

THE GENDER DIMENSION OF TRANSITIONAL JUSTICE MECHANISMS

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I. INTRODUCTION

In recent years, violence committed against women during armed conflicts has received considerable attention. The jurisprudence that emerged from the international tribunals

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for Rwanda and the former Yugoslavia has been touted by human rights advocates and scholars as monumental progress in the efforts to protect women's rights under international law and to recognize the scope and content of past atrocities. In this paper, I will argue that far from being a panacea, these judicial advancements merely expose the importance of evaluating the gender-sensitivity of transitional justice mechanisms.

I will ground this proposal in the historical and recent treatment of crimes committed against women during armed conflicts and argue that the overwhelming focus on sexual violence obscures the full range of women's experiences. I will present an alternative definition of harm, which posits that women's experiences during armed conflicts are not limited to sexual violence and cannot easily be encapsulated by discrete events or "elements of the crime" definitions. Using this more expansive conception of harm, I will evaluate how prosecutions and truth commissions accomplish important gender aims—whether they punish offenders, record the scope of past atrocities, respect and respond to victims, and promote gender equality in a post-conflict society. I will contend that this analysis indicates that characteristics inherent in the institutions themselves make truth commissions far superior to prosecutions at accomplishing these gender aims. This conclusion demonstrates that, at a minimum, a gender differential exists that should be considered when choosing which mechanism to employ, determining resource allocations during transitions, and evaluating the effectiveness of past efforts.

II. HISTORICAL TREATMENT OF CRIMES COMMITTED AGAINST WOMEN DURING ARMED CONFLICTS

The historical treatment of rape committed during armed conflicts and the developments made by the tribunals for Rwanda and the former Yugoslavia has been well documented by many scholars. A brief overview here will serve to establish a valuable baseline understanding of how crimes committed against women have been treated in the past and are being addressed in the present.

The United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has described rape

as the “least condemned war crime.”¹ Although rape was prohibited by the law of war for centuries,² it was often viewed as a natural by-product of war; images of “rape and pillage” can be found in popular mythology, religious writings, art, and novels.³ In modern international conventions and treaties, rape is often relegated to an offense prejudicing “family honor and rights” or as an outrage “upon personal dignity.”⁴ As a

1. Special Rapporteur on Violence Against Women, Including Its Causes and Consequences, *Preliminary Report on Violence Against Women, Its Causes and Consequences*, ¶ 263, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994) (Ms. Radhika Coomaraswamy).

2. See THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS, 111–13, 143–44, 151–52 (1993) (describing war ordinances issued by kings and other authorities during the late middle ages and early renaissance).

3. Amanda Beltz identifies several pertinent examples, including Nicolas Poussin’s painting the “Rape of the Sabine Women” and Biblical and Koranic depictions of women as spoils of war.

21 *Judges* 14:21 (“Benjamin returned at that time, and they gave them the women whom they had kept alive from the women of Jabesh-gilead; yet they were not enough for them . . . And they commanded the sons of Benjamin, saying, ‘Go and lie in wait in the vineyards, and watch; and behold, if the daughters of Shiloh come out to take part in the dances, then you shall come out of the vineyards and each of you shall catch his wife from the daughters of Shiloh, and go to the land of Benjamin.’”); 31 *Numbers* 17:18 (“Now therefore, kill every male among the little ones, and kill every woman who has known man intimately, But all the girls who have not known man intimately, spare for yourselves.”); 20 *Deuteronomy* 14 (“Only the women and the children and the animals and all that is in the city, all its spoil, you shall take as booty for yourself; and you shall use the spoil of your enemies which the LORD your God has given you.”); 14 *Zechariah* 1-2 (“Behold, a day is coming for the LORD when the spoil taken from you will be divided among you. For I will gather all the nations against Jerusalem to battle, and the city will be captured, the houses plundered, the women ravished and half of the city exiled, but the rest of the people will not be cut off from the city.”). . . . Koran 3:50 (“O Prophet! Lo! We have made lawful unto thee thy wives unto whom thou hast paid their dowries, and those whom thy right hand possesseth of those whom Allah hath given thee as spoils of war.”).

Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim’s Rights with Due Process Rights of the Accused*, 23 ST. JOHN’S J. LEGAL COMMENT. 167, 170 & nn.11–12 (2008).

4. Hague Convention Respecting the Laws and Customs of War on Land, art. 46, Oct. 18, 1907, 36 Stat. 2277 (“Family honor and rights, the lives of persons, and private property, as well as religious conviction and practice must be respected.”); The Geneva Convention Relative to the Treat-

whole, documents purporting to regulate armed conflicts commonly fail to recognize the effect of sexual violence on the victim or acknowledge other forms of harm targeted at women during armed conflicts.⁵ Asken identifies several poignant examples,

In the entirety of the Hague Conventions and Regulations, one single article (IV, art. 46) vaguely and indirectly prohibits sexual violence as a violation of “family honour. The forty-two-volume set of transcripts of the Nuremberg Trial contains a 732-page index. Neither “rape” nor “women” is included in any heading or subheading in this index, despite the fact that crimes of sexual violence committed against women were extensively documented in the transcripts. In the five supplementary indexes to the twenty-two-volume set documenting the Tokyo Trial, “rape” is only included under the subheading “atrocities.” Even then, a mere four references are cited, representing but a minuscule portion of the number of times rape and other forms of sexual violence were included within the International Military Tribunal for the Far East (IMTFE) transcripts. The four 1949 Geneva Conventions came after the Second World War and the Nuremberg and Tokyo war crimes trials. Within the 429 articles that comprise the four 1949 Geneva Conventions, only one sentence of one article (IV, art. 27) explicitly protects women against “rape” and “enforced prostitution,” and only a few other provisions can be interpreted as prohibiting sexual violence. The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict omits any reference to sexual violence. In the two 1977 Additional Protocols to the Geneva Conventions, only one sentence in each ex-

ment of Prisoners of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 972 (stating, “[W]omen shall be especially protected against any attack on their honor, in particular against rape”).

5. Kelly D. Asken, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 295 (2003) (“documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention [harms committed against women during armed conflicts.]”).

licitly prohibits sexual violence (Protocol I, art. 76; Protocol II, art. 4).⁶

The failure of these international agreements to provide minimal protections to women makes it unsurprising that the major war crimes tribunals chartered to respond to the atrocities of World War II, the International Military Tribunal at Nuremberg and the Military Tribunal for the Far East at Tokyo, largely disregarded overwhelming evidence of sexual violence crimes committed by the Axis Powers and Allied Forces⁷. The Tokyo Tribunal, on the other hand, did indict some defendants for rape, and managed in *Yamashita* to hold a high-ranking Japanese General responsible for rape committed by troops under his command.⁸ Still, the Tokyo Tribunal fell far short by only prosecuting rape in conjunction with other crimes and completely ignoring the over 200,000 women kidnapped and held against their will in rape camps.⁹ By failing to prosecute sexual violence committed against women at this critical juncture, the tribunals perpetuated the minimization

6. *Id.* Article 76 of Additional Protocol I reads, “[W]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” Additional Protocol I to the Geneva Conventions of 12 August 1964, and Relating to the Protection of Victims of International Armed Conflicts, art. 76, June 8, 1977, 1125 U.N.T.S. 3. Article 4(2)(e) of Protocol II prohibits “outrages upon personal dignity, in particular humiliating or degrading treatment, rape, enforced prostitution and any other form of indecent assault.” Additional Protocol II to the Geneva Conventions of 12 August 1964, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, June 8, 1977, 1125 U.N.T.S. 609.

7. Patricia Viseur Sellers, *Rape under International Law*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 159, 161. Consideration of rape and women generally was disturbingly absent from the Nuremberg Trial. The forty-two volume trial transcript contains a 732-page index. “Rape” and “sexual violence” are notably omitted as a heading or subheading despite the extensive documentation of sexual violence in the transcript. Askin, *supra* note 5.

8. The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East 29 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); see *In re Yamashita*, 327 U.S. 1 (1946) (upholding a military commission’s decision that held General Yamashita responsible for acts of rape, among other crimes, committed by his subordinates).

9. For a depiction and discussion of the “comfort stations” see Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law; Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?* 46 MCGILL L.J. 217, 221–23 (2000).

of crimes committed against women and missed a valuable opportunity to vindicate the rights of women.

Since the Nuremberg and Tokyo Tribunals, some progress has been made towards recognizing and preventing crimes directed towards women during armed conflicts. Additional international treaties developed to protect human rights generally also attempt to address gender violence, sexual discrimination, and sexual violence. These include the International Covenant on Civil and Political Rights,¹⁰ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹¹ and the Convention Against Torture and Other Forms of Cruel, Inhumane, and Degrading Treatment or Punishment.¹² Female Refugees are entitled to protection against gender-based violence under these same human rights

10. Articles 2 and 3 prohibit sex discrimination. Article 9 protects the individual right to liberty and security of person. Article 7 protects the fundamental human right to mental and physical integrity. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/RES/2200(XXI) A, at 16 (Dec. 16, 1966).

11. Article 1 prohibits “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/180, at 193 (Dec. 18, 1979). Although Article 1 does not mention violence, the CEDAW committee—the body established to monitor the implementation of CEDAW—has interpreted the article to include gender-based violence because “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on basis of equality with men.” Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003). The committee described gender violence as “violence that is directed against a woman because she is a woman or that affects women disproportionately . . . includ[ing] acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty.” *Id.* ¶ 6.

