Societies that have experienced conflict often face a difficult transitional stage. Transitional justice mechanisms provide important tools in understanding how these societies emerge from conflict. Conflict often exposes women to a myriad of harms that have historically been ignored when societies undergo post-conflict transition. Contemporary debates in transitional justice have increasingly aimed to be more inclusive of gender. As such, there have been significant gains in incorporating gender-issues in transitional societies, including hard won gains in international law surrounding sexual violence. This article will discuss the advancement of gender within the key pillars of transitional justice: prosecutions, truth commissions, reparations and institutional reform and questions whether gender has become a central issue in transitional justice.

Introduction

Transitional justice mechanisms provide important tools in understanding how societies emerge from conflict (Bell, Campbell and Ní Aoláin 2004: 305). Contemporary debates in the transitional justice field have increasingly involved a role for gender within these mechanisms, which has been formulated by years of feminist intervention (Bell and O’Rourke 2007: 1). By examining the key pillars of transitional justice: prosecutions, truth commissions, reparations and institutional reform, this article will explore the complex relationship between gender and transitional justice, assessing to what extent gender has become a central issue. Firstly, it will examine the subject of ‘harms’ experienced by women in societies which have experienced conflict, and consider how these harms differ from those suffered by men. Secondly, after drawing upon the concept of gender-harms, the article will consider how gender-harms have been addressed through the pillars of transitional justice, and question whether gender has been promoted as a central issue. It will be argued that although much progress has been made in incorporating a

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gender-sensitive approach in transitional justice, the key pillars of transitional justice fail in addressing the complex web of gender based harms.

Harms
In order to examine whether gender has become a central issue in transitional justice, it is important to analyse gender-harms that arise as a result of conflict. Heywood (2011: 422) argues that many of the harms that women are exposed to are similar to those experienced by men. However it is often the case that women’s pre-existing socioeconomic status, and deeply rooted cultural norms in a patriarchal society, indicate that the harms which women are subjected to differ substantially to those suffered by men (Turano 2011: 1061). This often has roots in what is commonly known as the public/private divide of society. This divide can be seen in the study of classical liberalism, which analyses the distinction between the public sphere of government and commerce and the private sphere consisting of family and the domestic home (Pateman 1989: 118). In many societies, men often dominate the public sphere of government and commerce, whilst women are usually relegated to the private or ‘domestic sphere’ (Turano 2011: 1062).

In societies that experience conflict, this role in the private sphere often subjects women to additional harms that are often not experienced by men. In addition to direct physical harms such as sexual violence, women often experience indirect harms as a result of conflict. O’Rourke (2013: 20) discusses women’s experience of ‘secondary-victimhood’ whereby women are subjected to a range of indirect harms. These can include displacement, whereby women are often exposed to further danger in refugee camps in which their needs and priorities are often neglected (Turano 2011: 1064). Additionally, women are often reliant on their husbands or fathers for support. As a result of conflict, a void is left in this support as many men leave to fight, are killed, imprisoned, disappear or are disabled as a result of the conflict. This can subject women to great emotional and economic pressures. Furthermore conflict frequently collapses the effective functioning of primary healthcare, which in turn subjects women to other indirect harms including: rises in maternal mortality and morbidity (Cockburn 2001: 21). The concept of ‘secondary-victimhood’ can be seen by looking at the case of Argentina under the rule of the military junta in the late 1970s. The junta was responsible for mass violations of human rights as it waged war
on what it considered to be a “Marxist subversive threat” (Filippini 2009: 1). The emotional distress as a result of the disappearance of thousands of (mainly) men was widely displayed in campaigning by the ‘Mothers of the Plaza de Mayo’ (Bille, Hastrup and Sørensen 2010: 50).²

Women are not susceptible to these harms as a result of their biological sex per se. Instead, it is the social inequalities that exist prior to conflict via the public/private dichotomy that increase the susceptibility of women to gender related harm once conflict begins. This article now turns to individually examine to what extent the four pillars of transitional justice incorporate a gender-sensitive approach.

**Prosecutions**

When considering the extent to which gender has become a central issue in transitional justice, it is of paramount importance to address the evolution of criminal prosecutions for sexual violence. Much progress has been made in articulating an international legal framework aimed at prosecuting those involved in sexual violence against both men and women. Campbell describes the term sexual violence as: “a gender-neutral term that refers to violence of a sexual nature against either women or men,” (2007: 416). However although victims include men, it can be safely asserted that women are disproportionately affected by sexual violence (Wallstrom 2012: 1).

