

ELISABETH
PORTER

Ethical Commitment to Women's Participation in Transitional Justice

Abstract: Ethical issues of justice and human rights are central to countries emerging from conflict. Yet involving women in transitional justice processes rarely is articulated in ethical terms. To make a case for an ethical commitment to improving women's participation in these processes, the paper begins by exploring why transitional justice strategies should bother with gender. Women and men often experience conflict and injustices differently which may require different responses to redress harms suffered. Timor-Leste is used as a case study. The paper explores whether hybrid traditional and formal justice systems can address women's justice claims in principle and specifically, when applied to Timor-Leste. The paper maintains that customary justice practices can be combined with conventional ones, but only when both practices adhere to international human rights conventions, which rarely happens where patriarchal practices are entrenched. The conclusion addresses what might be done to create gender-responsive justice systems given that they are crucial in building environments that are conducive to sustainable peace and security.¹

Key words: gender justice, Timor-Leste, transitional justice, women's participation, UNSCR 1325

•

When a country is moving out of conflict and trying to confront the challenges of how to deal with past atrocities, interrelated ethical issues of justice and human rights come to the fore. Within such contexts, arguments defending the inclusion of women in post-conflict reconstruction and in transitional justice processes generally are built on principles of rights, equality and justice. In this article, these principles are highlighted in order to show why the support of women's participation in transitional justice needs an ethical commitment to upholding the dignity of women. Gender-neutral analyses of transitional justice miss this point.

To make a case for an ethical commitment to foster the participation of women, I address three general questions that should be asked in transitional justice processes, using Timor-Leste as a case study. First, why should transitional justice strategies bother with gender? It has been shown that women and men often experience violent conflict, human rights abuses that occur during armed conflict and injustices of war differently. Women are often subject to greater rights violations relative to the same standards of justice, namely, a respect for

¹ A modified version of this paper was first presented at a conference: 'Transition, Stabilization and Development in Asia and the Pacific', 26-28 September 2011 at Flinders University, Adelaide. I am grateful to the anonymous readers of this journal and the editors for helping me to tighten the argument.

basic human rights. Also, women are particularly disadvantaged in post-conflict contexts because routinely they are excluded from the full gamut of peace processes. An ethical commitment to encourage women's participation in all transitional justice processes has two goals; it is directed toward the inclusion of gender differences and also to reversing unjustified exclusions. Taking into account differences of experiences of human rights abuses and injustices, I am proposing an extensive view of justice which 'builds recognition of difference and responsiveness to individuated needs, as well as the protection of the rights of difference into its basic conception'.² This conception is demanding, but is necessary in order to cater adequately for different experiences, needs and requirements of justice. In many traditional cultures moving out of conflict, there is a high prevalence of accepted violence against women that accompanies the cultural acceptance of gendered inequalities. This violence remains in Timor-Leste, a nation pronounced as a United Nations' success story, an example of a commitment to the UN Security Council Resolution 1325 (UNSCR 1325) on 'Women, Peace and Security'³ (and subsequent related resolutions 1820, 1888, 1889 and 2122.). UNSCR 1325 calls for measures to prevent violence, protect women and girls, ensure that gender perspectives are included in relief, recovery and justice strategies, and importantly, it calls on member states to increase the 'representation of women at all levels of decision-making' to prevent, manage and resolve conflict.⁴ The resolutions' call for the inclusion of women is expansive, encompassing the entire gamut of post-conflict reconstruction work.

The second question explores whether hybrid traditional and formal justice systems can adequately address women's justice claims in principle, and specifically, when applied to Timor-Leste.⁵ There are real difficulties in combining these systems because they are often insufficiently sensitive to women's situations or explicitly informed by gender-biased, cultural norms. I seek to show that customary justice practices can be combined with conventional ones in ways that are responsive to differences, including women's justice claims, but only when both practices adhere to international human rights conventions. Such an adherence rarely happens consistently in places where patriarchal practices are entrenched.

2 Carol Gould, 'Diversity and Democracy: Representing Differences', in Seyla Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political*, (Princeton University Press: Princeton NJ., 1996), 171-86, p. 180.

3 UN Security Council, "Resolution 1325 S/RES/1325 [on women and peace and security]," 4213th meeting, 31 October 2000.

4 Ibid., para. 1.

5 For other cases, see Elisabeth Porter and Anuradha Mundkur, *Peace and Security: Implications for Women* (St Lucia: University of Queensland Press, 2012). See also, Elisabeth Porter, 'Gender-Inclusivity in Transitional Justice Strategies: Women in Timor-Leste', in Susan Buckley-Zistel and Ruth Stanley, (eds.), *Gender in Transitional Justice* (Palgrave Macmillan: Basingstoke, 2011), 221-240.

Third, I conclude by offering some suggestions as to what can be done to create gender-responsive justice systems, given that they are crucial in building environments that are conducive to sustainable peace and security. Introducing changes is by no means straight-forward. I argue that the inclusion of women as moral agents into all transitional justice processes is crucial to developing broad notions of transitional justice and peacebuilding.⁶

Why should transitional justice strategies bother with gender?

Transitional justice occurs during a society's shift away from conflict, and includes judicial and non-judicial mechanisms that address the legacy of human rights abuses. These mechanisms aim to serve dual goals of confronting past violations of human rights and ensuring accountability for these violations and also of creating new spaces for just social, political and legal arrangements. Their tools include trials, truth commissions, reparations, judicial reforms, amnesty, disarmament and reconciliation.⁷ These are major tools of transition and stabilization which are necessary for development to progress. In needing to set priorities, most transitional strategies have gone beyond the dualistic peace or justice tensions which miss the point that peace is intended to be more than an interlude between conflicts. Building peace and building a just, inclusive society are connected. Peace should bring not only physical security, but legal, just ways to protect rights and secure economic and social well-being. Not only do different contexts require different transition, stabilization and development strategies, ones that draw on local cultures and histories, but so too, different gendered experiences of inequalities, injustices and human rights abuses require culturally appropriate differentiated responses. Herein lies an ethical dilemma. As shown later, culturally specific responses do not always support international human rights law.