12. Article 1 prohibits, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing him for an act.” G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984). Under this article, rape and other forms of abuse “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” would constitute torture. *Id.*

instruments. The U.N. Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees also codifies the rights of refugees in particular, defining who qualifies as a refugee and requisite minimum standards of treatment.¹³ Gender, however, is currently not a basis for persecution leading to a right of asylum under either the Refugee Convention or its protocol.

Regional human rights law also provides protections against gender-based violence during armed conflicts. Although most conventions fail to explicitly address gender-based violence, broad interpretations of the right to physical and mental integrity and the fundamental right to gender equality provide implicit protections.¹⁴ The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women also directly prohibits “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women” perpetrated or condoned by the state.¹⁵

Despite the progress made in these instruments to codify and guarantee human rights, international tribunals were rarely used in the fifty years following the Nuremberg and Tokyo Tribunals to prosecute war criminals. This changed in the 1990s, when the United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the

13. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

14. The right to physical and mental integrity is protected in Article 3 of the European Charter, Article 4 and 5 of the African Charter, and Article 5(1) of the American Charter. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3 Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]; African [Banjul] Charter on Human and Peoples’ Rights arts. 4–5, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter]; American Convention on Human Rights art. 5(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]. The right to gender equality is found in Article 14 of the European Convention, Article 2 and 18(3) of the African Charter, and Article 1(1) in the American Convention. European Convention art. 14, at 232; African Charter art. 2 & 18(3), at 246 & 249; American Convention art. 1(1), at 145.

15. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women art. 1, June 9, 1994, 33 I.L.M. 1534. Article 4 of the Convention enumerates the rights of women to “the recognition, enjoyment, and protection of all human rights and freedoms embodied in regional and international human rights instruments.” *Id.* art. 4, at 1535.

International Criminal Tribunal for Rwanda (ICTR) to respond to reports of widespread violence and ethnic cleansing in those countries.¹⁶ The jurisprudence that later emerged from these tribunals has been heralded as redefining how sexual violence is categorized and prosecuted under international law.¹⁷ Although the ICTY and ICTR are two separate tribunals, it is most helpful to consider the decisions of these tribunals together, in chronological order to understand the development of jurisprudence to address sexual violence crimes.

On September 2, 1998, the ICTR issued the landmark *Akayesu* decision that declared that rape and sexual violence formed part of a widespread and systematic attack directed against civilians, which constituted genocide and crimes against humanity.¹⁸ This pioneering decision also produced the first international legal definition of the elements of rape, stipulating that rape required “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive,”¹⁹ and describing sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”²⁰ The court emphasized that coercion did not require physical force, but that “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.”²¹

This decision was considered groundbreaking for a number of reasons. This was the first time that sexual violence was

16. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

17. Despite these advancements, the ICTY and ICTR have not been free from criticism. Prosecutors for both tribunals have been criticized for failing to bring indictments for sexual violence and not properly investigating and preparing cases that would result in successful prosecutions. The ICTY prosecutor, in fact, did not even originally indict Akayesu. Rather, it was only after witnesses spontaneously testified about horrific gang rapes that the judges demanded the Office of the Prosecutor investigate accusations of sexual violence and consider amending the indictment to include additional charges. Askin, *supra* note 5, at 318.

18. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 695, 731 (Sept. 2, 1998).

19. *Id.* ¶ 598. The court noted that the elements of rape “cannot be captured in a mechanical description of objects and body parts.” *Id.* ¶ 688.

20. *Id.* ¶ 598.

21. *Id.*

found to constitute genocide or a crime against humanity.²² Second, unlike most courts in peacetime that require nonconsent and force as an element of rape, the *Akeyesu* court omitted requirements that victims physically resist or verbally convey their nonconsent, and that a perpetrator exert force. Also, by allowing sexual violence to comprise the underlying crime for genocide or a crime against humanity, the court unambiguously recognized the extensive harm sexual violence causes individuals and their communities, and acknowledged that sexual violence is employed by armed groups as a weapon of war to cause terror and devastation. Finally, this decision is notable because Akayesu was not accused of physically perpetrating any of the sexual violence crimes himself. Rather, he was found to have “specifically ordered, instigated, aided and abetted” the acts of sexual violence by allowing them to take place on or near the bureau communal while he was present and to have encouraged the acts of sexual violence by sending “a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.”²³

On November 16, 1998, the ICTY issued the *Delalic* judgment, recognizing sexual violence as torture and further expanding jurisprudence on superior responsibility for rape.²⁴ The trial court stated that sexual violence may constitute torture when the elements of torture adopted in the Convention Against Torture are satisfied.²⁵ The court emphatically

22. The ICTY statute granted the court jurisdiction over genocide, which was defined as “acts committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group,” and over crimes against humanity, which were defined as “crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.” Statute of the International Tribunal for the Former Yugoslavia, arts. 4 & 5, S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993). The ICTR Statute granted the court jurisdiction over genocide, which was defined as “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group,” and crimes against humanity defined as “crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Statute of the International Tribunal for Rwanda, arts. 2 & 3, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/RES/955 (1994).

23. *Akeyesu*, Case No. ICTR-94-4-T, ¶ 692.

24. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 354–78, 496 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

25. The elements of torture required by the court were

stressed that “rape causes severe pain and suffering, both physical and psychological,” explaining that it was

difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could not be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation . . . [because] this is inherent in situations of armed conflict.²⁶

The court also found that the violence suffered by the victim “was inflicted upon her . . . because she is a woman . . . represent[ing] a form of discrimination.”²⁷ In addition, the court expanded the notion of superior responsibility, finding superiors responsible when information, “indicated the need for additional investigation in order to ascertain whether offences were being committed or [were] about to be committed” by subordinates.²⁸

Less than one year and a half later, on July 21, 2001, the ICTY issued the *Furundzija* judgment, convicting a commander of rape and torture as war crimes.²⁹ The court stated that “rape may also amount to a grave breach of the Geneva Con-

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- (i) There must be an act or omission that causes severe pain and suffering, whether mental or physical,
 - (ii) which is inflicted intentionally,
 - (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
 - (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

Id. ¶ 494.

26. *Id.* ¶ 495.

27. *Id.* ¶ 941.

28. *Id.* ¶ 393. The Appeals Chamber offered the following helpful example: “[a superior who receives] information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.” Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 238 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

29. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), *aff’d*. Case No. IT-95-

ventions, a violation of the laws or customs of war, or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.”³⁰ The court held that the elements of rape were

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (c) by coercion or force or threat of force against the victim or a third person.³¹

The court also ruled that “any form of captivity vitiates consent.”³² Unlike in *Akayesu*, the court in *Furundzija* used a more mechanical definition to describe the act of rape, but both decisions declined to stipulate that victims must physically or verbally convey their nonconsent to the perpetrator, or that the perpetrator must use physical force. Neither decision was reversed on appeal.³³

On February 22, 2001, the ICTY issued the *Kunarac* decision, convicting the defendants of rape and enslavement as a crime against humanity.³⁴ This was the first court to recognize that the enslavement and repeated rape of victims held in facilities for days, weeks, or months constituted a crime against humanity.³⁵ The court also convicted Kovac on charges of “outrages upon personal dignity”³⁶ for making women and

17/1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000).

30. *Id.* ¶ 172 (internal citations omitted).

31. *Id.* ¶ 185.

32. *Id.* ¶ 271.

33. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Appeals Chamber Judgment (June 1, 2001).

34. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 883–890 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001). Unfortunately, apart from a passing reference in a footnote, the trial chamber did not employ the term “sexual slavery” at any point in the opinion. *Id.* ¶ 541, n.1333.

35. The trial court defined the crime of enslavement as “the exercise of any or all of the powers attaching to the rights of ownership over a person.” *Id.* ¶ 540.

36. *Id.* ¶ 782. An outrage upon personal dignity is an act “animated by contempt for the human dignity of another person. The corollary is that the

girls dance nude on tables while others watched for entertainment. Here, the court again employed a mechanical definition of rape,³⁷ and also chose to impose a consent requirement—that the penetration occurs without the consent of the victim and that the perpetrator acts with the knowledge that penetration occurs without consent.³⁸

The *Kvoeka* judgment was issued on November 2, 2001.³⁹ While only one of the accused was charged with physically committing rape, the judgment was significant because it offered the standard of liability for sexual violence committed during the course of a joint criminal enterprise.⁴⁰ The trial

act must cause serious humiliation or degradation to the victim.” Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 56 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 25, 1999). The court in *Kunarac* reiterated that it was “not require[d] that the perpetrator . . . intend to humiliate his victim,” rather, “[i]t is sufficient that he knew that his act or omission could have that effect.” *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 774.

37. The court used the following definition:

[T]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 460.

38. The court stated that a consent requirement was necessary because “the true common denominator which unifies the various systems [of law] . . . [is the] basic principle of penalising violations of sexual autonomy.” *Id.* ¶ 440. “Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.” *Id.* ¶ 457.

