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# African Journal on Conflict Resolution

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# Gender and transitional justice in Africa: Progress and prospects\*

*Helen Scanlon and Kelli Muddell\*\**

## **Abstract**

During the past few decades, different models of transitional justice (TJ) have developed throughout Africa to try to address the mass human rights abuses that have occurred during conflicts. These mechanisms, both judicial and non-judicial, have often failed to adequately tackle the extensive gender-based violence that has been prevalent on the continent. This article examines the ways truth commissions, legal mechanisms, reparations, security sector reform efforts, and traditional mechanisms in Africa have dealt with gender-based human rights violations. While recent African TJ mechanisms have been innovative in developing means to address crimes against women, these mechanisms continue to fail victims. This is in large part because the current discourse on gender and transitional justice needs to be broadened to better address women's experiences of conflict. Future TJ initiatives need to re-examine the types of violations prioritised, and recognise the continuum of violence that exists in pre-conflict and post-conflict societies. It is also important to challenge the transitional justice field to stop reducing sexual-based violence to 'women's problems', and explore how men are affected by the gendered dynamics of conflict.

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The need to address gender-based violations as a critical facet of women's struggles for human rights, especially in those societies emerging from civil war and militarised environments, remains a slowly developing field. While the emergence of peace-building initiatives in Africa in the last three decades has been mirrored by the development of numerous models of transitional justice, the inclusion of gender issues has been weak. Transitional justice models range from a number of judicial and non-judicial approaches that have been adopted by post-conflict societies to address human rights abuses of the past. War crime tribunals and truth and reconciliation commissions (TRCs) have been set up throughout Africa since 1974 with varying degrees of success.<sup>1</sup> Recent experiments on the continent have ranged from United Nations (UN) tribunals and 'hybrid' criminal courts, to domestic trials and truth-seeking initiatives. Within these, numerous gender concerns have been revealed, from addressing the high levels of gender-based violence that occur during conflicts, to recognising the wide variety of roles women play beyond that of victim.

Neglecting gendered patterns of abuse entrenches impunity, distorts the historical record, and undermines the legitimacy of transitional justice initiatives, and thus ultimately affects both women's and men's access to justice. The high rate of gender-based human rights violations during recent conflicts in Africa attests to the need to challenge a culture of impunity. However to date the achievements of transitional justice initiatives in addressing these violations have been inconsistent and uneven. Gender-related concerns are frequently overlooked during the devising and implementation of transitional justice mechanisms, leading to a lack of justice for gender-based violence and a failure to examine how gender inequalities underpin much of the violence taking place.

Nevertheless, current and future transitional justice initiatives in Africa offer an opportunity to consider and implement the lessons learned from other countries' experiences. Despite the many challenges facing women during conflicts,

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1 TRCs include Uganda (1974), Zimbabwe (1985), Uganda (1986), Chad (1991), Rwanda (1992), Burundi (1995), South Africa (1995), Nigeria (1999), Sierra Leone (2002), Ghana (2002) and Liberia (2007). War Crime tribunals were established for Rwanda (1994) and Sierra Leone (2002).

post-conflict settings have at times revealed that there is an opportunity to promote women's leadership, enhance access to justice, and build momentum for fundamental women's rights reform. While women's organisations are generally not present and women are severely underrepresented at the tables where peace agreements are negotiated, transitional justice mechanisms offer women other opportunities to participate in and influence the peace-building process.

The interrogation of various initiatives on the continent allows the opportunity to analyse some of the progress made in getting gender onto the agenda of transitional justice processes. It also provides the chance to interrogate from a gender perspective the prospects of enhancing women's rights through these processes as a number of countries embark on transitional justice initiatives.

### **Truth seeking**

Truth Commissions and Commissions of Inquiries have been the most visible transitional justice mechanism on the continent in recent years. Since 1995, commissions have been created in Burundi (1995), South Africa (1995), Nigeria (1999), Sierra Leone (2002), Ghana (2002) and Liberia (2007) and recent peace agreements have included commitment to commissions in Burundi, Togo and Kenya among others.

