arthur Kleinman, *Introduction* to VIOLENCE AND SUBJECTIVITY 6 (Veena Das et al. eds., 2000)

[29] *See, e.g.*, ROSALIND SHAW, UNITED STATES INSTITUTE OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE 1 (2005), *available at* http://www.usip.org/pubs/specialreports/sr130.pdf.

[30] ROSS, *supra* note 19, at 86-88. These observations were made with respect to the South African Truth and Reconciliation Commission, but they apply with equal force to criminal tribunals.

overcompensation has had the effect of sexualizing women in ways that fail to capture both the array of manners in which women suffer gross injustice, as well as the ways in which men suffer gendered violence as well. What is more, to see the "gender issue" surface only in the case of sexual violence is to elide the gendered dimensions of war, violence, and the investment in killing over caring.

Further, this problem of mis-recognition or over-recognition creates a structural tension related to healing and justice: narrating sexual violation according to the strict rituals of legal testimony renders it all the more difficult for these victims to script new social possibilities and to claim a self who has a future, and is not tethered to a painful past. This, in the end, is among the central goals of transitional justice—coming to terms with the past in a way that helps chart a future that moves beyond that past. This is among the greatest challenges to transitional justice mechanisms: how to honor the injuries and crimes of the past while creating the possibilities for new ways of being in the future.

The scripted performance that many women are expected to perform as witnesses in criminal trials implicates another dilemma that inheres in the project of gendered justice during periods of social and political transition. War crimes tribunals, truth and reconciliation commissions, and other public mechanisms of transitional justice have complex objectives, but one of them is surely the project of reshaping a post-conflict national identity. These institutions serve to lay down a baseline; they mark out a past the society hopes neither to forget nor to return to. The first stages of transition are typically highly dynamic, characterized by a "representational gap" where different narratives of the recent past battle to be dominant. Often women's stories, women's memories, and women's experiences are appropriated in the service of this rebuilding project. A popular identification with selected aspects of women's suffering can be quite powerful. For instance, their sexual violation can come to stand for the violation of the nation as a whole. So too, the fact that the nation's men were unable to protect "their" women from the violence of the recent past can be rendered as a metaphor for the emasculinization of the culture more broadly. Writing about the immediate post-World War II period in Germany, Heide Fehrenbach observed that "[i]n the wake of defeat and occupation, German men lost their status as protectors, providers, and even (or so it seemed for a short time) as procreators: the three Ps that had traditionally defined and justified their masculinity."[31] In this period in German history, Fehrenbach is concerned

[31] Heide Fehrenbach, *Rehabilitating Fatherland: Race and German Remasculinization*, 24 SIGNS 107, 109 (1998).

with excavating how masculinity, fatherhood, and nation were explicitly linked to one another, and how the manipulation and appropriation of narratives of women's suffering provided a narrative anchor for the remythologization of a national masculinity.

Different versions of this kind of problem can be found in many post-conflict societies. At the end of the genocide in Rwanda, for example, the society had become radically feminized—that is, women outnumbered men by overwhelming ratios.[32] This imbalance has been rectified in part through the return of Hutu refugees who had fled Rwanda over a period of years.[33] However, ongoing imbalances, coupled with explicit requirements for women's representation in the national parliament, risk "feminizing" the society in ways that are likely to be met with strong efforts to remasculinize Rwandan culture. In this regard, the motifs and rituals of cleansing after war need to bear close attention to their gendered and counter-gendered implications. There is a rich literature analyzing this dynamic in post-war Germany that urges due care and attention to the ways in which masculinity and femininity get articulated in the process of restoring post-conflict national identity.[34]

In different ways, and by different means, rebuilding post conflict societies is almost inevitably a process of re-masculinization. Left untended, this process can take the form, for instance, of reinstalling men as good citizens by and through the ideological redefinition of "women's place," or of formulating new political leadership in the form of a "national father." Those who have studied post-war Germany have observed how rebuilding the *vaderland* was converted into a project of establishing a *land of fathers*.[35]

While these concerns should be attended to with respect to all of the mechanisms of transitional justice, they have particular purchase in the

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[32] *See* REPUBLIC OF RWANDA NATIONAL CENSUS SERVICE, THE GENERAL CENSUS OF POPULATION AND HOUSING: RWANDA: 16-30 AUGUST 2002: REPORT ON PRELIMINARY RESULTS (2003), *available at* www.grandslacs.net/doc/2816.pdf.