39. Prosecutor v. Kvoeka, Case No. IT-98-30/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

40. The court explained that,

A joint criminal enterprise can exist whenever two or more people participate in a common criminal endeavor. This criminal endeavor can range anywhere along a continuum from two persons conspiring to rob a bank to the systematic slaughter of millions during a vast criminal regime comprising thousands of participants. Within a joint criminal enterprise there may be other subsidiary criminal enterprises. For example, were the entire Nazi regime to be considered a joint criminal enterprise, that would not preclude a finding that Dachau Concentration Camp functioned as a subsidi-

chamber held that the defendants, under a joint criminal enterprise theory, were responsible for “any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence.”⁴¹ Some have interpreted this decision as requiring detention facilities to ensure there are adequate protections and monitoring to prevent sexual abuse.⁴²

On April 25, 2005 the ICTY issued the *Muhimana* judgment. Here, the tribunal grappled with the challenge of reconciling the conceptual *Akayesu* definition of rape, and the mechanical definition of rape utilized by the ICTY in the

ary of the larger joint criminal enterprise, despite the fact that it was established with the intent to further the larger criminal enterprise. Within some subsidiaries of the larger criminal enterprise, the criminal purpose may be more particularized: one subset may be established for purposes of forced labor, another for purposes of systematic rape for forced impregnation, another for purposes of extermination, etc.

Id. ¶ 307.

41. *Id.* ¶ 327. The court found sexual violence at the Omarska camp to be both foreseeable and inevitable,

In the Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation. Liability for foreseeable crimes flows to aiders and abettors as well as co-perpetrators of the criminal enterprise.

Id.

42. Askin, *supra* note 5, at 344. Askin bases her interpretation on the trial court’s consideration of the responsibility of a hypothetical superior who, “has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.” *Id.* (quoting *Kvoeka*, Case No. IT-98-30/1-T, ¶ 318). The court also offers as an example of prior notice, quoting *Delalic*, “a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission.” *Kvoeka*, Case No. IT-98-30/1-T, ¶ 318 (quoting *Prosecutor v. Delalic*, Case No. IT-96-21-T, Appeals Chamber Judgment, ¶ 238 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001)).

Furundzija, *Kunarac*, and *Kvočka* decisions. The chamber stated that,

The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* broadly referred to a ‘physical invasion of a sexual nature’, *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.⁴³

Finally, on July 7, 2008, the ICTR issued the *Gacumbitsi* judgment, affirming that the prosecution can establish non-consent as a matter of law by proving the existence of “coercive circumstances under which meaningful consent is not possible.”⁴⁴

Shortly after these decisions, the International Criminal Court (ICC) articulated its definition of rape. The elements are largely a mixture of the rich jurisprudence on sexual violence that emerged from the ICTY and ICTR.⁴⁵ The ICC also

43. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶ 550 (April 28, 2005).

44. Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-A, Judgment, ¶ 155, 157 (July 7, 2006) (holding that “it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.”); see also Catherine A. MacKinnon, *The ICTR’s Legacy on Sexual Violence*, 14 NEW ENG. J. INT’L & COMP. L. 101, 102–03 (2008) (stating that the single biggest substantive accomplishment of the ICTR was the “definition of rape in *Akayesu*” and identifying *Gacumbitsi* as effectively sustaining the core insight of *Akayesu*). The prosecution of sexual violence as a crime against humanity is not confined to the ICTR and ICTY. On February 21, 2011, Congolese Lt. Col. Kebibi Mutware was sentenced for crimes against humanity in the “highest-profile sexual violence case ever tried” in the Congo. See *Congo Colonel Gets 20 Years After Rape Trial*, ABCNEWS.COM, Feb. 21, 2011, <http://abcnews.go.com/International/wireStory?id=12962964>. For a helpful summary of current trial proceedings of the ICC involving gender crimes, see WOMEN’S INITIATIVES FOR GENDER JUSTICE, 2010 GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 118–78 (2010) available at http://www.iccwomen.org/documents/GRC10-WEB-11-10-v4_Final-version-Dec.pdf.

45. The ICC definition of the war crime of rape included the following elements,

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the

offered definitions of the war crimes of sexual slavery,⁴⁶ enforced prostitution,⁴⁷ forced pregnancy,⁴⁸ enforced sterilization,⁴⁹ and sexual violence.⁵⁰ The ICC explicitly included sexual slavery, prostitution, forced pregnancy, enforced sterilization, and any other forms of sexual violence as grave breaches of the Geneva Convention.⁵¹ In addition, the ICC followed the ICTY and ICTR determinations that rape could constitute an act of genocide or torture.⁵² The ICC expanded the protection offered to women by allowing persecution based on gender to also constitute a crime against humanity.⁵³

Important themes emerge from the foregoing overview of the historical treatment of crimes committed against women during wartime. First, the tendency to ignore or mischaracterize these crimes has been undeniably present throughout history. Second, although the ICTY and ICTR did advance the protections afforded to women during armed conflicts, the jurisprudence from these tribunals and the rules that subse-

victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

International Criminal Court, *Elements of Crimes* [Hereinafter ICC *EoC*], Art. 8(2)(e)(vi)-1, ICC-ASP/1/3 (Sept. 9, 2002).

46. *Id.* art. 8(2)(e)(vi)-2.

47. *Id.* art. 8(2)(e)(vi)-3.

48. *Id.* art. 8(2)(e)(vi)-4.

49. *Id.* art. 8(2)(e)(vi)-5.

50. *Id.* art. 8(2)(e)(vi)-6.

51. Rome Statute of the International Criminal Court art. 8(2)(b)(xxii), July 17, 1998 2187 U.N.T.S. 90 (grave breaches of the Geneva Convention).

52. *Id.*; ICC *EoC* art. 6(b), n.2 (listing sexual violence as included in Article 6(b)'s definition of the serious bodily harm element of genocide); art. 7(1)(g) 1-6 (explaining rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence as crimes against humanity); art. 8(2)(a)(ii)-1 (war crime of torture).

53. ICC *EoC* art. 7(1)(h)(3) (Crime against humanity of persecution).

quently emerged from the ICC still demonstrate a limited conceptualization of the crimes committed against women by representing the main crime to be, or to emanate from sexual violence.⁵⁴ Finally, the tribunal decisions illustrate the challenge courts face when determining the requisite elements of crimes commonly committed against women during armed conflicts. Formulations that are well accepted during peace time, such as the demonstration of nonconsent, may be overly restrictive in the context of conflict.⁵⁵ The ICC's enumeration, while helpful, can produce the false impression that grave harms committed during conflict are capable of being narrowed down to a checklist of factors and discrete occurrences.

III. CHARACTERIZING THE CRIMES COMMITTED AGAINST WOMEN

I now seek to explain why a limited conception of harm is fundamentally flawed by exposing that the myriad of harms women suffer before, during, and after armed conflicts are far from limited to sexual violence, and by demonstrating that a discrete or insular conception of crimes fails to capture the far-reaching and entrenched acts of discrimination and degradation that women experience. I also propose that while attention to sexual violence crimes is a welcome change from earlier societal oblivion, it carries the concurrent risk of erroneously confining the definition of crimes committed against women to sexual violence, and embedding an overly constrained "elements of the crime" type analysis of violence perpetrated during armed conflicts.

Many of the forms of harm to which women are subjected are similar to those men also suffer. It is essential to understand, however, that even when women are susceptible to the same violations as men, both women's pre-existing socioeconomic and legal status and the embedded cultural norms in a

54. I say "emanate" because the ICC, as discussed, also codifies prohibitions against sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. Although this extends beyond sexual violence, the sexual nature of these harms remains dominant.

55. For an interesting argument that the consent paradigm is inappropriate in the genocide context, see Adrienne Kalosieh, *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, 24 WOMEN'S RTS. L. REP. 121 (2003).

patriarchal society may imply that the ensuing harms are entirely different.⁵⁶ It also cannot be forgotten that women are far from a cohesive or homogenous group. The notion that common gender produces universal experiences or beliefs is negated by the multiplicity of identities and lifestyles within each gender.⁵⁷ Women are both rich and poor, illiterate and educated, and from the countryside and from the city, making their experiences during times of peace and war very different.⁵⁸ With these important caveats in mind, gender—the socially constructed roles, responsibilities, and perceptions of aptitudes and characteristics of women and men—can offer a valuable, although not infallible, insight into the treatment of women during armed conflicts. I take a chronological approach to discuss the gender dimensions of armed conflicts, first identifying and analyzing gender-based harms that fall on women during the lead up to armed conflicts, then turning to women’s unique vulnerabilities during armed conflicts, and finally addressing the harms that women suffer in the after-

56. Ruth Rubio-Marín makes this poignant observation in defining the quest of her book on gender and reparations to account for the “double marginalization” of women victims in transitional and post-conflict societies. Ruth Rubio-Marín, *The Gender of Reparations: Setting the Agenda*, in *WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 20, 22 (Ruth Rubio-Marín ed., 2006).

57. See ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 53 (1995) (identifying the separate experiences and ideologies of women and the effect on the political process). Christine Chinkin also discussed the different ideologies and priorities of women, explaining, “[F]or some there may be very specific health care needs . . . for others, finding information about missing relatives . . . may be their foremost concern; for others . . . attempting to restore normality for their children . . . [but] for all, economic survival will be essential.” Christine Chinkin, *Gender, Human Rights and Peace Agreements*, 18 OHIO STATE J. DISPUTE RESOLUTION 876 (2003).