Historically, truth commission mandates have most often been written, interpreted, and implemented with little regard for the distinct and complex gender-based violations of human rights suffered; but gender-sensitive mandates are vitally important in the creation of future truth commissions (Nesiah et al. 2006). Truth commissions present a medium to document patterns of gender-based violence, to suggest gender-sensitive reparations, to create a more accurate historical record of the conflict and to enable the creation of more effective gender-sensitive programmes for post-conflict reconstruction. For example, in Sierra Leone, the TRC used findings from the hearings to recommend changes in discriminatory laws that made women vulnerable to the violence.

In South Africa, after the TRC opened its doors in 1995, a number of feminist activists engaged the TRC in discussions on the gendered nature of truth, arguing

that the systemic impact of apartheid needed to be addressed by the Commission. In some regards, the South African TRC was seen to have successfully included women. Women were well represented in its staff, constituted more than half of those who testified, and three separate hearings that focused exclusively on women were held. However, many gender activists criticised the TRC both for the fact that women tended to speak of others' experiences rather than their own (only 158 women gave evidence regarding sexual abuse) and more specifically for overlooking the structural impact of apartheid on women's lives. The TRC was also critiqued for categorising rape as 'severe ill-treatment' instead of recognising it as a form of torture and persecution as it is currently recognised in international law. Thus, despite one chapter being dedicated to women in the final TRC report, the gendered nature of the country's past was only superficially recorded.

TRCs that have emerged in Africa subsequent to the South African TRC have achieved varying degrees of success in pursuing gender justice. Ghana's National Reconciliation Commission, established in 2002, elected to 'mainstream' gender throughout its operations, and did not hold separate public hearings for women. As a result, gender-based abuses were subsumed among the broader violations of human rights, and there was no separate focus on gender-based violations in its final report. The lack of focused attention on women – who submitted less than 20 percent of all testimonies – rendered gender-based violence largely invisible within the process.

Drawing lessons from the South African experience, the Sierra Leonean Truth and Reconciliation Commission, with the assistance of the United Nations Development Fund for Women (UNIFEM), set out to pay special attention to the experiences of women and children during the conflict. Integral to the development of the TRC was the role played by civil society during the public hearings. Binaifer Nowrojee has noted that women's groups were primary actors in the gender hearings, organising marches through Freetown, which ultimately resulted in the women's hearings being the best attended. The public hearings brought national attention to the plight of women during the war as well as to the marginalisation of and discrimination against women prior to the conflict. The Commissioners' interpretation of the mandate, which in effect allowed investigation of the experience of Sierra Leonean women both pre- and

post-conflict, added a new dimension to the ability of TRCs to address the past. Consequently, the final report was able to highlight cases of gender violence as well as the multiple roles women played. The Commission's recommendations have been used by civil society groups such as the Mano River Women's Network to advocate for legal reforms to advance gender justice.

Despite these important achievements that indicate the real impact of TRCs in the advancement of gender justice, truth commissions have been criticised for advancing a narrow and partial truth. Gender-sensitivity is of vital importance during the 'truth-seeking' process. For example, cultural norms and stigma may prevent women from testifying publicly, and this needs to be addressed in creative ways to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Further sensitivity is needed regarding language. During initial interviews by the Sierra Leone truth commission, for example, the nature of questions was widely criticised. Women were being asked questions such as: 'What were you wearing when it happened?' and 'Who was there when it happened?'. However, gender training was subsequently provided for all Commission staff regarding interview techniques and how to support and protect female witnesses. Further, victims may use language that does not immediately indicate sexual violence due to the stigma attached. For example, in Sierra Leone, women would sometimes say 'I lay with him' when they had been victims of sexual abuse. It was also noted that greater efforts are needed to document women's experiences throughout the conflict, rather than simply when transitional justice processes commence.

The crimes that truth commissions are mandated to investigate will also impact on the version of 'truth' that commissions are able to record. For example, in the South African case, perpetrators could apply for amnesty 'in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past' (Promotion of National Unity and Reconciliation Act 1995: Preamble). In one case an application for amnesty for rape was rejected as one Commissioner argued rape could not be considered a political crime (Hayner 2001). Ultimately the South African TRC report conceded that the manner in which human rights violations had been defined in the Commission's mandate

‘resulted in blindness to the types of abuse predominantly experienced by women’ (Truth and Reconciliation Commission of South Africa Report 1998:4.10.316).