The historic UNSCR 1325 was the first Security Council resolution to address the particular effects of armed conflict on women and girls. The Independent Expert Assessment on women, war and peace conducted during 2001-2002 in response to this resolution, found that whether women were victims of shocking atrocities, refugees, internally displaced persons, combatants, heads of household, community leaders, activists or peacebuilders, 'women and men experience

6 For research on links between gender, ethics and transitional justice see Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay', *The International Journal of Transitional Justice* 1 (2007), 23-44; Fionnuala Ní Aoláin, 'Advancing Feminist Positioning in the Field of Transitional Justice', *The International Journal of Transitional Justice* 6 (2012), 205-228; and Donna Pankhurst, (ed.), *Gendered Peace. Women's Struggles for Post-War Justice and Reconciliation* (New York, Routledge: 2008).

7 Mantilla, *Gender, Justice, and Truth Commissions* (Washington DC.: The World Bank, 2006), p. 6. See also Daniel Philpott, "An Ethic of Political Responsibility," *Ethics & International Affairs* 23/4 (2009), 389-407.

conflict differently'.⁸ This difference is manifest in the effects of war, choices to fight or build peace, extent of sexual violence and the opportunities to be involved in decision-making during stabilization periods. Two of these differences have massive ethical implications for women and provide ample reasons why we should bother with gender: women's exclusion from many aspects of decision-making in post-conflict reconstruction work belittles women's agency; and the cultural acceptance of violence against women undermines gender equality. My argument is that addressing exclusion and gender-based violence demonstrates an ethical commitment to improve the chances of women's participation in transitional justice processes.

First, in terms of exclusion, in a sample of 21 major peace processes since 1992, the UN Development Fund for Women (UNIFEM, now part of UN Women) found that while 'women's participation in negotiating delegations averaged 7.6 per cent of the 11 cases for which such information was available' and data is not easy to collect accurately in war zones, 'only 2.4 per cent of signatories to peace agreements were women and that no woman has ever been appointed as "chief mediator" with the exception of Graça Machel who was one of three mediators appointed by the African Union for the Kenyan crisis'.⁹ These low statistics influence the direction of transitional strategies and undermine the dignity of women when they are excluded from active participation. It means that gender is 'a central axis of inequality and exclusion that structures women's political and economic participation in transitional societies'.¹⁰ As Mervyn Frost reasons, 'to engage in international relations at all is to make ethical claims for oneself and to recognize the ethical standing of others'.¹¹ All efforts to include women and other marginalized groups in transitional justice processes demonstrate a commitment to an inclusive moral perspective.

Second, patriarchal traditions justify violence against women that undermine the equality that frequently is enshrined in new laws and constitutions. Timor-Leste is an apt case. Without going into the historical roots of the Timorese conflict, some background on cultural practices is needed. Outside of Dili the capital, subsistence farming is the norm where crop failure increases adversity, particularly in female-headed households. The UN Population Fund confirms poor nutrition, with 46 per cent of children under five undernourished for their

8 Elisabeth Rehn and Ellen Johnson-Sirleaf, *Women, War and Peace: the Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (New York: UNIFEM, 2002), p. xi.

9 UN Secretary-General, *Report of the Secretary-General on Women and Peace and Security*, S/2009/465, 16 September 2009, p. 4.

10 Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women', *International Journal of Transitional Justice* 1/3 (2007), 338-354, p. 341.

11 Mervyn Frost, *Global Ethics: Anarchy, Freedom and International Relations* (London: Routledge, 2009), p. 19.

age and 40 per cent of people malnourished.¹² In 2008, maternal mortality was reckoned to be 800 per 100,000 live births, among the highest in the world,¹³ and from 2011 has improved to about 370 per 100,000 live births.¹⁴ The UNDP Human Development Index (2010) ranks Timor-Leste at 120 (out of 169) and the UNDP (2010) Gender Inequality Index states that only 19 per cent of births are attended by a skilled health professional; there is a 53.8 per cent adolescent fertility rate; and 61.6 per cent of women have some labour force participation compared with 84.8 per cent of men.¹⁵ Development statistics are stark, 41 per cent live below Timor's national poverty line of \$US0.88 a day.¹⁶ Timor-Leste struggles with vestiges of colonialism, poverty, population growth, unemployment, low skills, minimal health and education services, poor infrastructure and a weak justice system. These struggles affect men as well as women.

During Indonesia's violent military occupation, 1975-1999, women and men suffered deprivation of food, displacement, denial of self-determination, torture and killings. Some women chose to be guerrilla fighters. More women suffered when they were imprisoned, harassed, shunned and left as sole breadwinners for being part of resistance movements or attached to men who were activists; as well as being sexually assaulted, raped or taken as sexual slaves for no other reason than being a girl or woman. Gang rape was used as a tool of war, trafficking of girls and women occurred in West Timor camps, some forced sterilization occurred, and some women were required to bury husbands and children who were killed by Indonesian militia.¹⁷ Women's activism grew during colonialism and war and adapted to each new crisis.¹⁸ The strength of local women's organizations that arose during the years of resistance to Indonesian rule was a critical factor in ensuring an identifiable emphasis on gender in transitional processes. It is estimated that there are over 500 international and national NGOs operating in Timor-Leste with an increasing number committed to gender issues.¹⁹ There are distinct cultural and patriarchal norms that affect women specifically, such as early marriages at fifteen with ensuing early pregnancies, the cultural acceptance of domestic violence as normal, dowries which give husband's families the right

12 AusAID, 2011, "East Timor" <http://www.ausaid.gov.au/country/country.cfm?CountryId=911> (accessed 22 August 2011).

13 AusAID, *Violence Against Women in Melanesia and East Timor. Building on the Global and Regional Promising Approaches* (Canberra: AusAID, Australian Government, 2008), p. 191.

14 UN Women, *In Pursuit of Justice. Progress of the World's Women 2011-2012* (New York: UN Women, 2011), p. 131.

15 UNDP, 2010, 'Human Development Reports', <http://hdr.undp.org/en/statistics/> (accessed 22 August 2011).

16 AusAID, (2011).

17 UNIFEM 2004, "Gender Profile of the Conflict in Timor-Leste," pp. 3-5, www.womenwarpeace.org/webfm_send/749 (accessed 13 January 2009).