58. Intersectionality is a sociological study that originated in the 1960s and 70s and formed a “revisionist feminist theory” that challenged the idea of gender as the primary factor determining women’s fate. The movement argued that women as a group did not share uniform life experiences, rather the forms of oppression and discrimination experienced by white, middle class women were far different from those experienced by minority, poor, or disabled women. The term “intersectionality” represents the intersection of multiple forms of discrimination. For a revealing analysis of how intersectionality can be used to understand women’s experiences during armed conflict and exclusion from transition processes, see Fionnuala Ní Aoláin & Eilish Rooney, *Underenforcement and Intersectionality: Gendered Aspects of Transition for Women*, 1 INT’L J. TRANSITIONAL JUST. 338 (2007).

math.⁵⁹ Connecting the treatment of women before and after a conflict to the treatment during a conflict allows patterns of discrimination and degradation to emerge, and also recognizes that before guns are fired and after bombs are dropped, society as a whole is profoundly affected by armed conflict.

Women's experiences before armed conflicts are often characterized by mounting disruption to everyday life. Propaganda used to rally support for military action and inculcate ethnic or national fervor often draws on gender stereotypes of masculinity and femininity.⁶⁰ Women are many times relegated to the domestic sphere as "mothers of the nation" to the detriment of their careers and educational aspirations.⁶¹ The increased mobilization of soldiers can also accelerate human trafficking and the commercial sex trade around military bases, resulting in a dangerous environment for women and young girls.

During an armed conflict, women are exposed to further harm. Women are likely to be less mobile than men because of their child care and elder care responsibilities.⁶² This can leave them unable to flee and at the mercy of occupying forces.⁶³ This lack of mobility often places women at the front lines when conflict ensues, exposing them to trauma, violence,

59. A succinct table identifying many gender issues in conflict situations can be found in "Gender Equality and Peace building: An Operational Framework." BETH WORONIUK, *GENDER EQUALITY AND PEACE BUILDING: AN OPERATIONAL FRAMEWORK* 51, available at http://www.genderandpeacekeeping.org/resources/4_Gender_Equality_and_Peacebuilding.pdf. Judith Gardam and Hilary Charlesworth also provide a strong overview of the significant ways women are affected by war. Judith Gardam & Hilary Charlesworth, *Protection of Women in Armed Conflict*, 22 HUM. RTS. Q. 148 (2000).

60. CYNTHIA COCKBURN, *GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE* 8, available at http://www.genderandpeacekeeping.org/resources/3_Gender_Armed_Conflict_and_Political_Violence.pdf. See also WORONIUK, *supra* note 59.

61. See PATRIZIA ALBANESE, *MOTHERS OF THE NATION: WOMEN, FAMILIES AND NATIONALISM IN TWENTIETH-CENTURY EUROPE* (2006) (exploring the consequences of nationalism, ethnic unrest, and religious zeal on women's rights).

62. Int'l Comm. of the Red Cross [ICRC], *Women and War*, 65, Publ'n Ref. No. 0798 (October 2001), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0798_women_facing_war.pdf.

63. *Id.*

and death.⁶⁴ Conflict also profoundly disrupts family structures and everyday life. Women are often reliant on their husbands or fathers for support. The traditional division of labor is shattered when men leave to go off to fight, are disabled, disappeared, or killed, and women are forced to take on traditionally male responsibilities in addition to their care-giving roles.⁶⁵ This added economic stress can also expose women to increased rates of domestic violence.⁶⁶

When the government and civil society are consumed by a dispute, essential services such as access to food, health care, water, and fuel, may become more scarce.⁶⁷ The collapse of

64. Wars have in fact have become more dangerous for women. Nearly 90% of the casualties in recent wars have been civilians, 40% higher than figures from World War II. Because of women's restricted mobility "civilians" are a group made up predominantly of women. INGOMAR HAUCHLER & PAUL M. KENNEDY, *GLOBAL TRENDS* 184 (Continuum Publishers 1994); ICRC, *Women and War*, 16, Publ'n Ref. No. 0944 (Feb. 28, 2008), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0944.pdf (noting that "populations fleeing violence and threats, mostly women and children, are particularly vulnerable to landmines in border areas" and discussing how the implications of landmine injuries are worse for women because of the value placed on a woman's physical appearance). Haleh Afshar, *Women and Wars: Some Trajectories Towards a Feminist Peace* 13 DEV. PRAC. 178, 181 (noting that "increasingly, wars are fought on the home front. In Iraq it was marketplaces and bridges that were bombed . . . In Afghanistan, it is the towns.").

65. This fact was acknowledged by the Inter-Agency Standing Commission. Their report stated that armed conflict causes "a dramatic increase in the number of women heads of households with responsibilities and high demands for meeting the needs of both children and aging relatives, abrupt changes in women's roles and increased workloads, access to and control over the benefits of goods and services . . . in such situations the human rights of women and children are often directly threatened . . . and women become more exposed to violence, especially sexual violence." Inter-Agency Standing Comm., *Policy Statement for the Integration of a Gender Perspective in Humanitarian Assistance*, 1–2 (May 31, 1999).

66. See Cockburn, *supra* note 60, at 8 (noting that domestic violence often increases as social tensions grow, and that violent episodes can become more dangerous when men increasingly possess firearms).

67. See Gardam & Charlesworth, *supra* note 59, at 153 (noting that women have the most to lose when resources are diverted during armed conflict). See Cockburn, *supra* note 60, at 6–7 (explaining that reduction in welfare spending hits women especially hard because female headed households are less likely to have access to credit or the labor required to increase production). Eugenia Date-Bah, *Sustainable Peace After War: Arguing the Need for Major Integration of Gender Perspectives in Post-Conflict Programming* 5 (ILO Action Programme for Countries Emerging from Armed Conflict, Working Paper, 1996) available at

primary health services often leads to large rises in maternal and child mortality and morbidity.⁶⁸ The women who manage to flee face perilous refugee camps where their needs and priorities are often neglected.⁶⁹ These camps can be especially difficult for women who are many times responsible not only for themselves but also for the well-being of their children.⁷⁰

Even after a conflict has ended, gender dynamics continue to shape reconstruction. Women's perspectives are notably absent from the public sphere—they are often sidelined from formal peace negotiations, excluded from political leadership, impeded from electoral participation, and ignored or misrepresented by the media.⁷¹ Women's access to land ownership and government social benefits is also obstructed.⁷² Many times those who fought in the conflict, a group com-

after-war-arguing-the-need-for-major-integration-of-gender-perspectives-in-post-conflict-programming/attachment ("Essential infrastructure, such as schools, hospitals and bridges, is often targeted for destruction. Public services and administration cease to function or at best function at a very reduced level and, therefore, are not able to reach many members of the population and areas. There is [also] a considerable disruption in education.").

68. Gardam & Charlesworth, *supra* note 59, at 154 ("The reproductive role of women generally makes them particularly vulnerable to shortages in medicine, reliable birth control, and medical treatment."); Cockburn, *supra* note 60, at 11 ("for example, the collapse of primary health services obviously affected women differently, leading to appalling rises in maternal and child mortality and morbidity.").

69. See, e.g., Gardam & Charlesworth, *supra* note 59, at 154 (offering as an example the decisions by relief workers that sanitary towels were a minor concern; a decision that hardly reflects the reality that such provisions are basic to women's dignity and well-being).

70. Up to eighty percent of the World's internally displaced persons and refugees are women and children. Inter-Agency Standing Comm., *supra* note 65, at 1; see Cockburn, *supra* note 60, at 16 ("For women, mainly responsible not only for themselves, but for rearing, controlling, and educating children, refugee camps and overcrowded lodgings are specially nightmarish. Female body processes—menstruation, gestation, parturition, lactation—become more burdensome, uncomfortable, and dangerous. Women and girls are continually at risk of molestation and rape from camp guards and other inmates.").

71. See Eugenia Date-Bah, *supra* note 67, at 70 (offering recommendations for including women's voices in post-conflict reconciliation).

72. Gardam & Charlesworth, *supra* note 59, at 154–155 (noting that men are often placed "in charge of decision-making process[es] regarding humanitarian assistance and its distribution . . . [and] consequently, women are frequently disadvantaged, either deliberately or because their needs are not properly understood.").

posed primarily of men, are given priority for social and health services to the exclusion of women.⁷³ The instability and destruction of communities following a conflict can increase violence experienced in the home, a phenomenon exacerbated by men suffering from posttraumatic stress, unemployment, and dislocation. Destabilization also can overload criminal justice responses to violence against women,⁷⁴ weaken or eliminate social services that would normally respond to violence, and overload typical criminal justice responses.

The harms committed against women during armed conflicts are quite different than the crimes prosecuted by criminal tribunals. First, the harms are heavily contextual in nature and do not conform to ordinary judicial notions of causation. Courts struggle with whether it is appropriate to attribute personal responsibility to those who lay the contextual foundation for crimes later committed by others. In the *Media Case* for example, the appeals chamber for the ICTR dated responsibility for inciting genocide at the outbreak of mass physical killings, viewing evidence of the link between the genocidal acts and broadcasts aired before then as “at the very least, tenuous” especially when the period between them was “relatively long [T]he longer the period between broadcast and action, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it.”⁷⁵

73. Christine Chinkin discusses the different needs and priorities of men and women following an armed conflict in the context of forming an effective peace agreement by including the voices of both genders. She also points out that the “presence of international military or peacekeeping forces [following a conflict] creates the potential for increased prostitution, sexual violence, and . . . human trafficking.” Chinkin, *supra* note 57, at 877. Aid that may be available to women may reinforce patriarchal norms by being available to women only in their role as mothers. Hilary Charlesworth, Christina Chinkin & Shelley Wright, *Feminist Approaches to International Law* 85 AM. J. INT’L L. 613, 641 (1991) (citing a World Bank report that acknowledged that women’s projects were almost exclusively in the areas of “health, hygiene, nutrition, and infant care.”). WORLD BANK, WORLD BANK EXPERIENCE WITH RURAL DEVELOPMENT 1965-1986 89 (1987)).