Also, varying interpretations of what constitutes sexual violence may exclude some victims from truth-seeking processes. For example, in many contexts women may have agreed to sexual acts because they have been told their lives would be spared, or for survival issues such as the offer of food or shelter. In the Democratic Republic of the Congo (DRC) and other contexts numerous cases have been exposed of exploitation by military and civilian peacekeepers who have exchanged food or small sums of money for sex. In such circumstances women often do not recognise the coercive nature of these relationships as being a form of sexual abuse.

It is important that those developing transitional justice mechanisms tailor these initiatives to the local context, rather than simply trying to ‘cut and paste’ models from other countries. For example, when looking at the South African TRC which has often been exported as a model, the unique circumstances of the country must be considered. Despite the mass atrocities that were committed in the name of apartheid there was very little large-scale conflict that took place on South African soil. Thus, South Africa’s infrastructure was still largely intact at the start of their transitional phase, and this created enabling circumstances for transitional justice processes such as the TRC. In many other African countries, internal conflict has devastated infrastructure meaning that the first step in any transitional justice phase will need to focus on re-building the foundations necessary for implementation. Therefore, attempting to recreate South Africa’s ‘model’ in a country whose infrastructure has largely been destroyed is unlikely to succeed.

## **Legal mechanisms**

Since the end of the Second World War, there have been numerous developments in international law which provide for the prosecution of sexual crimes or gender-based violence during conflicts. However, such violations remained removed from widespread prosecution until the 1994 Rwandan genocide – during which as many as 500 000 women were raped. This led to a more radical recognition of the need

for a gender-based prosecution strategy to address sexual violence in conflicts as a war crime. The Arusha-based International Criminal Tribunal for Rwanda (ICTR), an ad hoc court established in 1994 to prosecute those 'responsible for serious violations of international criminal law' during the country's genocide, was a turning point in how international courts addressed sexual violence.

Under the 1998 Rome Statute creating the International Criminal Court (ICC), rape has been defined as a crime against humanity, a form of genocide, a form of torture or enslavement, and a crime of war. As such, rape is now included under *jus cogens* – 'higher law' that may not be violated by any country – and can therefore be tried in the courts of any country, even those not party to the conflict. Further, the need to ensure the protection of women during conflicts has been included under a number of international legal bodies, such as through UN Resolutions 1325<sup>2</sup> and 1820 on sexual violence as a tactic of war, as well as the African Union Protocol on Women.

In Sierra Leone, the nature and extent of atrocities committed during the civil war prompted the creation in 2000 of the Special Court which was mandated to prosecute those who 'bear the greatest responsibility' (*Agreement on the Special Court for Sierra Leone* 2002) for war crimes, crimes against humanity and other serious violations of international humanitarian law. The Sierra Leone Special Court, a hybrid transitional justice experiment, led to a number of landmark legal developments which had significant implications for international gender justice. These included recognising gender crimes in its definition of crimes against humanity and widening their interpretation to include sexual slavery and forced marriages. The Court was also groundbreaking in its paying and arranging for access to health facilities to perform procedures such as fistula repair in order to help those women who were to testify.

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2 This resolution emphasises 'the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard, *stresses* the need to exclude these crimes, where feasible from amnesty provisions'. Gender activists have stressed that the wording regarding amnesty be amended to exclude 'where feasible' to ensure that the international community make a stance that sexual violence can never be awarded amnesty.

Increasing women's visibility in the judicial and legal systems is also critical in the quest to realise prosecutions for gender-based violence. Sierra Leone's Special Court ensured that 20 percent of its investigative team was focused on sexual offences, a marked improvement on the Rwandan International Tribunal which never worked with more than one to two percent of investigators for the area (Nowrojee 2005). However, currently the extent to which the Special Court has pursued sexual violence convictions is increasingly coming under scrutiny. A recent study of the Special Court argued that its judgments have shown that gender-based crimes have been 'misunderstood, misinterpreted, mischaracterized or excluded during trials and in judgments' (Oosterveld 2009).