The origins of the contemporary transitional justice system found form in the aftermath of World War II with the Nuremberg and Tokyo trials (Jeffery and Kim 2013: 4). Despite falling inside culpable behaviour under the Geneva Conventions, sexual violence was not prosecuted in either trial (O'Rourke 2013: 83). It can therefore be argued that at this time in history, the topic of gender was not a central issue within the concept of transitional justice. In the transcripts of the Nuremberg trial, for example, there is a 732-page index whose contents fail to include the words ‘rape’, or ‘women’ (Turano 2011: 1048); and, in the transcripts of the Tokyo trial the

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² Argentina’s ‘Dirty War’ saw the disappearance of an estimated 30,000 Argentines between 1976 and 1983. Many of the disappeared are thought to have been murdered at detention camps or taken on ‘death flights’ whereby detainees were sedated and dropped to their deaths from military aircraft. For an in-depth analysis of the practice of disappearances and other atrocities carried out by the military junta during this period see Guest (1990) and Kritz (1995). The ‘Mothers of the Plaza de Mayo’ is an organisation of Argentine mothers seeking truth and accountability for the disappearance of their children during the Dirty War, see Arditti (1999).
word ‘rape’ is only referenced on four occasions (Turano 2011: 1062). It is from this standpoint that the evolution of criminal prosecutions regarding sexual violence against women must be addressed.

Transitional justice saw significant advances made in the area of criminal accountability for sexual violence in the 1990s. The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were pioneering in this regard, helping to redefine how sexual violence is prosecuted under international law (Turano 2011: 1052). This had the effect of advancing gender as a central issue in societies emerging from conflict. Although they are separate tribunals, it is helpful to analyse the jurisprudence that developed from these tribunals together. The ICTR decision of Akayesu (1998) is considered a landmark judgment: it saw a defendant convicted of rape, both as an instrument of genocide and as a crime against humanity, and formulated a conceptual definition of rape in international law (Chenault 2007: 221). The subject of sexual violence was further developed in the ICTY judgments of Muhimimana (2005), Furunjzija (1998), Kunarac (2001) and Kvocka (1999). This jurisprudence acknowledged the importance of sexual violence as a gender-harm and advanced the issue of gender as a central issue in transitional justice.

The entry into force of the Rome Statute in 2002, which established the International Criminal Court (ICC), also indicates progress in advancing gender in transitional justice. This was achieved by including within the Statute a comprehensive definition of sexual violence which comprises: rape, forced prostitution, sexual slavery, enforced sterilization and other forms of sexual violence (Wallstrom 2012: 3). The Statute also recognises that sexual violence can constitute a war crime, as well as a crime against humanity and an act of genocide (Wallstrom 2012: 3). In addition to these developments in international law, progress has been made by the UN with the adaptation of Security Council Resolution 1325 (2000), which highlights the needs of women and girls during repatriation, resettlement, rehabilitation, reintegration and post-conflict reconstruction (De Alwis, Mertus and Sajjad 2013: 184).

Although progress in the acknowledgement of sexual violence as a gender specific harm is to be welcomed, a critical assessment of these changes is necessary to reflect
on their efficacy. As many as 20,000 women are estimated to have been raped in the
former Yugoslavia between 1992 and 1994 (Nahapetian 1999: 129); however, as of
February 2014, the ICTY has only convicted 30 people of sexual violence violations
(ICTY 2014). Similar figures exist for the ICTR, with over ninety per cent of
completed cases failing to bring rape charges (Nowrojee 2011). Askin asserts that
“the ICTR has failed to capitalise on the Akayesu legacy,” suggesting that its
operation has failed to provide adequate conviction rates (Askin 2005: 1007). There
has also been criticism of the ICC’s rate of prosecuting crimes of sexual violence
against women. The case of Lubanga (2012) in the Democratic Republic of Congo is
a notable example of the failings of the ICC in this regard. Despite the widespread
documentation of sexual violations, the ICC failed to bring charges against Lubanga
for either sexual slavery or rape (Owen 2009: 105). The UN has attempted to address
the issue of slow progress regarding the prosecution of sexual violence through
Security Council Resolution 1960 (2010). This Resolution recalled the responsibility
of states to end impunity and to prosecute those responsible for genocide, war crimes
and crimes against humanity, noting with concern that only limited numbers of
perpetrators have been brought to justice. The passing of Security Council Resolution
1960 (2010) was praised by Human Rights Watch (2010) as “a tremendous step
toward ending this horrendous practice.”