74. Chinkin, *supra* note 57, at 881.

75. Catherine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, 103 AM. J. INT’L L. 97, 98 (2009). (citing *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-A, Appeals Chamber Judgment, ¶ 513 (Nov. 28, 2007)).

It should come as little surprise that international tribunals struggle over questions of causation. It is an enigmatic requirement in domestic law as well. The implications of this difficulty, however, are clear. If a court waives in finding that a radio station instigated genocide when it repeatedly used slogans calling for the extermination of the Tutsi, it would be naïve to think a court would conclude there is a clear connection between the identified gender-based harms and armed conflicts. Regardless of the number of studies that demonstrate a connection between armed conflicts and increased human trafficking or domestic violence, the link does not fit neatly into the legal theories courts use to determine whether the causation requirement has been met.

Second, many of the harms identified are not considered crimes. When a woman is forced to abandon educational opportunities, left impoverished after losing financial support, or relegated to inadequate social services, the events are devastating but not viewed as criminal. These harms are therefore not addressed by tribunals. Moreover, the exclusion from reconstruction efforts, the dangerous instability in communities, and the obstruction of access to essential government services are real harms, but are not criminal. Furthermore, they may occur *after* rather than during the armed conflict, the latter of which is the period over which war tribunals have jurisdiction.

Finally, criminal tribunals focus on discrete occurrences rather than patterns of abuse. Women are not only harmed as individuals when these harms befall on them, they are harmed as a class by the pattern of harms which further reinforces entrenched social inequalities.⁷⁶

I have sought to illustrate that the harms committed against women during armed conflicts cannot be reduced to sexual violence and are not encompassed by crimes prosecuted by criminal tribunals. Courts only recognize a small subset of the harms committed against women and fall far short of addressing all gender-based harms and curing gender biases

76. See Medina Haeri & Nadine Puechguirbal, *From Helplessness to Agency: Examining the Plurality of Women's Experiences in Armed Conflict*, 92 INT'L REV. RED CROSS 103, 108 ("[Women] are not vulnerable *per se* as a matter of their biology. Rather, it is the pre-existing peacetime social inequalities, which are further reinforced by conflict, that result in women's wartime vulnerabilities.").

entrenched in society and institutions. Women at all stages of an armed conflict experience harm that is both a result and reinforcement of their vulnerable position in society.⁷⁷ To ignore broader harms is to risk perpetuating a false account of both the crimes committed and their genesis.⁷⁸ Overly focusing on sexual violence crimes may also demonstrate a patriarchal prejudice that reduces women to mere sexual beings.

IV. EVALUATING TRANSITIONAL JUSTICE MECHANISMS

The time immediately following an armed conflict is a critical junction, as that is when a country is faced with the decision of how to best account for the past, and move forward into the future, in a way that ensures stability and, hopefully, democracy and respect for human rights. This unique historical moment has spawned “transitional justice,” a wide-ranging interdisciplinary exchange dedicated to dealing with the past and building a durable peace. Hard problems rarely lead to simple solutions; it is thus unsurprising that such a laudable goal is often difficult to achieve, and that debates about best practices and appropriate aims are hard fought. I utilize the broader definition of harm developed in the previous section

77. In December 1993, the UN General Assembly passed a resolution “[r]ecognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.” G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

78. Crimes committed against women have been historically underreported. For example, the “fact finding” mission in Rwanda in 1994 did not detect the systematic sexual violence being perpetrated against women until women began giving birth in unexpected numbers. Ann Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, 19 HUM. RTS. Q. 283, 292 & n.31 (1997). Ignoring crimes committed against women, or viewing them on a lesser plane may be a result of entrenched discrimination within international law. *Feminist Approaches to International Law* suggests that “international law accords priority to civil and political rights, rights that may have very little to offer women generally. The major forms of oppression of women operate within the economic, social and cultural realms. Economic, social and cultural rights are traditionally regarded as lesser form of international right and as much more difficult to implement.” Charlesworth, Chinkin & Wright, *supra* note 73, at 635.

to critically evaluate whether prosecutions or truth commissions are institutionally better suited to account for the full scope of harms women experience during armed conflicts.⁷⁹

A. *Investigative Framework*

As mentioned, the proper goals of transitional justice are not undisputed; such judgments are far from content neutral. In defining goals, an analogy to traditional criminal justice aims—deterrence, retribution, incapacitation, utilitarianism, and rehabilitation—is tempting. Additional, far-reaching aspirations to strengthen democracy and respect for human rights are also commendable. I confine my analysis, however, to questioning how prosecutions and truth commissions respond to the following goals for addressing crimes committed against women:

1. *Punishing offenders, both those responsible for committing the immediate crime and those that contributed to the offence by ordering or facilitating its occurrence.* This goal could be described as fulfilling four functions of criminal justice—retribution, by punishing the offender; incapacitation, by removing the offender from society; specific and general deterrence; and rehabilitation.
2. *Memorializing the full scope of past atrocities.* This aim is more difficult to characterize under a traditional criminal justice understanding of the goals of punishment. Most crimes committed outside of the context of an armed conflict can easily be encapsulated into an “elements of the crime” formulation. Crimes perpetrated during armed conflicts, however, become increasingly non-discrete occurrences that require more consideration of the contextual background in which they occurred, as discussed in the preceding section.

79. Prosecutions and truth commissions are not the only transitional justice mechanisms available. Reparations, lustration, and amnesties have also played an important role following armed conflicts. My analysis, however, will focus on prosecutions and truth commissions in particular because of the large role they play during a transition. For a helpful analysis of the gender dimensions of reparations, see generally WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATORS, *supra* note 56, and THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Marín ed., 2009).

3. *Properly respecting and responding to the needs of victims.* This goal also does not easily fit within the traditional aims of criminal justice, which is generally perpetrator rather than victim-centered.
4. *Cultivating respect and opportunities for women in the post-conflict society.* This aim is similar to the general forward-looking utilitarian idea that punishment is justified by the ensuing good consequences it produces.

My evaluation of prosecutions and truth commissions will be multifaceted. It is important to consider whether these aims are achieved in practice. It is essential, however, to also explore the institutional characteristics of each transitional justice response that make achievement of the enumerated aims more or less attainable in the future. This evaluation is crucial because limitations exposed here cannot be corrected without changing the fundamental characteristics of the mechanism itself, an option that is often untenable.

It is important to note that it is not my intention to designate a hierarchy of goals. I am not advocating a ranking between the above enumerated aims or proposing where on the general spectrum of transitional justice objectives my identified gender goals should lay.⁸⁰ Divorced from this value judgment, I examine how prosecutions and truth commissions meet each goal.⁸¹ I am also not claiming that my list of gender goals is all-inclusive. Rather, I have chosen to limit my analysis to aims most commonly articulated.

Finally, women's experiences during armed conflicts cannot be understood by an analysis limited to sexual violence crimes, as discussed in the preceding section. Recognizing,

80. I also have not spent time responding to scholars that argue that post conflict justice is an extravagance, that is both costly and potentially destabilizing. The importance of transitional justice is assumed here.

81. Others have acknowledged that different human rights violations may require different transitional justice mechanisms. Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002). The importance of evaluating mechanisms in light of different contexts is often lost when scholars lump together different crimes under expansive terms like "mass atrocities." The constitutive elements of the crime and the conflict profoundly affect the desirability of an approach. In addition, while the appropriate response to some crimes during peace-time may unquestionably be prosecutions, during a transition an alternative mechanism may be far superior.

however, that some may not accept my broader definition of crimes committed against women, I evaluate the ability of each mechanism to account for both the broad gender harms discussed and for sexual violence crimes in particular.

B. *Prosecutions*

As Miriam J. Aukerman notes, while many disagree about the practicality of prosecutions in certain contexts, there is a pervasive assumption that prosecuting perpetrators is the “optimal method for dealing with past atrocities.”⁸² In her holistic analysis of prosecutions as a transitional justice tool, Aukerman points out that “[p]rosecutions are better designed to achieve some goals than others.”⁸³ Her valuable analysis will not be repeated here, but her point is well taken; the efficacy of prosecutions as a transitional justice response can only be evaluated in light of its ability to achieve stipulated goals. I discuss both prosecutions undertaken by domestic and international tribunals. Although there are notable differences between them, for our purposes a conjunctive analysis will be the most illuminating.

1. *Punishing Offenders*

Punishment seems to quite naturally require prosecutions. Our proclivity towards prosecutors, judges, and trials is probably based on the accepted societal response to wrongdoings during peace time and the widespread veneration of the Nuremberg Trials.⁸⁴ Many argue that only prosecutions allow the, “identification, exposure, condemnation and proportionate punishment of individuals who violated fundamen-

82. *Id.* at 40. A fervent argument for the superiority of prosecutions can be found in Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991). Many believe high costs, low bureaucratic capacity, and the potential for dangerous political consequences are potential prohibitive roadblocks to prosecutions.

83. Aukerman, *supra* note 81, at 44.

84. Ruti Teitel explains that the notion of trials as “foundations for liberalizing political change” can be traced to the Middle Ages, offering the trials of King Charles I and Louis XVI as examples of the tradition of trials. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L. J.* 2009, 2036 (1997).

tal norms recognized internationally as crimes.”⁸⁵ Others ominously warn, that the “complete failure of enforcement [through not employing prosecutions] vitiates the authority of law itself, sapping its power to deter proscribed conduct.”⁸⁶ In practice, however, the ability of prosecutions to expose, condemn, and deter crimes committed against women during armed conflicts is less than clear.