On an international level, the Hague-based ICC, which came into existence in 2002 as the first permanent international criminal tribunal, was set up as a court of last resort to prosecute offences where national courts failed or were unable to respond. As previously mentioned, the 1998 Rome Statute establishing the ICC expanded the definition of crimes against humanity and war crimes to recognise rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, trafficking or any other form of sexual violence after the intense lobbying by women's groups globally. As such the ICC can both prosecute these crimes and create an obligation that all investigations include gender-based crimes. To date, the Central African Republic, the DRC, Uganda and Sudan have all come under the scrutiny of the Court and in a number of the arrest warrants issued, including that of Sudanese president al-Bashir, gender-based violence has been cited. However, various criticisms have been levelled regarding the ICC's stated aims and its ability and willingness to pursue gender-based crimes.

The ICC's decision to charge Congolese Thomas Lubanga with the recruitment and use of child soldiers in the DRC occurred amidst outcries by gender activists that charges against Lubanga had failed to include sexual violence, despite evidence of his links to the widespread sexual enslavement of girls. A request to include sexual slavery and cruel and inhumane treatment to Lubanga's indictment came from victims' lawyers in June 2009 and relates to the numerous witnesses who have testified about the rape and severe abuse of children in the Union of Congolese Patriots (UPC). The victims' lawyers contended that sexual slavery

was part of being a female child soldier and this needed to be recognised in the prosecution.

ICC prosecutors had also charged two further DRC militia leaders, Germain Katanga and Matthew Ngudjolo. But in a controversial decision in May 2008, the prosecutors removed counts of sexual slavery from the indictments on the grounds of their inability to ensure witness protection. New charges of rape and sexual slavery were subsequently filed in June 2008 after the witnesses were admitted to the court's witness protection programme, but the case highlights the challenges faced by the court. Hence, despite the fact that the ICC is believed to have the opportunity to establish precedents in addressing gender-based violations, in reality this is simply not happening. It is not surprising that women's organisations in post-conflict contexts are becoming increasingly frustrated because in spite of clear evidence of extraordinary rates of sexual violence, and the heightened media attention around this, the ICC is failing to prosecute these crimes.

Further, the reality is that while the successful prosecutions of those leading actors involved in orchestrating gender-based violence during the conflict may provide some deterrent, the majority who have perpetrated serious human rights violations against women have enjoyed almost complete impunity and have never been prosecuted. Furthermore, while recent developments in jurisprudence in Africa have brought greater attention to the impact of conflicts on women, they have not stemmed the widespread occurrences of violence against women, as this remains shockingly high in post-conflict settings.

In addition to a legal framework, other criteria need to be considered in the pursuit of gender-sensitive prosecutions – such as victim support (psychological and physical), witness protection, and the need to address certain realities such as transport and childcare which may affect women's access to the court. In short, the record of the international mechanisms suggests incapacity to prosecute sex crimes, and as many as 90 percent of the ICTR judgments have so far not included rape convictions.

A further challenge is the creation of a sustainable domestic judicial system to challenge impunity for gender-based crimes in the post-conflict era.

On the domestic level, despite often depleted and fragile legislative and judicial infrastructure after a conflict, a number of countries – Liberia, Burundi and the DRC among them – have undertaken commitments to protect and enshrine gender concerns through both international and domestic instruments. Recent examples have shown, however, that enacting gender laws is only the beginning. A study from Liberia, which passed a sophisticated rape law in 2006, has revealed that challenges with prosecuting sexual-based crimes are due both to the inadequate judicial system and the lack of knowledge among victims of the stages and procedures for prosecuting offenders.

Increasing the visibility of women and, more particularly, gender-sensitive personnel in judicial and legal systems is also critical in the quest to realise prosecutions for gender-based violence. This was revealed starkly during the 1998 trial of former mayor, Jean-Paul Akayesu, by the ICTR. When the initial charges against him did not include rape, the presiding judge, Navanethem Pillay, insisted this be probed due to its frequent mention in witness testimonies. As a result of her intervention, as well as mounting pressure from women's groups, charges for rape were investigated. This was particularly significant as it was the first time an international court had ever punished sexual violence in a civil war; and it was the first time that rape was found to be an act of genocide, aimed at the destruction of a group. It was also indicative of the need to have adequate gender-responsive representation in the judiciary, as well as open interaction with women's groups.