18 See Yvonne Corcoran-Nantes 'The politics of culture and the culture of politics--a case study of gender and politics in Lospalos, Timor-Leste' *Conflict, Security & Development* 9/2 (2009), 165-187.

19 Anna Trembath and Damian Grenfell, *Mapping the Pursuit of Gender Equality. Non-Government and International Agency Activity in Timor-Leste* (Melbourne: Globalism Institute, RMIT University, 2007), p. 41.

to control women, and the notion that women humiliate their husbands if they stand for public positions.

Why is violence against women so prevalent? After the referendum for independence in 1999, domestic violence was a conspicuous crime. In 2004, 'domestic violence in East Timor accounted for some 45 per cent of all crime cases...and made up 67 per cent of the cases reported to the police'.²⁰ Contributing reasons include the return of men who had participated in guerrilla warfare, had become familiarized to conflict and felt impotent at the loss of their identity. High unemployment meant few options for work, so frustrations were taken out on women. The major reason is that violence against women is an accepted cultural norm. When training in gender and peacekeeping was given to military and civilian personnel, 'participants repeatedly pointed out the endemic problem of wife beating as a gender issue that could not be touched because it was "part of the culture"'.²¹ In a legal case of Dr Segio Lobo, a surgeon and former Minister for Health who was detained for physically assaulting his wife, he was acquitted by an all-male panel of judges who concluded that 'the cultural situation in East Timor allows a man to control the actions of his wife'.²² Frequently, 'violence against women is not seen as a crime but rather as a family problem to be resolved at the family or village level'.²³ Indeed, even 51 per cent of women surveyed in a study of gender-based violence 'strongly agreed that "a man has good reason to hit his wife if she disobeys him"'.²⁴ Many women are held back from pursuing formal legal channels against an intimate partner, knowing that the humiliation or imprisonment of a breadwinner is not in their family's interest. Clearly, transitional justice strategies should do more to eliminate any acceptance of violence against women because the brutality undermines women's sense of dignity and moral integrity, and this lessens the chance of women participating in decision-making processes.

Can hybrid systems adequately address women's justice claims?

Having established the importance of an attention to gender differences in transitional justice, including attending to the exclusion of women from peace

²⁰ Susan Harris Rimmer, *Gender and Transitional Justice. The Women of East Timor* (London & New York, Routledge, 2010), p. 42.

²¹ Angela Mackay, 'Mainstreaming Gender in United Nations Peacekeeping Training: Examples from East Timor, Ethiopia, and Eritrea', in Dyan Mazurana, Angela Raven-Roberts and Jane Parpart, (eds.), *Gender, Conflict, and Peacekeeping* (Lanham, MD.: Littlefield Publishers, Inc., 2005), 265-279, p. 271. MacKay explains on p. 276 that lessons learnt in this training include the need for differing materials on gender, culture and human rights for pre-deployment training and in-mission training.

²² Harris Rimmer, (2010), p. 132.

²³ Flora Soriano Menezes, 'Interaction Between Formal and Traditional Justice Systems. "Local Justice and Formal Justice: Can the Two Systems Work Together in Timor-Leste"?' *Second International Conference: Women for Peace*, Dili, 5-6 March 2009. She writes as a legal researcher in the Women's Justice Unit, monitoring the treatment of women in cases of sexual assault and domestic violence.

²⁴ Aisling Swaine, 2003, 'Traditional Justice and Gender-Based Violence Research Report', International Rescue Committee, August 2003, Dili, p. 13.

processes and the frequent degradation of their dignity, we explore now the question of whether hybrid traditional and formal justice systems can adequately address women's justice claims. This question is relevant to all post-conflict contexts.²⁵ Its answer when applied to Timor-Leste is enlightening, showing both difficulties of combination and possibilities for incorporating indigenous practices into justice. The UN's contribution in integrating gender issues throughout its transitional justice programs is important. As part of the early United Nations Transitional Administration in East Timor (UNTAET), a Gender Affairs Unit (GAU) was established in 2000.²⁶ The GAU welcomed local women from the outset, employing East Timorese colleagues to work alongside the international staff. The GAU consulted women's NGOs closely. The Unit promoted gender equality through capacity-building workshops, development of training materials and gender analysis of legislature. It maintained networks with local women and sought to mainstream a gender perspective throughout the Administration. It was the first functioning GAU in a UN Peacekeeping Mission.

The post-independence period saw the strengthening of women's organizations and NGOs to defend women's rights. The recognition of women's rights is included in the constitution, an achievement that can be partially attributed to the effectiveness of strong women's advocacy. In the August 2001 elections, 27 per cent of those elected to the Constituent Assembly to administer the territory were women. All major human rights treaties were ratified in December 2002, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In the second Parliament, 2007-2012, 27.7 per cent elected were women.²⁷ Susan Harris Rimmer summarizes the general problems identified by Timorese women's groups in the post-conflict period and these include:

the failure of domestic and international law to adequately address gender-based persecution experienced during the Indonesian occupation from 1975 to the present; the impact of poor economic and social conditions, including bars to property ownership; the failure of policy or law to provide acknowledgement or compensation for survivors of gender-based persecution or the children born of rape;

25 See Alexandra Gheciu and Jennifer Welsh 'The Imperative to Rebuild: Assessing the Normative Case for Post-conflict Reconstruction' *Ethics & International Affairs* 23/2 (2009), 121-146.

26 Prior to UNTAET, a UN Mission of Support in East Timor (UNAMET) helped to supervise the referendum where on 30 August 1999, the people voted for independence. After the post-referendum violence, the International Force for East Timor (INTERFET) was an Australian-led multinational stabilisation force. UNTAET's mandate ran from October 1999 to independence in May 2002. The UN Mission for Support in East Timor (UNMISSET) provided support while the fledgling state sought to achieve self-sufficiency. The UN Office in Timor-Leste (UNOTIL) ran from May 2005 to August 2006. After the 2006 violence the UN Integrated Mission in Timor (UNMIT) supplied support.