“Squandered opportunities, periods of neglect, and repeated mistakes have caused setbacks to effective investigations and prosecutions [of crimes committed against women during armed conflicts].”⁸⁷ Ingrained societal biases towards both women generally and victims of sexual violence in particular are often the underlying culprits. Investigators many times lack experience and training in responding to sexual violence. The result is shoddy investigative work that can later prevent rape charges from being brought or force them to be withdrawn altogether.⁸⁸

Investigative problems are compounded when tribunals require evidence of nonconsent or forensic documentation of intercourse. The earlier discussion outlining the jurisprudence that emerged from the ICTY and ICTR illustrated the difficulties courts have defining the *actus reus* and *mens rea* of sexual violence. A mechanical definition and steep evidentiary requirements is especially burdensome to victims of sexual violence committed during an armed conflict. The consent requirement that seems necessary in peacetime to distinguish lawful sexual acts is often impertinent in the highly coercive atmosphere of an armed conflict. While it may be appropriate to expect a victim to report sexual violence immediately and provide corroborating evidence during peacetime, the same requirements are much more onerous in the midst of an armed conflict.

85. Douglass Cassel, *Why We Need the International Criminal Court*, 116 THE CHRISTIAN CENTURY 532, 533 (1999).

86. Orentlicher, *supra* note 82, at 2542.

87. COAL. FOR WOMEN’S HUMAN RIGHTS IN CONFLICT SITUATIONS, WE CAN DO BETTER INVESTIGATING AND PROSECUTING INTERNATIONAL CRIMES OF SEXUAL VIOLENCE 2 (2004) [hereinafter IMPROVING INVESTIGATIONS AND PROSECUTIONS], http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php.

88. *Id.*

In addition, prosecutors have frequently failed to even file charges for sexual violence. When changes are brought, many complain they “are often added belatedly, as an afterthought, in amendments that are not properly integrated into cases.”⁸⁹ Practicality also requires that prosecutions be necessarily selective. Only a fraction of perpetrators will ever stand trial, and those that do may be far from the most culpable.

Recognizing these failures, suggestions have been made to improve the investigation of crimes committed against women, and to design a more effective prosecution strategy.⁹⁰ Training on gender sensitivity and on developing skills in sexual violence investigation and jurisprudence, has been advocated and would be helpful.⁹¹ Training can be essential to dealing with sexual violence victims who are often reluctant to talk about their experiences and may not recognize the harms committed against them are worthy of punishment.

Prosecutions have an even more troubling track record of responding to harms other than sexual violence. Sexual violence has been the overwhelming focus of most tribunals to the exclusion of other more contextual harms.⁹² Broader harms often appear invisible to prosecutors, judges, and investigators. This can be attributed to the limited jurisdiction and resources of war crimes tribunals. While better awareness and expanded jurisdiction may help address this problem, structural limitations may still obstruct major improvements. Inherent institutional limitations that can thwart the punishment of

89. *Id.*

90. The Coalition for Women’s Human Rights in Conflict Situations advocates a prosecution strategy at the outset to ensure “the consistent inclusion of such charges in the indictments.” They stress that this requires “continuous and sustained attention to the collection and compilation of sexual violence evidence.” *Id.*

91. *Id.*

92. This was seen in the historical analysis in section two of this paper, and has also been cited by other scholars. *E.g.*, Katherine M. Franke, *Gendered Subjects of Transitional Justice* 15 COLUM. J. GENDER & L. 813, 822-23 (2006). Some attribute the focus on sexual violence, to the detriment of other women’s issues such as socioeconomic priorities, as a reflection of the fact that women “from the ‘third world’ are not the prime architects of the priorities and approaches of the international women’s movement.” Vasuki Nesiiah, *Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice*, 15 COLUM. J. GENDER & L. 799, 805 (2006).

deserving offenders include an individual notion of punishment, the requirement that basic due process standards must be met, and a conception of crimes as discrete occurrences that are capable of being defined by set elements.

Employing prosecutions assumes that, “even . . . massive horrors can and should be treated as punishable criminal offenses perpetrated by identifiable individuals.”⁹³ The problem with an individual notion of punishment is that it absolves large segments of the population. The contextual harms discussed in section three are not created by one individual; rather, they are formed by systematic disadvantages engrained in society through years of practice and affirmation. Even sexual violence is not solely the criminal act of an individual. Sexual violence relies on the enabling environment an armed conflict provides, and women are often targeted based on entrenched societal notions of honor and property.

The problematic focus on individuals at Nuremberg profoundly minimized the complicity of German citizens and the participation of German and international businesses in Nazi crimes. An individual notion of punishment should be profoundly troubling from a number of perspectives. First, it means that everyone responsible is not being appropriately punished. Second, because leaders must often rely on the complicity of society to orchestrate large atrocities, absolving collective responsibility dangerously removes valuable consequences for civilians whose indifference or aid is necessary to perpetrate war crimes.

The second institutional characteristic of prosecutions that can provide a hurdle for punishing crimes committed against women is due process constraints. The legitimacy of trials requires that due process norms be respected. The value of protecting the rights of defendants is not being questioned here, rather the consequence—that technical acquittals may interfere with substantive justice⁹⁴ and “elements of the crime”

93. Aukerman, *supra* note 81, at 42 (quoting MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 25 (1998)).

94. See GARY JONATHAN BASS, STAY AT THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 285 (2000) (discussing similar concerns for war crimes tribunals generally).

definitions may hamper the recognition and punishment of broader harms is being posited.

Due process requires that the defendant be permitted to confront their accuser and that the prosecutor prove guilt based on evidence. These two fundamental requirements may pose large hurdles in sexual violence cases. Elements of the crime formulations provide difficulties for prosecuting sexual violence and are practically prohibitive to punishing broader harms as described earlier. I have not identified these institutional drawbacks to argue, as some have, that the institution itself should be modified and the rights of war criminals be relegated to a lower importance.⁹⁵ That would risk the legitimacy of the transition itself. Rather, I contend that such limitations may indicate whether prosecutions are well suited to meet the outlined gender goals.

Finally, despite these drawbacks, many claim that only prosecutions provide sufficient deterrence to potential war criminals. The actual deterrent effects of prosecutions, however, are limited by the practical realities and systemic limitations of prosecutions. It is normally believed that for deterrence punishment must be either certain or severe; the perceived cost must be greater than the perceived benefit; and the offender must permit such calculations to influence their decision to act. The last two prongs are questionable for a war criminal; “men willing to commit mass murder are terribly difficult to dissuade”⁹⁶ and the severity and certainty of punishment is also unclear. Punishment is, in fact, far from certain—far fewer offenders will be prosecuted than go free—and due process protections and modest sentences may result in mild punishments.⁹⁷

2. *Memorializing the Full Scope of Past Atrocities*

It has been argued that the “trials involving genocide or crimes against humanity are less about judging a person than

95. Beltz, *supra* note 3, at 195–96.

96. Bass, *supra* note 94, at 291.

97. There is often outcry at the mild sentences offenders receive. For example, in the recent Congolese case against Congolese Lt. Col. Kebibi Mutware, victims are cited as complaining that the sentences (20 years) were not harsh enough. *Congo Colonel Gets 20 Years After Rape Trial*, *supra* note 44.

about establishing the truth of events.”⁹⁸ An apt example is the prosecution of Adolph Eichmann. Koskenniemi explains,

while the prosecution . . . was almost universally held to be necessary, few thought that the necessity lay in the need of punishing Eichmann, the person. He was, after all, only a cog in the Nazi killing machine. Instead, the trial was held to be necessary in order to publicize the full extent of the horrors of the Nazi war against the Jews . . . His death would in no way redress the enormity of the crime in which he had been implicated. It might even diminish the extent to which the special nature of that crime lay in its collective nature as part of the official policy of the German nation.⁹⁹

It is possible, in fact, to attribute much of the historical record of the atrocities committed by the Nazis and the resulting inability of others to disprove those atrocities to the extensive record created during the Nuremberg trials.¹⁰⁰

In practice, whether trials develop an accurate historical account is suspect. Determining the objective truth of past atrocities is difficult, if not impossible in the wake of an armed conflict.¹⁰¹ The ability of prosecutions “to express or conserve the ‘truth’ of a complex series of events involving the often erratic action by major international players” is also questionable.¹⁰² The large number of international and national stake holders may compromise the capacity of trials to form an objective report of what occurred. These challenges could be addressed by employing additional safeguards to ensure a more

98. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. OF U.N. L. 1, 3 (2002). Bass argues that among the objectives frequently cited by liberals, the only objective for tribunals that “seems unambiguously worthy” is their ability to establish “a definite record.” Bass, *supra* note 94, at 286–87.

99. Koskenniemi, *supra* note 98, at 3.

100. Bass, *supra* note 94, at 302–03.

101. Koskenniemi notes how “[i]t took years until the full extent of the Jewish catastrophe was revealed to the victors. . . [a trial in the immediate aftermath] will necessary[ly] be based on fragmentary evidence and influenced by interpretations by contemporaries with a concrete stake in the result.” Koskenniemi, *supra* note 98, at 22.

102. *Id.* at 1.

deliberative process. Other problems, however, are inherent to trials themselves.