[33] *See* ANNA OBURA, NEVER AGAIN: EDUCATIONAL RECONSTRUCTION IN RWANDA 35 (2003), *available at* http://unesdoc.unesco.org/images/0013/001330/133051e.pdf.

[34] *See, e.g.*, Fehrenbach, *supra* note 31, at 29; ROBERT G. MOELLER, PROTECTING FAMILY: WOMEN AND MOTHERHOOD IN THE POLITICS OF POST WAR GERMANY (1993); Elizabeth Heineman, *The Hour of the Woman: Memories of Germany's 'Crisis Years' and West German National Identity*, 101 AM. HISTORICAL REV. 354 (1996); Susan Jeffords, *The Remasculinization of Germany in the 1950s: Discussion*, 24 SIGNS 163 (1998).

[35] Fehrenbach, *supra* note 31, at 117.

context of criminal prosecutions for gross injustice from the immediate past. To the extent that criminal tribunals tend to expect and solicit testimony of sexual violation from female witnesses, women become figured in collective memory as particular sorts of victims that encourage popular identification with selected aspects of women's experience. This is not to say that the culture should ignore the reality of sexual violation of women. Rather, we should appreciate how the testimony provided to criminal tribunals amounts to an appropriation of the meaning of women's suffering—they lose control of giving meaning to that suffering both for themselves and for the role it may play in the shaping of collective memory. Law itself tends to be a particularly masculinist practice, elevating rationality and objectivity over context and nuance, preferring process to substance, master-narrative to nuance, and being generally ill suited to the kind of empathic listening that would transform the speaking self into a healing self.[36] Even where law's masculinity has been constrained, as in for instance the adoption of special procedural and evidentiary protections related to the prosecution of sexual violence, we must be realistic in our expectations of the kind of gendered justice that it can deliver.

None of this is to say that we should abandon criminal prosecutions as a key instrument in the transitional justice toolbox. Rather, transitional justice should be viewed as a critical practice and an ongoing experiment in which future applications of its methodologies should benefit from the lessons learned from our previous efforts.

The Special Court for Sierra Leone has sought to apply lessons learned from the ICTY and ICTR ad hoc tribunals. A hybrid court, located in Sierra Leone rather than extraterritorially (as were the two ad hoc tribunals), it will try cases against those who "bear the greatest responsibility" for violations of international humanitarian law since November 30, 1996, and is expected to complete its business within three years of its establishment in 2002.[37] Perhaps most importantly, what distinguishes the Sierra Leone Special Court from the ad hoc tribunals is the fact that a Truth and Reconciliation Commission was set up to operate

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[36] *See*, *e.g.*, CAROL SMART, FEMINISM AND THE POWER OF LAW (1989); Richard Collier, *Masculinism, Law and Law Teaching*, 19 INT'L J. SOC. LAW 427 (1991).

[37] The Secretary General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, *Annex: Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, ¶ 2, U.N. Doc. S/2000/915 (Oct. 4, 2000).

parallel to the legal prosecutions.[38] The Commission began its public hearings in April 2003 and issued a final report to President Ahmad Tejan Kabbah in October 2004. Not unlike the South African TRC, the TRC in Sierra Leone has promoted the healing and reconciliatory powers of verbal remembering that can complement the adversarial methodologies and culpability aims of the Special Court. Some have been skeptical, if not critical, of public verbal memory practices as a tool of transitional justice in cultures, such as that of Sierra Leone, that place greater cultural value on "forgiving and forgetting" than on public truth telling.[39] At the same time, the TRC's proceedings highlighted structural injustices that local activists had sought to reform for some time—particularly those relating to gender inequalities in Sierra Leone's family and property laws.[40] The TRC's final report included in its explicit mandate:

> The Commission, primarily through the testimonies it received from women and girls, seeks to find answers as to why such extraordinary violence was perpetrated against women. Did the origins lie in the cultural and traditional history of Sierra Leone, where women were afforded a subservient status to men? Did the low status of women in socio-political life make them easy targets? Or is it because men still perceive women to be chattels, possessions belonging to them, symbols of their honour, making them the deliberate targets of an enemy determined to destroy the honour of the other? The answers probably lie somewhere in a combination between all of these factors.[41]

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[38] This is not the first time that these two platforms of transitional justice have been set up simultaneously, but it holds out the hope of greater success than the dual track process put in place in Timor-Leste. *See, e.g.*, PIERS PIGOU, INT'L CENTER FOR TRANSITIONAL JUSTICE, CRYING WITHOUT TEARS: IN PURSUIT OF JUSTICE AND RECONCILIATION IN TIMOR-LESTE: COMMUNITY PERSPECTIVES AND EXPECTATIONS (2003), *available at* http://pbpu.unlb.org/pbpu/library/Timor-Leste.pdf.

[39] SHAW, *supra* note 29, at 1.

[40] *See* Amnesty Int'l, Briefing Paper: Sierra Leone, No One to Turn to: Women's Lack of Access to Justice in Sierra Leone (2005), http://www.amnestyusa.org/stopviolence/document.do?id=ENGAFR510112005; Amnesty Int'l et al., Sierra Leone Government Urged to Implement the Recommendations of the Truth and Reconciliation Commission (TRC) (2005), http://www.amnestyusa.org/countries/sierra_leone/document.do?id=ENGAFR510122005 [hereinafter Amnesty Int'l, TRC].

[41] SIERRA LEONE'S TRUTH & RECONCILIATION COMM'N, 3B WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION 87 (2004), *available at* http://www.trcsierraleone.org/pdf/start.html.

The extensive findings promulgated by the TRC offered complex accounts of how social, legal, political, and cultural forces conspired to render women more vulnerable to a range of outrages and degradations in the war in Sierra Leone. In contrast to the lack of sensitivity to the issues of women and girls displayed by the South African TRC,[42] the Sierra Leone TRC consulted local and international women's advocates early and often, and formulated special rules of procedure that were designed to address the particular needs of female witnesses.[43] The TRC made strong recommendations with respect to legal, political, educational, and economic reforms that would strengthen the position of women in Sierra Leonean society and would render them less vulnerable to future victimization.[44] It urged the repeal or reform of all statutory and customary laws that discriminated against women, the passage of new laws requiring all political parties to ensure that at least thirty percent of their candidates for all national and local elections be women, and recommended that Sierra Leone ratify the Protocol to the African Charter on the Rights of Women.

Unfortunately, President Kabbah has moved slowly to implement the reforms contained in the TRC's final report.[45] Yet, the TRC findings complement the prosecutions undertaken by the Special Court. The Court's prosecutor has made a deliberate effort to charge forced marriage as an inhuman act and crime against humanity under the Court's statute, and has identified sexual violence as one of the Court's priorities.[46]

It is too early to draw conclusions about the degree to which Sierra Leone's two-track process is better able to address the under- and mis-recognition problems of the past as these two fora, undertaken as compliments to one another, aim to minimize the limitations to community and group healing and justice that they each must bear. Yet, the Sierra Leone TRC and Special Court have absorbed lessons learned from the gender-based mistakes of prior attempts to accomplish post-conflict

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[42] *See, e.g.*, ROSS, *supra* note 19, at 20-26.

[43] 3B WITNESS TO TRUTH, *supra* note 42, at 88-92.

[44] 2 *Id*. at 168-76.

[45] Amnesty Int'l, TRC, *supra* note 39.

[46] Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Prosecutor Welcomes Arraignment of RUF and AFRC Indictees on Charges Related to Forced Marriage (May 17, 2004), http://www.sc-sl.org/prosecutor-051704.html; Press Release, Special Court for Sierra Leone, Office of the Prosecutor, Statement of the Prosecutor on International Women's Day (Mar. 8, 2005), http://www.sc-sl.org/Press/prosecutor-030805.pdf.

reconciliation through hearings and prosecutions, and have sought to strike a new balance between the aims of recognition and redistribution that each platform can reasonably offer.