## **Reparations**

Increasingly transitional justice initiatives have sought to provide redress for victims, both monetary and symbolic, instead of focusing solely on the punishment of perpetrators. Through restitution, compensation and memorialisation reparations fulfil a number of practical and symbolic purposes of acknowledging the harm inflicted upon victims. According to gender activists reparations have the potential to facilitate the rebuilding of women's lives: 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the

origins of violations of women's and girls' human rights predate the conflict situation' (Nairobi Declaration on the right of women and girls to a remedy and reparation 2007). In countries where truth commissions have provided some form of amnesty for perpetrators reparations may be the only form of justice that victims receive. Reparations can also be a mechanism to provide redress for women who may not want to become involved in prosecution or truth-seeking due to the stigma associated with gender-based violations of human rights.

Following the United Nations General Assembly adoption of *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, a number of women's organisations mobilised to examine how to better incorporate gender into reparations policies. This led to the 2007 Nairobi Declaration which redefines reparations and guides policy-making for implementing this right specifically for victims of sexual violence (Nairobi Declaration on the right of women and girls to a remedy and reparation 2007). The declaration notes that: 'Reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives' (Nairobi Declaration on the right of women and girls to a remedy and reparation 2007).

While reparations are critical in the pursuit of gender justice they are often an under-funded afterthought in transitional justice processes. Further reparations programmes to date have often failed to recognise and address structural issues which have given rise to gender-based violations of human rights. Issues of implementation have also been of concern. These range from an absence of accessible information about these processes to the inability of women to have control over family finances.

In the majority of cases reparations policies emanate from recommendations made by truth commissions. Limitations arise from this since policies tend to mirror a commission's shortcomings, for example, by generalising human rights violations across genders or failing to recognise the specific abuses suffered by women. As noted earlier in the case of South Africa, the definition

of victim did include the 'relatives or dependents of victims' of whom the vast majority were women. However, there was a hierarchy in this definition in the reparations process, which meant relatives and dependents were only entitled to grants if the 'primary' victim was deceased. While important to recognise the deceased, it failed the South African context where recognition was needed of the impact of detention on family members and the effect of post-traumatic stress disorder. Another related challenge was that only those who were victims of crimes identified by the truth commission as human rights violations received reparations. As socio-economic crimes have generally been beyond the reach of commission's mandates this impedes the scope of reparations.

A further problem stems from the fact that truth commission recommendations are not binding and are dependent on the will of the government for their implementation. Thus, if the government lacks the political will to implement reparations, or decides to pay a smaller amount than the truth commission recommended (as was the case in South Africa), there is little recourse for victims. Further, often the available resources do not correspond to recommendations that have been made. For example, in April 2009, Sierra Leone had only twenty five percent of the funding needed to compensate victims and as such the government had to decide who will receive what. As a result, some war widows have been registered to receive reparations, but they will not receive benefits until at least 2010.

Even when women can access reparations, further difficulties have been identified. Reparations programmes have also repeatedly overlooked the problem of children born of sexual violence or circumstances linked to conflict. Due to the widespread sexual and gender-based crimes recorded by the Sierra Leone truth commission, creative measures were suggested for reparations to the victims of gender-based violence. These included service packages and symbolic measures, such as access to healthcare and rehabilitation services, counselling and psychological support. Men and boys who had been victims of gender-based violence were also eligible for assistance. However, gender activists claim that while the provisions were far-reaching, many constituencies were overlooked, such as children born of rape. This was compounded by the lack of political will by government to enforce

recommendations such as the call for a public apology by the president over the suffering of women and girls.