Legal and historical truths are far from identical. The “truth” that ultimately emerges from tribunals can offer an inaccurate account based more on prosecution strategy than the reality of past events. There is also the concurrent danger, if the purpose of a trial is to establish the truth of events, a defendant may attempt to “hijack” the truth and record their version of the facts.¹⁰³ It is practically inevitable that the defendant will introduce his version of truth during a trial. Establishing any defense—superior orders, command responsibility, *tu quoque*, self-defense, necessity, proportionality, or reprisals—requires the defendant to reference the context in which the accused crime occurred. This result is dangerous for the very fact that it cannot be avoided unless the safeguards inherent to a fair trial are disregarded; a result that should be untenable.

In fact, even the venerated Nuremberg trials are not immune from criticism that the resulting truth was troublingly inaccurate. For many, the trial unduly minimized the significance of attacks on civilians, portrayed the Nazi regime as “aggressive militarists,” downplayed the racist and genocidal characteristics of the Nazi regime, and whitewashed the atrocities committed by the Allied Powers.¹⁰⁴

Trial procedures mandate an individual approach and center on the pertinent facts deemed relevant to judge the guilt of the individual. This is not a problem during peacetime when the broader context is unimportant and the main focus is on whether the accused “did it.” The context in which events occurred, however, takes on increasing importance when responding to harms committed during an armed conflict. The truth of historical events requires attention to the “structural causes, such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects” that is impossible with an individual focus that does not take into account contextual

103. The Milosevic trial is an apt example. Koskenniemi explains how, during the course of the trial, Milosevic “conducted his defense less in order to save himself than in order to get his version of truth across to the public in Serbia.” *Id.* at 17–18.

104. *Id.* at 20.

causes.¹⁰⁵ That a historically accurate truth often fails to emerge from prosecutions should not be surprising. The adversarial process, where both sides are charged with vehemently presenting the facts most favorable to their side, is designed to best determine the guilt of the accused while protecting their rights. Relying on prosecutions to write history detracts from that fundamental purpose.

This section has identified many of the practical and institutional limitations that make it difficult for trials generally to record an accurate account of past atrocities. Such limitations are compounded in the case of recording crimes committed against women specifically. The same practical and institutional constraints that keep charges from being brought against perpetrators discussed in the preceding section also concurrently result in a historical account that is skewed against women.

3. *Properly Respecting and Responding to the Needs of Victims*

Prosecutions have been heralded as affirming “the inherent dignity of individuals,”¹⁰⁶ and as necessary to enable the healing process.¹⁰⁷ This characterization is based on the belief that an individual is validated when the crimes committed against them are recognized and punished. Victims, however, are often auxiliary rather than central to the criminal justice process. A trial focuses on establishing the guilt or innocence of the accused, not on telling the victim’s story. Most institutional protections are designed to benefit the accused, not those that testify against them. While these problems are present for the victims of all crimes, they may be especially exacerbated for women.

Prosecutors’ offices have been widely criticized for “problems with training investigatory staff, providing witness protection, implementing confidentiality protection, and ensuring security in travel back . . . as well as for inappropriate cross-examination[s], inadequate counseling for victims, and

105. *Id.* at 13–14.

106. Orentlicher, *supra* note 82, at 2542.

107. Koskenniemi explains that it is commonly believed that “only when the injustice to which a person has been subjected to has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored.” Koskenniemi, *supra* note 98, at 4.

the lack of sanctions for improper judges.”¹⁰⁸ Many institutional features of prosecutions are to blame. The manner in which a trial is conducted minimizes consideration for the victim. Relevance rules confine the manner in which a victim can tell their story. Testimony about the historical or social contexts in which crimes occurred, or that were by themselves harms to the victim is often excluded.

Due process requires the accused have an opportunity to confront their accuser. The experience of being cross examined is often humiliating and demeaning. Women are often asked detailed questions on topics that are profoundly uncomfortable and are subjected to disbelief and scrutiny for their sexual past. Trials can be marathon experiences that involve hours, days, and weeks of going over the same questions.¹⁰⁹ Many victims who have testified within tribunals often report feeling “more silenced than heard” by tribunal judges.¹¹⁰ After testifying, victims commonly complain that they have “little or no regular information or updates about what happens in the cases with which they help the prosecutor’s office.”¹¹¹ Such silencing and sidelining contributes to a sense of alienation and invisibility.

In addition, due process requires the defendant be notified of the identity of witnesses testifying against him, thereby threatening victim safety. This can be troubling when prosecutors fail to inform witnesses of the entire risk of testifying.¹¹² With victims, it is important for investigators and prosecutors to restore a sense of autonomy and agency. Victims have ex-

108. Franke, *supra* note 92, at 818.

109. For example, it was noted that in one case the woman was asked 1,194 questions by defense council. IMPROVING INVESTIGATIONS AND PROSECUTIONS, *supra* note 86.

110. Franke, *supra* note 92, at 818.

111. IMPROVING INVESTIGATIONS AND PROSECUTIONS, *supra* note 87.

112. Witnesses are often assured that their identity will be kept confidential. They are not told that the accused will know the names of witnesses that testify against them, which often means that the name of a witness will be known back home. This places women at risk for reprisal, and often harms their interpersonal relationships because of the stigma of being a rape victim. For examples of killings and intimidations of witnesses/others who cooperate with the international criminal tribunal for Rwanda, see Connie Walsh, Center for Constitutional Rights, Witness Protection, Gender and the ICTR, WOMENSRIGHTSCOALITION.ORG, 1997, http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php.

perienced severe, life-altering events occurring outside of their control. Prosecutors and investigators should strive to restore their sense of autonomy. Full disclosure and explicit warnings are essential to allowing victims make an informed decision about their participation in trials.

Although many features of the adversarial process—due process requirements and perpetrator-centered investigations and trials—cannot be changed without altering the fundamental nature of the institution itself, sensitivity training for prosecutors, defense attorneys, and judges, along with counseling services and medical treatment for victims may profoundly improve the trial process for victims and work to better respect and respond to their needs. Still, a fundamental institutional problem remains because “[h]ealing the witness is not and cannot be the court’s concern . . . bearing witness . . . [to heal] requires an empathetic listener, someone to hear and affirm suffering . . . [not] an objective arbiter tasked with deciding what happened.”¹¹³

4. *Cultivating Respect and Opportunities for Women in Post-Conflict Society*

As a society undergoes fundamental changes, an occasion to generally cultivate respect and opportunities for women emerges. Unfortunately, many transitions fail to offer meaningful improvements for women; even formal guarantees may only function to shroud a depressing reality.¹¹⁴

Tribunals do not generally propose far-reaching policies or offer general recommendations. Instead, judges are tasked with rendering a decision on the case at hand with the facts presented. Their power, however, extends beyond judging the guilt of the accused. Trials can illustrate the priorities of a society and can forge a “hard break” with the past. Which crimes are charged, the manner in which a trial is conducted, and how punishment is meted out all offer an invaluable glimpse into a society’s values. Trials can represent an opportunity to build respect for women in a post-conflict society. For exam-

113. Franke, *supra* note 92, at 821–22.

114. Afghanistan has been offered as an example of a transition where the role of women did not meaningfully change. Formal guarantees to equality have been systematically ignored in practice. See Aoláin & Rooney, *supra* note 58, at 352.

ple, when sexual violence was recognized to qualify as a war crime, an act of genocide, and a crime against humanity, the gravity of the violence committed against women was acknowledged and, accordingly, women's rights were affirmed. When, however, the harms committed against women are forgotten and misrepresented rather than punished, when the scope of past atrocities are ignored rather than memorialized, and when women victims are disregarded or disrespected rather than treated sensitively and respectfully, an opportunity to improve women's condition in society is lost.

Thus, while courts are not institutionally equipped to mandate broad changes, they do possess a profound capacity to send valuable normative signals that can resonate throughout society.

C. *Truth Commissions*

Truth commissions are being increasingly employed during transitions.¹¹⁵ Truth commissions are tasked with documenting past human rights abuses, identifying responsible individuals and institutions, and recognizing and memorializing the experiences of victims.¹¹⁶ They are also often charged with making recommendations for later prosecutions, reforms, and reparations.¹¹⁷ The efforts of truth commissions are not immune to criticism.¹¹⁸ Here, however, the focus will be on

115. Argentina, Chile, El Salvador, Guatemala, Peru, Sierra Leone, and South Africa are just a few of the countries that have employed truth commissions following a conflict. The estimate of the number of truth commissions that have been employed in the twentieth century worldwide varies from less than two dozen to nearly 75 because of the difference in how the "truth commissions" are defined. Eric Brahm, *What is a Truth Commission and Why Does it Matter?* 3 PEACE & CONFLICT REV. 1 (2009) (reviewing over 70 potential truth commission cases in an effort to establish a unified definition of a "truth commission").

116. VASUKI NESIAH, INT'L CTR. FOR TRANSITIONAL JUSTICE, TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES, AND PROCEDURES 1 (2006).

117. *Id.*

118. See, e.g., Neil J. Kritz, *Progress and Humanity: The Ongoing Search for Post-Conflict Justice*, in POST CONFLICT JUSTICE 55, 62 (M. Cherif Bassiouni ed., 2002) (noting typical concerns about truth commissions, including: the truth commission would conduct overlapping investigations; inconsistent statements made by the same individual to the truth commission and prosecutors could be used to impugn witness testimony; the truth commission may compete for international resources and local attention; and the combination of the ICTY and TRC would be confusing to many in society).

how truth commissions fulfill the goals outlined for addressing crimes committed against women.