27 NGOs Working Group, *NGOs Alternative Report: Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women CEDAW In Timor-Leste* (Dili: NGOs Working Group, 2009), p. 33.

the failure of domestic law to protect women from the escalation of domestic violence post-independence; obstacles to participation in pre-and post-independence decision-making...; And obstacles to participation in key decisions about transitional justice mechanisms, such as amnesties.²⁸

What these responses show is that not only do women typically experience conflict differently to men; they often accordingly develop different conceptions of what is needed to redress gender-based harms and move closer to gender-inclusive practices of justice. Heeding these differences is integral to a gender-inclusive transitional justice.

A truth commission shows potential to deal with truth, equality and justice, and also, can combine formal and informal procedures. A crucial part of any ethical approach to international affairs, including the establishing of a truth commission, is to determine what local actors say they need to overcome the obstacles listed above. 'Individual human actors who have capacities for deliberating over possible courses of action and their consequences and proceeding on the basis of their deliberations are understood to be moral agents'.²⁹ In Timor-Leste, the Commission for Reception, Truth and Reconciliation (CAVR) listened to the community demand for a reconciliation that was culturally-sensitive to local practices of justice.³⁰ The CAVR's mandate was to: establish the truth about human rights violations and 'less serious crimes' perpetrated during the political conflicts from 25 April 1974 to 25 October 1999; assist in the reintegration of those who had committed these crimes via a community-based reconciliation process; and help rebuild the dignity of victims of human rights violations.³¹ UN Regulation 2001/10 required a gender-sensitive approach to be integrated into all aspects of CAVR. Women's groups were involved in the consultative process preceding the appointments and two of the seven Commissioners and ten of the 29 Regional Commissioners were women. The Commission explicitly encouraged practices to expand openings for women to contribute, including: outreach work encouraging women's participation; liaising with women's NGO networks; having national thematic hearings on women; supporting women witnesses; devoting almost 10 per cent of Community Profile Workshops to participation only by women; providing women with the option of in-camera testimony; including women in

28 Harris Rimmer, (2010), p. 10.

29 Toni Erskine, *Embedded Cosmopolitanism. Duties to Strangers and Enemies in a world of 'Dislocated Communities'* (Oxford: Oxford University Press, 2008), p. 24.

30 Chega! Commission for Reception, Truth and Reconciliation (CAVR) (2006) www.cavr-timorleste.org/en/cheгаReport.htm (accessed 13 January 2009).

31 Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006). Freeman suggests that it is innovative in combining a truth commission 'in tandem with a hybrid criminal court' with distinctions between 'harmful acts' and 'serious criminal offences', p. 77.

statement-taking teams and training statement-takers on gender issues; and developing an oral history archive of 200 women's testimonies.³² These practices did increase women's participation and are positive examples of what is involved in showing an ethical commitment to inclusivity.

During the public hearing on women and conflict in 2003, activists from diverse women's groups presented a substantial submission on behalf of the women of Timor-Leste, demanding social and psychological support and gender equality, understood as inclusion in decision-making processes. This is important. A genuine inclusivity is an ethical commitment to the right of men and women to be enabled to live to their full capacities and to exercise choices that make their lives meaningful. A central question in international ethics 'concerns how to treat others as both free and equal individuals, and what duties arise from this recognition'.³³ So often, women are not given this fundamental recognition and hence their moral esteem is disregarded. Yet, despite the Commission's attempts to encourage women's participation, 'at the close of field operations only 21.4 per cent of deponents who provided statements were women'.³⁴ As has happened in truth commissions elsewhere, women typically testify about what happened to their sons, husbands, brothers or fathers during conflicts. Heavy cultural taboos and personal shame often leads women to suppress detailed accounts of their suffering. Victims of sexual violence are vulnerable to community isolation and discrimination, stigmatization of children born through rape, being discarded by one's spouse, failure to find a man willing to marry, and in Timor-Leste, humiliation when known as 'military wives' because family 'honour' is violated.

Community Reconciliation Procedures (CRP) for less serious crimes drew on traditional justice practices that involve local leaders and spiritual practices of confession and forgiveness, as well as principles of arbitration and mediation. The UN regulation to be gender-inclusive meant that at least one of the CRP panel members at each hearing was a woman. Victims who had urgent needs that were recognized during panels were referred to the victim support staff. In replicating traditional practices, CAVR's belief was that 'the reconciliation procedures serve as an important counterpart to the general principle of strict criminal liability because they make the admission of wrongdoing and the expression of remorse in an act of reconciliation a viable form of rendering justice to victims',³⁵ challenging narrow western notions of justice. CAVR went a long way to ensure that women

³² Vasuki Nesiiah, *Truth Commissions and Gender: Principles, Policies, and Procedures* (New York: International Centre for Transitional Justice, 2006), p. 19.

³³ Richard Shapcott, *International Ethics. A Critical Introduction* (Cambridge: Polity, 2010), p 4.

³⁴ CAVR, 1.6-174.

³⁵ Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: UN Truth Commission for East Timor', *American Journal of International Law* 95 (2001), 952-966, p. 963.

with significant expertise in gender issues assumed leading roles. Not to diminish the importance of prosecution, but in stabilizing a nation, priorities are made and with CAVR, restorative justice, which focuses on victims and seeks to reintegrate former perpetrators of violence into communities was the main concern. On the surface, it appears to compromise western ethics of legal accountability. Instead, restorative justice approaches may be more accessible to women, given their flexibility in process, inclusivity and ability to address victim/survivor needs, and as such, this is another instance where some women may have different understandings to men of ways to redress the harm of conflict. However, caution is needed. Sometimes, 'restorative' is tied closely to 'post-conflict reconstruction' which may mean pushing women to return to a set of relationships that revisit past injustices.³⁶ That is, as I have argued elsewhere, layers of violence continue during the post-conflict period and much of this violence manifests itself in domestic violence and gender-based violence, calling into question the concept of 'post-conflict'.³⁷