A significant development in the field of reparations has been the delivery of reparations by military tribunals in the DRC. In April 2006, a military court in Mbdandaka found seven army officers guilty of mass rape of more than 119 women (according to the UN estimate, the number was over 200) at Songo Mboyo in 2003 and sentenced them under the Rome Statute which the DRC ratified in 1998. This was the first time rape was tried as a crime against humanity in DRC, and the first such sentence against military personnel for these crimes. The officers had rebelled against their commanders and attacked the villages of Songo Mboyo and Bongandanga. For the destruction of the villages and the mass rape, they received sentences of life imprisonment and the verdict required each victim's family to receive reparations in the amount of US \$10 000. Rape victims were to receive US \$5 000.<sup>3</sup>

### **Security sector reform**

Security sector reform (SSR) has increasingly been deemed as integral to transitional justice initiatives since the police, military, and other security agencies, as well as non-state security actors such as armed rebel groups, are often the most serious perpetrators of human rights violations. In some societies such as Zimbabwe, it is clear that until the security forces are reformed, attempts at truth seeking and accountability will be untenable. An effective SSR policy can potentially ensure the future integrity of the security sector to prevent abuses; promote the security sector's legitimacy by vetting perpetrators, and empower society through their involvement in the process. In countries transitioning from conflict, reforming the security system must also confront the shortages of resources, personnel, skills, and infrastructure. Lack of training and poor remuneration compromise the efficiency of security structures and exacerbate concerns regarding legitimacy and corruption.

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3 The soldiers escaped shortly after their conviction, which calls into question the extent that victims received justice.

One of the main criticisms of SSR programmes to date has been their focus on the army and major rebel militia groups in which primarily male combatants associated with these groups have been targeted in reform strategies. Thus, other security-related bodies such as the police, border control guards, or smaller rebel groups, as well as more marginal combatants such as women and children have been neglected. Although women's involvement is often overlooked, they have played a key role in conflicts as combatants. Recent surveys have shown women may constitute as much as 30 to 40 percent of armed forces and they are also sometimes involved in leadership roles. For example, the Lord's Resistance Army in northern Uganda was initially begun by Alice Lakwena. Nonetheless SSR programmes have at best implemented a quota of ten to twenty percent for the involvement of women.

A major challenge in implementing SSR often stems from the variety of local and international actors involved in the devising and implementation of programmes. This was evident in Liberia where SSR was outlined through provisions in the Liberian Constitution, the Comprehensive Peace Agreement, and a UN Security Council Resolution. Local ownership has also been noted as critical to successful SSR but this is often not realised because of the deployment of international personnel and the exclusion of local experts, or due to the lack of local expertise. This often leads to perceptions that SSR is as an externally-led process with little local relevance. The focus of international donors results in emphasis on and funding of specific aspects of the process which are often interest-orientated. Recently, the focus of a number of major donors has been on training security structures in counter-terrorism skills, rather than human rights or gender equality which has undermined the efforts of women's groups in pursuing their agendas.

Engendering SSR requires the involvement of women's groups to better develop gender-sensitive strategies. SSR remains a male-dominated field and many gender activists question the extent to which a security sector can be reformed, and point out the need to challenge the very notion of security structures (Hamber et al. 2006:487). Women need to be part of the debate in order to effectively engage with security structures. In Liberia, there have been a number of attempts to include women from different sectors in the different stages of the SSR process. Quotas have been established for recruiting women to different security branches,

and specialised education initiatives for female recruits have been set up. A Women and Children Unit has been set up by the police, and anti-sexual and gender-based violence legislation has been enacted. While these are exemplary efforts, shortcomings have already been noted. It was stated that the training for the army is now actually less gender-sensitive than in the past and that gender remains widely considered as unimportant in security sector governance. There are therefore a number of lessons to be learnt from the Liberian experience for those countries planning SSR processes in the future.

### **Traditional mechanisms**

Traditional mechanisms are often implemented in countries where there is an absence of, or lack of access to, formal justice mechanisms. They are generally quicker to implement than formal mechanisms, and are more accessible to the local population – both culturally and physically. Traditional and informal justice mechanisms also provide the possibility for reparative (rather than retributive) sentences against perpetrators. Thus, instead of serving a prison sentence, perpetrators may assist the community through rebuilding houses, schools or other structures in an area affected by violence or help their victims in farming their land.