Despite some criticism over conviction rates in these cases, it is important to be aware
that the issue of sexual violence has been radically reformed since the inception of
transitional justice. The recognition of the importance of tackling sexual violence by
the ICTY, ICTR, ICC and the unanimous adaptation of UN Resolution 1960 to tackle
the problems of prosecuting sexual violence shows a clear advancement of gender
based harm as a central issue in transitional justice. The problem that the role of
prosecutions as a pillar of transitional justice faces is that the harms experienced by
women as a result of conflict cannot be strictly confined to sexual violence. Women
face a complex set of different harms as a result of conflict, many of which are
indirect. There is a danger that an overly centred importance on sexual violence
crimes may demonstrate a patriarchal prejudice that reduces women to mere sexual
beings (Turano 2011: 1066).
This raises another problem for prosecutions as a pillar of transitional justice, namely that many of these indirect harms are not considered to be criminal (Turano 2011: 1066). For example, both the inability to access primary healthcare and the economic stress suffered in the absence of a male provider are harms suffered by women that cannot be resolved or addressed through prosecution. Thus, it is important to illustrate that prosecutions only address a limited proportion of harms committed against women and fail to address all gender-based harms.

**Truth**

The problems associated with achieving convictions in transitional societies have resulted in the emergence of ‘truth-seeking’ as a pillar of transitional justice (O’Rourke 2013: 101). The attempt to implement a gender sensitive approach to truth-seeking has been seen in various truth commissions (TCs). For example, South Africa’s Truth and Reconciliation Commission, following the abolition of apartheid, organised public hearings where women could recall their experiences and call for justice and reparations (Quast 2008: 18). This in turn established a precedent for the establishment of a gender perspective in TCs. Peru’s TC included a gender unit to ensure a gender perspective to the findings of the commission, which resulted in the final report containing a chapter specifically relating to gender (Falcon 2013: 192). Moreover, in the case of Sierra Leone, the United Nations Development Fund for Women provided specific staff for women victims as well as technical advice, training and other support. This resulted in increased participation by women and a final report highlighting gender-based violence (World Bank 2013).

Although the recognition of a role for gender in TCs is to be welcomed, deep-seated criticisms remain. These criticisms share similar characteristics to those relating to criminal prosecutions in that the TCs focus predominantly on the subject of sexual violence, excluding the myriad of other abuses experienced by women in the private sphere (Muddell 2007: 88). Maisel asserts that TCs have “universally failed to recommend ways to remediate the violations perpetrated against women outside the public, political sphere, even though their mandates purport to be all-inclusive and gender neutral” (Maisel 2011: 152). Therefore, TCs as a pillar of transitional justice ultimately fail to address the wide array of harms that women suffer as a result of conflict, restricting gender from becoming a central issue in transitional justice.
Reparations

The concept of justice for victims requires punishment for perpetrators and redress for survivors (Wallstrom 2012: 4). Rubio-Marin asserts that “reparations may be the most tangible manifestation of the efforts of the state to remedy the harms victims have suffered” (Rubio-Marin 2006: 23). The concept of reparations allows the state to address gender-harms that have been suffered by women in the private sphere, such as filling the financial void left behind following the death of a husband or father (O’Rourke 2013: 156).

The right to reparations under international human rights law is detailed in UN Economic and Social Council Resolution 2005/35. This document lays out the various forms of reparations: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition (UN Women and United Nations Development Fund 2010: 4). According to these basic principles, States are obliged to provide reparations when they are accountable for gross violations or where those responsible are unwilling or unable to meet their obligations. In addition to this, UN Security Council Resolution 1325 (2000) also detailed the recommendations on supplying reparations for survivors of gender-harms, such as, increasing financial support for survivors of gender based and sexual violence (Askin 2002: 517).