Legal Pluralism

So, what are the difficulties with doing women justice when traditional and formal justice processes are combined? In many post-conflict contexts, different legal structures overlap; it is not a simplistic formal versus informal justice. In Timor-Leste, there is a combination of Indonesian laws, UNTAET regulations and international laws. The Dili District Vulnerable Persons Unit (VPU), created in 2001 'is the gateway to the formal justice sector for female victims of crime in Timor' with jurisdiction over 'rape, attempted rape, domestic violence, child abuse, child neglect, missing persons, paternity and sexual harassment'.³⁸ As maintained earlier, the cultural acceptance of gender-based violence undermines women's self-confidence. The VPU has female officers and translators and women's groups offer shelter and support to vulnerable women. Yet outside of the capital, few women know of this Unit. The Judicial System Monitoring Program (JSMP) is an NGO founded in 2001 to monitor processes dealing with perpetrators of human rights abuses with an extended remit to aid the fledgling judicial system. Its Women's Justice Unit, established in 2004 to monitor cases involving women conducts training to expand the justice sectors' understanding of women's rights. Rights uphold beliefs about what constitutes a human being and why people deserve to be treated with dignity. A major impediment to

36 Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice? An Introductory Essay?' *The International Journal of Transitional Justice* 1/1 (2007), 23-44.

37 See Elisabeth Porter, *Peacebuilding: Women in international perspective* (London and New York: Routledge, 2007) and Elisabeth Porter and Anuradha Mundkur, *Peace and security: Implications for women* (St Lucia: University of Queensland Press, 2012).

38 JSMP, *Judicial System Monitoring Programme. Access to Justice for Women Victims* (Dili: JSMP, 2004), p. 9. It also includes the Timor-Leste Criminal Procedure Code, the Witness Protection Law and the Indonesian Penal Code.

substantive access to justice for women in post-conflict contexts is the lack of respect for women's rights, a lack which causes violence against women in the first place. This is why I am arguing that challenging the cultural acceptance of violence is a prerequisite to increasing the involvement of women in transitional justice processes.

Why then are the obstacles to gender-justice so formidable? The Victim Support Services (VSS) was established in Timor-Leste in 2005 to improve access to justice for women and children victims of violence and sits within the JSMP. In 2011, the VSS employs six lawyers to assist clients from the 13 districts. Based on the experience of VSS, the JSMP produced a report to 'show that even though laws are now in place to protect the rights of victims of gender-based violence, in reality these laws are not being implemented effectively and consequently the rights of victims are not yet being protected in practice'.³⁹ This report demonstrates how the current legal framework should protect victims' rights. In the Constitution all citizens are equal before the law and have the same rights (Article 16). The Penal Code which came into force in July 2009 codifies 'crimes that can be used to prosecute cases of gender-based violence' including mistreatment of spouse, offences against physical integrity and sexual crimes.⁴⁰ The Law Against Domestic Violence came into force in July 2010 and 'includes physical, sexual, psychological and economic violence' and it 'places obligations on the government to engage in programs to change public opinion about domestic violence'.⁴¹ The mandate of the UN Mission in Timor was grounded in UNSCR 1325 and supported the Office of the Secretary of State for Equality in mainstreaming gender. Despite these examples of ways to improve women's access to justice, obstacles to the implementation of the laws on gender-based violence remain. The pattern of obstacles is present in every post-conflict context. In Timor-Leste, women victims still have: lack of knowledge of and lack of confidence in the formal legal system; lack of community support given cultural constraints; economic dependence; geographical barriers; problems with judges' limited understanding of gender-based violence; and language obstacles given that few people speak the Portuguese language of the courts.⁴² The formal justice system rarely notes that when husbands go to prison, women 'are left in serious financial difficulty, or that rape ruins women's chances of marriage and financial security'.⁴³

The traditional, customary system of justice is familiar to people, who from

39 JSMP, *Legal Protection for Victims of Gender-Based Violence: Laws do not yet deliver Justice*, March 2011, (Dili: JSMP, 2011), p .3.

40 JSMP, (2011), p. 5.

41 *Ibid.*, pp. 6-7.

42 *Ibid.*, pp. 18-24.

43 *Ibid.*, p. 2.

early years derive much of their normative framework from local customs. In most countries, customary justice is administered primarily by men and continues to uphold traditional gendered values that favour men. Customary mechanisms of justice provide a framework where parties to a dispute come together to explore the reshaping of relationships. There typically is a gap between western norms of justice as criminal prosecution, and traditional mechanisms of justice where the restoration of the social order and spiritual harmony take precedence. Generally, healing relationships is an important element of customary justice. Healing is initiated through an initial community gathering where offenders and victims slowly regain the trust of fellow community members. In Timor-Leste, select government agencies and women's groups are seeking to make local government councils and chiefs active in reducing domestic violence, including passing a 2004 decree permitting women to be elected as village chiefs.

Flora Soriano Menezes, a lawyer with the JSMP explains that in Timor-Leste, the traditional system operates from within the family to the subdistrict, and involves processes with local elders, the extended family of the perpetrator and the victim. The chief benefits of the traditional system are speedy resolution, minimal costs, the community accepts the decision and it promotes reconciliation. However, she stresses her concern that resolving disputes through traditional justice channels frequently ignores the rights of women and children, thus in practice, is contrary to international human rights standards. Any assumption that customary justice is more legitimate because it represents the community's history and voice has to be questioned. Who defines the dominant ethical values and whose voices remain unheard? Most customary justice procedures do not have sanctions against gender-based violence. In principle, customary practices can be combined with conventional legal ones, but in practice, they rarely adhere to international human rights conventions, so justice claims are inadequately dealt with.⁴⁴

What is needed to foster women's participation in transitional justice?

Given the difficulties of realizing gender-justice when traditional and formal justice systems are combined, what are the ways forward to address these problems? Education on equality and rights alone is insufficient; interrogating dominant masculinities is integral to the changes needed if there is to be the presence of normative principles of gender inclusion in transitional processes. Further, the formal legal system can influence community attitudes to ensure that human rights are upheld when victims bring cases of gender-based violence to the formal system rather than rely on traditional law. Effective initiatives negotiate spaces between different justice systems and, through local NGOs and women's

⁴⁴ The *gacaca* courts in Rwanda and the CRP described above are notable exceptions of successful uses of traditional justice practices.

organizations, empower women to know how to access plural justice processes that comply fully with national equality agendas and international human rights standards, despite the latter often being viewed as alien, an imposition by external western forces.