1. *Punishing Offenders*

The belief that “whatever salutary effects it can produce, an official truth telling process is no substitute for enforcement of criminal law through prosecutions” is quite common.¹¹⁹ Even those that celebrate the inclusion of truth commissions in a transition process do not commonly advocate for truth commissions as total replacements for prosecutions or suggest that their virtue is their ability to punish offenders.¹²⁰ Truth commissions are in fact institutionally constrained from imposing traditional forms of punishment—they cannot sentence an offender to time in jail or impose other sorts of penalties.

Our conception of punishment as incarceration, however, may be overly limited. For regimes that have steadfastly denied human rights abuses, the exposure of such crimes and the identification of those responsible can function as retribution. Although the potential for offenders to walk free may be unsatisfying, selective prosecution and limited punishments are also disquieting. If the form of punishment that truth commissions offer is the power to investigate past abuses and to identify enabling conditions and offenders, the only way to judge whether perpetrators are in some way “punished” for the crimes they commit against women is by determining whether those offenses are properly memorialized.

2. *Memorializing the Full Scope of Past Atrocities*

A recognized advantage of truth commissions is their ability to “canvass much more widely and deeply the criminality under scrutiny.”¹²¹ How truth commissions record “truth” is controversial. Many argue that the role of a truth commission

119. Orentlicher, *supra* note 82, at 2546 n.32.

120. See, e.g., Juan E. Mendez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 1, 15 (A. James McAdams ed., 1997) (arguing that using a truth commission as an alternative to criminal prosecution is “[t]he most extreme form of tokenism,” and suggesting that “[s]ocieties that are in a position to provide both truth and justice to the victims of human rights violations should be encouraged to pursue both objectives as much as they can.”).

121. Koskeniemi, *supra* note 98, at 12.

is not to write history by interpreting facts, but instead to objectively report what occurred. This undertaking can be complicated. Irrespective of intent, deciding which facts are pertinent is an enterprise of interpretation and discretion.¹²² Whether the underlying facts that form the commission report need to meet certain evidentiary standards is also questionable since exclusion based on forensic verifiability may preclude testimony that speaks to larger sufferings during an armed conflict.¹²³

Requiring that testimony be forensically verifiable also disadvantages women. First, broader harms that are often anecdotal or contextual but necessary to understand the full scope of the conflict are excluded.¹²⁴ Second, insular crimes, like sexual violence, often occur years before a truth commission is established. By the time a truth commission is instituted, any evidence or witnesses have long since vanished. In addition to these challenges, it can often be difficult for even well-intentioned truth commissions to incorporate women's experiences. Women are often reluctant to discuss their own experiences and their testimonies may exclude or minimize the harm done to them personally.¹²⁵

Generally, truth commissions have neglected gender and failed to address the impact of human rights abuses on women.¹²⁶ It is important to recognize that truth cannot be gender neutral.¹²⁷ When women's perspectives are excluded or misrepresented, a male-privileging power entrenching truth emerges in its place. For example, truth commissions often focus on killings, disappearances, custodial torture, abduc-

122. See Nesiah, *supra* note 92, at 802 (discussing the debate on the role of truth commissions in interpreting history).

123. *Id.* at 803 (debating the legitimacy or truth value of "survivor" testimonials).

124. An apt example is Peru. To understand the full scope of sexual violence committed during the armed conflict, one must grasp the contextual background in which rapes occurred. The injury of rape was compounded by the criminalization of abortion, resulting in many forced pregnancies. Viewing the injury more broadly allows one to see the range of legal and ideological factors that impacted the crime. VASUKI NESIAH, *supra* note 116, at 22.

125. The International Center for Transitional Justice (ICTJ) offers a number of plausible explanations for this occurrence. *Id.* at 17.

126. *Id.* at 2.

127. *Id.* at 7.

tions, and illegal imprisonment—excluding many of the dimensions discussed earlier that more fully encompass the scope of women’s experience during an armed conflict.¹²⁸ A focus on bodily crimes also risks reducing women’s experiences during armed conflicts to sexual violence.

A number of suggestions have been made on how to better incorporate gender into the agenda of truth commissions.¹²⁹ Staff recruitment efforts, gender mainstreaming, and having a dedicated gender unit have all been proposed. The mandate of a truth commission can also dramatically affect its ability to investigate more contextual crimes. Employing more thematic hearings that allow public discussions about the structural causes of the conflict, highlight broader patterns of abuse, and offer a more complex understanding of women’s role in the conflict also help to better record their experiences.¹³⁰

This section has exposed many practical challenges in fully memorializing the scope of atrocities committed against women. These problems are important and illustrate that currently this gender aim is not being accomplished. These difficulties, however, are not institutional constraints like those found in the analysis of prosecutions. The challenges experienced are capable of being addressed without altering fundamental qualities of the mechanism itself. This leads to the conclusion that truth commissions are better equipped to accomplish this gender aim.

3. *Properly Respecting and Responding to the Needs of Victims*

Unlike prosecutions, truth commissions are not focused primarily on the perpetrator. Instead, through investigating crimes and taking testimonies to memorialize the content of past atrocities, truth commissions are better able to focus on the needs of victims. Relaxed due process standards, and the

128. The ICTJ offers the South African case as an example of a truth commission whose lens was too narrow to account for the extreme vulnerabilities and structural inequalities created during apartheid. *Id.*

129. The ICTJ offers a number of recommendations about how to better incorporate gender into truth commission reports and investigations. *Id.* at 34–41.

130. *Id.* at 26.

absence of potentially painful cross-examinations create a more welcoming environment for victims.

Admittedly, truth commissions can also falter in respecting women victims and, at times, commissions may be forced to balance the needs and desires of victims with that of society as a whole. Still, the institutional constraints that prevented prosecutions from fully responding to victims' needs are not present in the truth commission process, making truth commissions better institutionally equipped to accomplish this goal.

4. *Cultivating Respect and Opportunities for Women in Post-Conflict Society*

Unlike prosecutions, truth commissions are often charged with offering general societal recommendations for reforms. Unfortunately, many times this valuable opportunity to offer proposals that can dramatically improve women's position in society after a conflict is squandered.

Fortunately, like with other aforementioned shortfalls of truth commissions, this is not an institutional limitation. The recommendations outlined to help incorporate gender into the agenda of truth commissions can also encourage commissions to make recommendations that have far reaching effects on women's opportunities in post-conflict society. Although underutilized, the capacity to make binding or nonbinding broad policy recommendations illustrates the ability of truth commissions to accomplish this goal.

D. *Evaluation*

An analysis of how prosecutions and truth commissions achieved the delineated goals for addressing crimes committed against women exposed a rather clear divide. While both prosecutions and truth commissions failed to optimally respond to crimes committed against women, the prosecution model was hampered by more numerous and more profound institutional constraints.

Many of the institutional drawbacks identified impede not only the accomplishment of gender aims, but also can obstruct the wider goals of transitional justice. This should not lead to the conclusion that a gender disadvantage does not exist. First, section three illustrated how women often, because of

their more vulnerable position in society, fall victim to broader, more entrenched harms. Accounting for these broader harms proved especially encumbered institutionally by a prosecutions model. Second, institutions can have a differential impact, even if men and women are disadvantaged in the same manner. Women, as a politically disempowered group, are likely to have more limited recourses when institutions fail them. Finally, skepticism that transitional justice fails to fully account for women's perspectives should not be quickly dismissed. Women are notably absent from most negotiating tables following armed conflicts and have suffered from systematic political exclusion. Extra caution should always be taken before disregarding the possible gender dimensions of prescribed methods.

V. CONCLUSIONS AND PROPOSALS

The importance of acknowledging the pitfalls of prosecutions has been advanced by other scholars.¹³¹ Similarly, others have also insisted that gender awareness and sensitivity need to be more widely and thoroughly incorporated into transitional justice responses. An evaluation of how prosecutions and truth commissions punish offenders, record the scope of past atrocities, respect and respond to victims, and promote gender equality in post-conflict societies has led to a synthesis of these contentions—it has illustrated that institutional limitations can make some transitional justice mechanisms better or worse suited for responding to crimes committed against women.

Due process requirements, a focus on individual criminality, perpetrator-centered proceedings, evidentiary standards, causation requirements, and “element of the crime” formulations—all constitutive elements of prosecutions—make trials especially ill-suited to achieve the gender justice goals outlined in this paper. I do not contend truth commissions are a panacea for accounting for the crimes committed against women; many practical obstacles emerged during the analysis. Rather, I argue that, just as squandering resources during a transition is universally accepted as unreasonable, ignoring the potential gender outcome disparity of certain transitional justice mecha-

131. See, e.g., Kritz, *supra* note 118.

nisms should be considered unacceptable. If some responses systematically fail to properly account for the crimes perpetrated against women, the choice of employing one mechanism rather than another, or the resource allocation between transitional justice tools, is a gendered decision that cannot be disregarded.

The observations made here do not offer easy solutions. The historical treatment of crimes committed against women illustrate that women's plight is often ignored or distorted. The jurisprudence that emerged from the ICTY and ICTR represents significant progress in realizing the international criminal law dimensions of sexual violence. The next step is to acknowledge the broader scope of women's experiences during armed conflicts and recognize that some transitional justice mechanisms may be better institutionally equipped than others at accomplishing this aim.