Although the link between reparations and gender-harms appears to have been highlighted by international law, the application of reparation programmes with sensitivity shown towards gender still appears to be a challenge in practice (UN 2013: 2). The Peruvian TC detailed in its findings that the Comprehensive Plan of Reparations be implemented with the promotion of gender equity. However, the follow-up body, the High Level Multisectoral Commission (Comisión Multisectorial de Alto Nivel), which was responsible for the drafting of the reparations program, failed to implement this recommendation into the programme (Duggan 2011: 206). This shows that there is a clear recognition of the importance to advance gender as a central issue in transition, but ultimately a failure in practice.

In addition to the Peruvian TC’s recommendations, other case studies point towards a similar conclusion, where institutions include a role for gender in their mandates, but
ultimately fail to deliver in practice. For example, the TC in Timor-Leste detailed gender equity as one of its five guiding principles. However, Rubio-Marin describes the efforts of the TC to implement a gender sensitive approach to reparations as “very weak”, highlighting the limited role of women in the articulation of reparations and describing the discussion on reparations in relation to gender-justice as “non-existent” (Rubio-Marin 2006: 296-319). Furthermore Rubio-Marin (2006: 317) emphasises the failure to include reparations for numerous forms of violence against women such as various violations of reproduction rights. Morocco’s Equity and Truth Commission, which was created to reconcile victims of human rights violations throughout a period known as the ‘Years of Lead’, also highlighted gender as one of its key priorities in its policy for reparations. However, narrow application dates and the use of closed-list systems prevent victims of gender-based violence from coming forward due to the psychological pressures involved (Rubio-Marin and Pablo de Grieff 2007: 323). Prifogle suggests that “although there has been some incorporation of gender sensitivities in reparation programs, most, if not all, programs prioritise violations experienced primarily by men, including illegal detention, torture…” (Prifogle 2010: 238). This suggests that the majority of states’ commitments to a gender sensitive approach regarding reparations remains rhetorical and has yet to manifest in implementation.

Institutional Reform

It is often the case that public institutions are involved in systematic abuses of human rights and repression. The transformation of institutions such as security forces and the judiciary into respected instruments of justice is vital for the rebuilding of post-conflict states (Harris et al 2013: 1). The ultimate goal of institutional reform is to establish the rule of law and ensure non-recurrence. Institutional reform provides an opportunity to focus on gender, both by involving women in the processes of reforming public institutions and also by producing public institutions that ultimately aim to protect women from conflict-related gender harms.

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3 The ‘Years of Lead’ refers to a period of rule by King Hassan II of Morocco, which was marked by systematic abuses of human rights by Moroccan state authorities. See http://www.ictj.org/sites/default/files/ICTJ-Morocco-TRC-2009-English.pdf (accessed 20 March 2014)
Rishmawi states that “there is little doubt…that the main structures to be reformed are the security institutions” (Quoted in UN Human Rights 2013: 1). It has been increasingly seen that in post-conflict zones reform of security institutions with an increased focus on gender has been attempted. This can most notably be seen in the area of police reform. Several UN bodies such as the United Nation Population Fund, the United Nations Development Programme (UNDP) and the United Nations Children Fund have invested in ‘gender training’ for national police forces in an attempt to advance gender in transitional justice (UN Women 2014). In addition to this, institutional reform has seen the introduction of dedicated police units specifically designed to address crimes against women. For example, in Rwanda, a Gender-Based Violence Office was established at the Rwandan National Police Force HQ in 2005 (Anderson 2014), whilst the UNDP has constructed a Women and Child Protection Unit in Liberia (Aleem 2013: 67). The development of gender units within state security provision help support attitudinal change both in state institutions and also in the general public, advancing gender as a central issue in transitional justice.

Institutional reform regarding judicial systems has also been seen to promote gender in transitional societies. For example, in 2005 Spain set up Courts on Violence against Women, which have the specific jurisdiction to tackle domestic violence and other gender-based harms against women (Quast 2008: 11). In Ecuador and Peru, courts receive support from NGOs which specialise in domestic violence (Quast 2008: 11). Other initiatives such as establishing free legal services for vulnerable women and improving access to justice in rural areas have been seen in Liberia (Griffiths and Valasek 2013: 144).