Changes needed for such an important yet difficult effort to achieve hybridity of traditional and formal systems include human rights education, zero tolerance of gender-based violence, male and female role models involved in both customary and legal methods, and practical and financial support for community-based customary practices to be as fair as traditional court proceedings. The likely changes are generational and part of long-term peacebuilding processes. In this final section, suggestions are made as to ways forward to address gender injustices and include women in transitional justice processes. To foster women's participation in transitional justice systems in ways that address women's ethical agency, three considerations are explored. These are general normative considerations that can be culturally adapted. First, a comprehensive notion of 'who is a victim?' permits an extended range of meaningful reparations. Second, connecting equality with cultural norms should build on international human rights conventions. This point has already been covered above, but is extended in this section. Third, in order to make this connection, institutional barriers to gender equality need to be overcome.

Victims and reparations

In addressing the past, transitional justice processes respond to distress. One way to act meaningfully is through engendering reparations. According to UN principles, reparations include restitution, compensation, rehabilitation, satisfaction (recognition of the truth) and guarantees of non-repetition. Engendering reparations requires extending the notion of who is a victim. Including direct and indirect suffering expands the pool of beneficiaries, 'by bringing to the fore the relatedness of the harms and the ways in which the diffuse nature of harms affects women specifically'.⁴⁵ Weight given to primary beneficiaries allows for widows whose husbands were executed or disappeared, and mothers who bore children through rape to qualify for reparations. A dependent's suffering and anxiety is 'treated as a direct violation'⁴⁶ of human dignity that requires attention. In placing greater emphasis on harms and human rights violations that go beyond military operations and 'extraordinary' violations of civil and political rights to include the "ordinary" the private or intimate violence that women experience

45 Ruth Rubio-Marín, 'The Gender of Reparations: Setting the Agenda', in Ruth Rubio-Marín, (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006), 20-47, p. 31.

46 Beth Goldblatt, 'Evaluating the Gender Content of Reparations: Lessons from South Africa', in Ruth Rubio-Marín, (ed.), (2006) *ibid.*, 48-91, p. 80.

in a militarized, unequal society'⁴⁷ consideration is given to the discriminatory practices, forced displacement, hunger and social and economic harms that women, widows in particular suffer during armed conflict. Such emphases expand norms of transitional justice beyond simply dealing with past violations and abuses, to ones that encompass 'recognition of structural inequalities and exclusions, and their intersectional impact on women's potential to participate as equals in a transitional society'.⁴⁸ The concept of victim enlarges as does the pool of those requiring reparations.

What happens when reparations are viewed in a holistic sense that incorporate social, psychological and practical examples of redress? Consider the normative goals of reparations which include 'ideals of affirming equal citizenship and strengthening a more democratic and inclusive political order...so that victims can see themselves as equal citizens'.⁴⁹ A reparations process that is meaningful to women listens carefully to the voices of local women to gauge their needs sensitively, affirming their damaged, but intrinsic dignity.⁵⁰ In summarizing general patterns of transitional justice processes, 'many female victims express preference for services to meet their basic needs and those of their family members over restitution of lost property or monetary compensation'.⁵¹ This expression may be an indicator of women's levels of poverty. It might articulate their lack of awareness of entitlements in seeking basic goods of citizens. As victims who have been harmed, survivors have the right to different forms of redress, rehabilitation, reintegration, compensation or restitution. Administrative reparations programs might be preferable to judicial options in advancing gender justice because of the high expenses of litigation, the pain of cross-examination and the lack of confidence of many women victims, who are 'overrepresented among the poor', rarely possess rights-based knowledge and usually have heavy family obligations.⁵² Also, collective reparations for women can be inclusive in involving laws on prevention of domestic violence and rape, gender-sensitivity training for police and military personnel, monitoring of enforcement agencies, improvement of social services for women, measures to address women's poverty, land rights, and economic opportunities and strong constitutional and equality

47 Rosemary Nagy, 'Transitional Justice as Global Project: critical reflections', *Third World Quarterly* 29/2 (2008), 285-6.

48 Ní Aoláin and Rooney, (2007), p. 354.

49 Ruth Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression' in Will Kymlicka and Bashir Bashir, (eds.), *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), 192-214, p. 194.

50 See Elisabeth Porter, 'Can Politics Practice Compassion?' *Hypatia*, 21/ 4 (2006), 97-123 for the importance of listening in fostering compassionate politics.

51 Rubio-Marín, (2006), p. 29.

52 Ruth Rubio-Marín and Pablo de Greiff, 'Women and Reparations', *The International Journal of Transitional Justice* 1 (2007), 318-337, p. 322.

protections for women.⁵³ While it is true that women should have access to these provisions independent of past injustices, they rarely do during violent conflict, so the changes introduced during post-conflict and transitional justice processes can in many ways be viewed as collective reparations.

Survivors made modest requests to CAVR, seeking perpetrator accountability and simple assistance to enable them and their children to participate meaningfully in the fledgling democracy. The types of reparations offered were about \$US200. Typically, beneficiaries used the money to buy food, clothing, shelter, medical treatment, the education of children or to start income-generating initiatives. The program ensured that ‘at least fifty per cent of program resources should be directed to female beneficiaries’.⁵⁴ This is a positive effort to address gender inequities that arise in the formulation and implementation of reparations policies that sometimes require that only those who participate in the statement-taking process can benefit. Beneficiaries included victims of torture, people with disabilities due to gross human rights violations, victims of sexual violence, widows whose husbands disappeared or were killed and single mothers who are primary breadwinners through being affected by conflict. The promised programs included school scholarships, help with school fees, essential social and health services, rehabilitation, skills training and access to micro-credit for livelihood activities. ‘With the exceptions of South Africa, the very modest urgent reparations scheme implemented in Timor-Leste... and some assistance funds provided in Rwanda to genocide survivors in special needs, virtually none of the reparations measures’ recommended or approved after truth commissions have been implemented.⁵⁵

Equality and international conventions

As already shown, equality and human rights for women challenge customary traditions. UNSCR 1325 ‘calls on all parties to armed conflict to respect fully international law applicable to the rights and protection of women and girls as civilians’.⁵⁶ Such a call contests long-established customs. For example, as noted above, when traditional justice systems are used to settle disputes, cases of sexual or domestic violence, they generally simply maintain the status quo in a culture where domestic violence is perceived as acceptable. They do not typically respect

53 These were positive measures identified in South Africa by Goldblatt, ‘Evaluating the Gender Content of Reparations’, p. 82.