In Rwanda, an estimated 120 000 perpetrators were arrested at the end of the genocide in 1994 and projections were that it would take over a 110 years to try all the detainees in the national courts. Thus, the *gacaca* courts were established in 2001 as a means to speed up the process. These were intended to be community courts, presided over by village elders in the presence of the whole community, where any person could request to give testimony. Sentences were generally restorative and involved the perpetrator being required to engage in community-oriented work. Women were specifically included at a number of levels, and there have also been widespread education campaigns to encourage women's involvement in the courts. Unfortunately, while women of all ethnic groups had suffered gender-based crimes, Hutu victim-survivors are not eligible for compensatory assistance (Lambourne 2006:18).

Since Mozambique's 1992 peace agreement, traditional justice mechanisms were widely used in the absence of a 'national' programme and proved an integral measure to enable healing and reintegration. After a civil war spanning over two decades, peace was the priority and there was no political will to censure either the government or the defeated opposition RENAMO (Mozambican National Resistance) forces. While many have been fascinated by the country's perceived successful transition, gender activists have voiced some concerns about the short- and longer-term implications of these strategies, and questioned how much justice has been achieved for women.

Thus, the use of traditional mechanisms as a form of transitional justice does pose a number of challenges. For example, cultural specificity has been raised as a concern in national projects – as in many contexts there are large numbers of different tribes and ethnic groups, with very different traditional practices. Rwanda was quite unusual since both Hutus and Tutsis had traditionally used *gacaca* and were unified by one language, but elsewhere on the continent it is rare to find different ethnic groups using the same cultural practices. For example, in Northern Uganda *Mato Oput* is traditionally an Acholi ritual which many other ethnic groups do not use. This creates the risk that using traditional mechanisms may be viewed by some communities as an external imposition in much the same way as an internationally-imposed tribunal or court.

Another potential problem is that many traditional justice mechanisms do not involve women and if quotas are implemented this then changes the nature of the mechanisms. A recent UNIFEM study on the implementation of resolution 1325 in Africa found that many traditional mechanisms focus on a community truth told from a male perspective, while women's truth is not a priority. Also of concern is the fact that sexual and gender-based crimes carry significant social stigma, which may create obstacles to women testifying in front of their own village or tribe. Concern has been expressed over the reality of having to testify against someone within their community. In Rwanda, however, in camera hearings have become widespread.

There is also the concern about whether these processes are effective when addressing crimes of the magnitude experienced in a number of recent conflicts.

Many traditional mechanisms (including *gacaca* courts and *Mato Oput*) were intended to be used in situations of disputes between individuals, families or villages or when one person had committed a crime against another within his/her tribe. Traditional mechanisms may therefore be inadequate when it comes to dealing with mass human rights violations and specifically with widespread rape.

### **Emerging transitional justice concerns**

A priority for the international community to ensure that transitional justice processes are more gender-sensitive is to promote the greater participation of women in peace negotiations, where transitional justice mechanisms are often first outlined. In October 2000, the United Nations Security Council passed the historic Resolution 1325, which provided the first official endorsement of the inclusion of women in peace processes and the implementation of peace agreements by the UN Security Council. Unfortunately, the nature of conflict often results in the exclusion of women's voices from peace negotiations resulting in their concerns not being addressed in any meaningful way in the peace-building process.

The character of peace processes, which traditionally involve only the main protagonists of human rights violations, must be challenged. Security Council resolution 1820's explicit call for sexual violence to be addressed in peace negotiations responds to the fact that this has seldom been the reality. According to a recent study conducted by UNIFEM of 300 peace agreements in 45 conflicts, only ten countries explicitly mentioned sexual violence and only five of these have been in Africa. Further, in their review of 22 peace processes which have taken place since 1992, UNIFEM revealed that women made up a mere 7.5 percent of negotiators and fewer than two percent of mediators. Thus greater action is required to ensure that peace negotiations address sexual violence, that women are involved in these processes and that these crimes are treated on an equal basis with other international crimes.