The opportunity to facilitate institutional reform often comes in the form of peace agreements which have tended to exclude women (Bell and O’Rourke 2007: 24). There is a need for a greater presence of women at the negotiation stage of peace agreements. Dharmapuri (2011: 65) highlights the effectiveness of women in the post-conflict resolution and peacekeeping missions, stating that:

*When women are included in disarmament, demobilization and reintegration programs, the ability to capture more arms and various weapons caches is enhanced. Gender analysis shows that when women*
are included in peace negotiations and decision-making, there are more moderate voices advancing the interests of the most marginalized groups. The inclusion of women in consultations makes it likely that more members of a society will benefit from stabilization efforts.

The involvement of women in the negotiation of institutional reform was seen to be of paramount importance in the transitional stage of the peace process in Northern Ireland. An all-women’s party, the Northern Ireland Women’s Coalition, played a key role in the signing of the Good Friday Agreement (Tonge 2002: 63). The institutional reform which arose from the Good Friday Agreement included commitments to advancing equal presence in political party representation and to safeguarding women’s equality of opportunity to participate in the public sphere (Ní Aoláin and Rooney 2007: 346). Institutional reform taking this form helps to change societal attitudes towards gender; it can also be argued that it helps diversify the role of gender from an overly centred sexual violence focus to a wider role for gender advancement in transitional justice.

Whilst highlighting the effectiveness of women in peace processes is important, it is also important to highlight the problem of adopting an ‘add women and stir’ approach (Warren and Cady 1996: 1). Bell and O’Rourke raise the issue that women are often used as ‘pawns of peace’ where their presence is included in the negotiation stage of peace talks, but the underlying issues which have resulted in gender-harm in the first place are widely disregarded once negotiations come to an end (Bell and O’Rourke 2007: 25). They have argued that: “[m]atters that address underlying issues of discrimination, domination and improvement of physical, social and legal security, particularly with regard to gender, are often addressed as secondary issues, or not at all.” Thus it can be suggested that that the inclusion of women in peace negotiations can sometimes lead to positive results, such as gender-sensitive police units and domestic violence courts for women. However ultimately the inclusion of women in peace agreements is more of a cosmetic variation which does not significantly impact upon tackling the underlying inequalities that exist prior to conflict. An example of this can be seen in the Dayton Accords which drew the conflict in Bosnia to an end in 1995 (Cousens and Cater 2001: 9).
Chinkin and Paradine (2001: 127) have stated that “[i]ssues of political participation and representation, and the sexual division of labor [sic]… were not addressed by the GFA [Dayton Accords]. This silence ensures that long-entrenched assumptions will continue.” This argument therefore posits that in order for institutional reform to effectively challenge the inequalities women face prior to conflict, the inclusion of women has to go beyond the ‘add women and stir’ approach. It has to effectively involve women and men on an equal basis, transforming the role of women from pawns of peace to equal participants in decision-making. Chinkin and Paradine use paragraph 118 of the Beijing Platform for Action to highlight this argument (2001: 151),

> Women’s equal participation in decision-making... can also be seen as a necessary condition for women’s interests to be taken into account. Achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of society and is needed to strengthen democracy and promote its proper functioning.

The reality is that gender sensitive institutional reform is a relatively new phenomenon and as a result has failed to achieve this level of gender equality in decision-making. Consequently much gender-sensitive reform fails to tackle the under-lying issues of inequality that exist prior to conflict. Therefore, institutional reform as a pillar of transitional justice has so far had a limited impact on the advancement of gender equality.

**Conclusion**

Despite hard-won gains in advancing the role of gender in transitional societies, transitional justice still faces a difficult task implementing gender as a central issue in practice due to the complex web of gender-based harms. However the advancements made in international law regarding sexual violence, the increased role of women in truth seeking, the creation of gender units in reparation programs, and the increased recognition for a role for women in public institutions must be looked upon with a degree of optimism. Whilst all four pillars of transitional justice currently face failure in tackling the diverse web of gender-based harms effectively in practice, the
attitudinal shift towards gender-based transition and the increasing recognition of
gender as a key issue in transition demonstrates a developing trend towards including
gender as a central issue in transitional justice.


Prosecutor v Akayesu ICTR-96-4-T, T Ch I (2 September 1998).


Prosecutor v Kvočka IT-98-30/1-T (17 March 1999).

Prosecutor v Lubanga ICC-01/04-01/06 (14 March 2012).

Prosecutor v Muhimana ICTR-95-1B-T, T Ch 3 (28 April 2005).