54 CAVR, 11-12.6. See Rubio-Marín, (2008), p. 195 for her account of Morocco’s Equity and Truth Commission which made gender mainstreaming one of its priorities in its reparations policy. Columbia’s Commission on Reparations and Reconciliation established a specific unit to ensure that its policies and recommendations took into account the specific needs of women. See Nesiha, (2006), p. 37 for a summary of ways that commissions have addressed gender equity in design and implementation of reparations programs.

55 Rubio-Marín, (2006), p. 26. Reparation schemes have been implemented in Argentina, Brazil and Chile.

56 S/RES/1325, 2000.

international human rights law. Encouraging practices that permit traditional community justice to play a complementary role to an adherence of state laws that abide by international human rights standards and UN conventions, is a tough, but worthwhile aspiration in transitional processes. The areas in which 'women's rights are least protected, where the rule of law is weakest and men's privilege is most fiercely guarded' are in the private and domestic spheres on issues of sexuality, marriage, divorce, reproductive health and economic rights to decent work and to inherit and control land.⁵⁷ Women from Timor-Leste 'have continuously stressed the need for justice to encompass their ongoing economic and social rights'.⁵⁸ Indeed, 'it can be argued that Timorese women, through their strong advocacy for women's rights and gender equality, managed to counter cultural relativist arguments that gender equity is a Western imposition, not translatable to contemporary society'.⁵⁹

In August 2009, Timor-Leste presented its first report on implementing CEDAW. The UN Committee commenting on this report acknowledges positive progress, but expresses concern: with the lack of information about women's rights and with 'the prevalence of a patriarchal ideology in the State party'.⁶⁰ A NGOs Alternative Report presents responses from 87 NGOs. The Report indicates that the State has not incorporated CEDAW provisions into national legislation nor tackled the problems of human rights violations against women. The Timorese Constitution recognizes the principles of gender equality as fundamental rights and citizenship in Article 17. It states that equal participation of women and men is fundamental to democracy in Article 62. But, the Report states that: 'Even though the Constitution guarantees women's rights and equality, the State has not yet... taken actions to eliminate discrimination against women in laws and policies'.⁶¹ Examples given include placing women as fourth on candidates lists; failing to recognize widows who helped during the struggle for independence; no exception for abortion for victims of rape and incest; pregnant students are forced to drop out of school; victims remain silent in judicial processes when intimidated by perpetrators; and gender focal persons in rural districts have insufficient power to be effective.

Securing rights for women in transitional democracies demands radical social, legal and political change. This is never easy because, as noted, equality sits

57 UN Women, (2011), p. 24.

58 Ibid., p. 24.

59 Susanne Allén, 'Post-conflict Reconstruction and Women's Security - Analyzing Political Outputs in East Timor', *Umeå Working Papers in Peace and conflict studies*, no. 1 (Umeå, Sweden: Umeå University, 2007), 1-22, p. 16. There is some difference between women who stayed in Timor during the occupation and those who returned after the violence in 1999.

60 Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women. Timor Leste*, CEDAW/C/TLS/CO/1, 7 August 2009.

61 NGOs Working Group, (2009).

uncomfortably with male-dominated community traditions. The commitment of local activists, to both human rights and local culture indicates ‘the scope for potentially constructive interaction between these different constructions of justice and appropriate behaviour’.⁶² However, increasing numbers of educated and diasporic Timorese recognize that ‘notions of human rights and of gender equality are perhaps the most contentious, confusing and challenging for customary approaches’ in terms of differing interpretations and practices of justice.⁶³ Justice means different things in different cultures. It is important to challenge any assumption that women must choose between rights and culture, and that respect for diversity means surrendering women’s rights. In Timor-Leste, one way to encourage both cultural practices and women’s rights is to have more women as local chiefs and empower women to bring their understandings of culture and personal empowerment to their communities. The point is to develop ‘hybrid models of law that bring together the best elements of customary law and state law’ yet to do so, ‘a careful balance must be sought between recognizing customary law on the one hand, and upholding human rights and the rule of law on the other’.⁶⁴ This is not easy. It requires training, education, mentoring, resourcing and time. Translating the ethical norm of human rights into local contexts helps to avoid a distancing between traditional local understandings of human rights and equality and international conventions.

To reiterate, in patriarchal cultures, the changes required to integrate human rights and gender equality into both customary and official legal avenues are massive. The resourcing and education needed is significant. Men and women need to be trained in human rights law, girls and boys need knowledge of why gender equality should be normative, male youths require anti-violence workshops and strong male role models, the rural illiterate and elders benefit from music and arts that depict equality, the police and security forces require regular gender training, and more women lawyers and chiefs are essential. All of these changes will only come about when there is a commitment to gender equality and justice on local, national, regional and international levels and this happens gradually over time when men and women have the confidence and opportunities to challenge gender-based violence and inequalities.

Overcoming institutional barriers to women’s participation

Despite decades of donor-funded projects in many post-conflict countries to train police and judiciary on gender-responsive approaches, substantial institutional

62 M. Anne Brown, ‘Security, Development and the Nation-building Agenda - East Timor’, *Conflict, Security & Development*, 9/2 (2009), 141-164, p. 155.