The relevance of women in informal peacekeeping initiatives on the continent has been increasingly apparent in recent years but need wider recognition at the international level. Grassroots women's groups have used a range of strategies to demand the inclusion of their concerns during the peace processes in Sudan,

Uganda and Liberia, among others. For example, in 2003 Liberian women organised themselves under the auspices of the Women in Peacebuilding Network (WIPNET) to demand an unconditional ceasefire, a negotiated settlement and international community presence in Liberia. During the 2003 peace negotiation process in Ghana, at which no women were present, a group of women held a parallel meeting resulting in ‘The Golden Tulip Declaration’. They subsequently physically barricaded the stalled peace talks using their bodies as human shields and demanded that an agreement be reached (Isis-WICCE 2005).

Despite these opportunities, a serious concern remains over the apparent continuum of violence facing women in societies emerging from conflict. For many women, sexual and gender-based violence is as prevalent during peace as during times of conflict but attention to these violations dissipates. Countries emerging from conflicts often face high levels of violent crime, which is exacerbated by weak and under-resourced justice sectors. Women who have been victims of gender-based violence also face considerable stigma, and there is often pressure to simply remain silent.

There are also other new challenges on the continent which may impact on transitional justice processes, such as the impact of the forcible transmission of HIV/AIDS in a number of recent conflicts, and the issue of how to better include male victims of sexual-based violence in processes. These topics have yet to be investigated to any great degree, but may well become important factors in gender and transitional justice in the future.

## **Challenges for gender and transitional justice**

The current discourse on transitional justice in Africa needs to be broadened in order to promote more inclusive gender-oriented notions of justice. Transitional justice initiatives are often devised in a way that reduces gender concerns to those of ‘victimhood’. The focus on women as victims not only perpetuates perceptions of women’s passive role during conflicts, but also silences other aspects of their experiences. Women’s multiple roles during a variety of recent conflicts were stressed – as they have been visible as cooks and porters, guards and perpetrators, as well as community leaders.

Furthermore, the conversation on gender issues within the transitional justice field must be more inclusive of men beyond assumptions of their roles as perpetrators. The reduction of sexual violence to 'women's problems' not only silences the experiences of men and boys who have suffered from sexual-based violence, but also creates an environment that allows many to overlook or deny the structural issues that cause this violence. Transitional justice needs to be re-imagined from a restorative justice perspective that is not about reverting to the pre-conflict status quo, but that thinks of how to heal and rehabilitate within a developmental framework.

Appreciation is needed during the devising of transitional justice mechanisms of the continuum of violence in pre-conflict and post-conflict societies. As Sierra Leone's TRC report indicated, gender-based violence including rape was also widespread prior to the conflict, and so contextualisation is needed to better understand high rates of sexual violence during conflicts. Rape has commonly been used as a weapon of war precisely because it helps to destroy communities through fracturing social relationships due to society's interpretations and stigmatisation of these acts. However, the fact that violence does not abate for many women during 'peace' times is often overlooked and as a result sexual violence during conflicts is deemed to be 'extraordinary'.

The apparent rise in post-conflict domestic violence may result from a number of interrelated processes, but it is increasingly acknowledged that transitional justice has a potential role in creating mechanisms to ensure that violence does not simply move to the home, and that a more holistic approach to justice can be achieved. One of the key challenges facing societies undergoing transition is to devise a sustainable judicial system that will prevent impunity for gender-based crimes in the post-conflict era. Emphasis is needed on strengthening legal and judicial mechanisms in order to transform the reality of gender-sensitive jurisprudence into tangible benefits. This requires ensuring domestic courts and judicial mechanisms are fully capacitated in the area of prosecuting gender-based crimes.

When seeking to address gender-based violence in transitional justice initiatives, not only physical violations must be considered, but also economic and social

violations. Currently, over 80 percent of all those forcibly displaced by war and conflict are women and children. Beyond the hardship of displacement, women and girls are also made more vulnerable due to the risk of further violence and sexual exploitation. In Sierra Leone, for example, in a survey of displaced households it was revealed that 94 percent experienced sexual assaults, including rape, torture and sexual slavery. Further, women still constitute the vast majority of the poor, but they are often the last to benefit from reparation programmes or development policies. Even when they do, they are frequently met with social challenges that prevent them from realising their rights and entitlements. Future initiatives in transitional justice thus have to recognise these broader concerns and radically challenge the current configuration of processes to enable a more gender-aware and inclusive approach to post-conflict reconstruction.

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