63 Ibid., pp. 154-5.

64 Laura Grenfell, ‘Promoting the Rule of Law in Timor-Leste’, *Conflict, Security & Development* 9/2 (2009), 213-238, pp. 229; 233.

barriers remain. Women in post-conflict contexts typically have less time and money to access formal justice systems, particularly when courts are located away from rural regions, and when women's lower levels of education mean they are uncertain how to negotiate legal intricacies. Mobile one-stop shops can bring together multiple services such as collecting forensic evidence and providing legal advice, health care and support. 'Legal aid services; specialised courts; and gender-responsive policing and judicial decision-making are all proven to make a difference, especially to the poorest and most excluded women'.⁶⁵ Investing in women personnel across all justice sectors furthers justice services for women with greater accountability. Training judges to understand the importance of upholding gender equality is imperative, as is tracking of judicial decision-making. In Timor-Leste, compliance with the 2009 Penal Code which criminalizes sexual crimes as a violation of women's integrity and security is crucial.

Gender justice is integral to securing human rights as part of sustainable peace. Practically, each differing context should seek to support women's legal organizations; implement gender-sensitive law reform and reparation programs; invest in improving women's access to truth commissions and courts; train judges, lawyers and police in gender equality; and use quotas to boost women legislators. It makes a difference to transition, stabilization, and development when women participate in leadership. The full range of transitional justice needs to be taken into account including: accountability and the end to impunity; deterrence of future conflict and war; historical record of the pattern of abuses and violations of international humanitarian law; reconciliation and healing; redress for victims; removal of perpetrators; and capacity-building and the rule of law.⁶⁶

The paper began by asking why bother with gender? It was noted that gendered differences in experiences of conflict may result in different approaches to redressing the harm of violations. In particular, an extensive view of justice which recognized the importance of responding to different needs is advocated throughout this paper. The reason for this is clear. Broad norms of justice encourage an expansion of options. For example, women do not always equate justice with prosecutions; rather, due recognition of what they have endured and the channels to rebuild their lives often take priority. What many women signal is their desire for 'not just criminal and civil accountability (rights-based justice), but assistance of the kind traditionally associated with development'.⁶⁷ This assistance is a 'healing justice', so for example, 'in seeking redress for sexual

65 UN Women, (2011), p. 56.

66 See Rachel Kerr, and Eirin Mobekk, *Peace and Justice. Seeking Accountability After War* (Cambridge: Polity, 2007), 1-14.

67 Naomi Cahn, Dina Haynes, and Fionnuala Ni Aoláin, 'Returning Home: Women in Post--Conflict Societies', *University of Baltimore Law Review* 39/3 (2010), 339-369, p. 355.

harms inflicted on them, women may be more interested in long-term health care than criminal punishment'.⁶⁸ Certainly, health care is a right that human beings should have independently of whether they have suffered extreme abuses. However, in situations of violent conflict where devastation and loss have destroyed basic infrastructure and have not permitted basic services to operate, desire for these services is not necessarily a by-product of a lack of a sense of justice-based entitlements due to women's subordinate status, or a failure to see the importance of prosecuting aggressors. Rather, in post-conflict societies where community and the collective is paramount, health care, schooling, adult literacy and economic skills training are seen by many women as redress, making up for the loss incurred during long periods of violence and importantly, preparing them to move on into a more just future.⁶⁹

The transformative possibilities of these types of reparations are immense, because reparations focus on the victim as an ethical agent and thus can be a vital vehicle for women's post-conflict recovery. For many Timorese women, like women in other poor, conflict-affected countries, local notions of justice are tied with exigencies of human security and the urgency of meeting human needs including health, nutrition and socio-economic sustainability.⁷⁰ For example, incidents of domestic violence may be reduced when women are able to contribute to family income. Simply because a woman is able to bring money into the family does not prevent a woman from being violated, but it may give women more sense of moral agency, including the right to make choices. Justice includes the meeting of everyday needs, and support to overcome psychological trauma and compensate for losses. Responding to broad understandings of justice is more likely to prompt locally meaningful strategies.

In conclusion, local women's priorities on human security as the practical foundation to justice and the prerequisite to inclusive citizenship include the provision of nutrition, clean water, decent housing with sanitation, basic education, medical care and psycho-spiritual counsel. Yet, in all post-conflict contexts, physical hardship continues for many, and impunity for crimes remains an obstacle to reconciliation. Peacebuilding is a long-term process that should empower moral agency.⁷¹ The challenge to achieve transitional justice processes that practice equality and respect cultural tradition is enormous. Processes of transition, stabilization and development must be able to protect and promote

68 *Ibid.*, p. 355.

69 I am thankful for a query from one of the editors that has prompted me to clarify this point. Victims of violence oppose impunity but during transitional justice times, often are more focused on their own aspirations to move on than on their abuser's prosecution, which is not to say that prosecution is not important, because of course it is.

70 See Porter, (2006) for an analysis of how attentiveness to people's needs is requisite to responding meaningfully to those who suffer injustices.

71 Porter, (2007), p. 34.

civil, political, economic, social and cultural rights for women and men, while working to hasten an acceptance of international law on human rights. Ideas and practices of equality between women and men can be brought into everyday forums where people see the value of equality in family and community life, and that women's participation in public life need not mean the destruction of traditional practices. Inclusion in all spheres of transitional justice as active agents is possible for women and men, when the responsibility to do so is taken on board.

In this paper, I have made three central arguments. First, I have maintained that the lack of respect shown to women during violent conflict results in particular disadvantage and minimizes opportunities for inclusion in transitional justice processes. Broad, holistic notions of justice tied to addressing practical, everyday exigencies go a long way in attending to particular disadvantage. Second, I have contended that there are traditional customary practices that are local, accessible and maintain community ties and should be encouraged to continue, albeit with modifications. If more women elders and chiefs who support women's rights can be included in these practices, and if more male elders and chiefs come to appreciate that gender equality is an important human rights norm to uphold, not one that will destroy cultural ties, these practices can be a locus of bottom-up claims for rights recognition and coexist with traditional legal courts. However, this hybridity is not straightforward. Third, I have shown that gender-responsive justice systems: expand the notion of victim by placing emphasis on harms suffered and thereby reparations needed; heed international conventions on equality; and respond to culturally contextual broad understandings of justice. Overall, I have argued that the commitment to increase women's participation in transitional justice is an ethical responsibility that attends both to difference and to dignity.

*Prof. Elisabeth Porter
University of South Australia,
Centre for Peace & Security,
Hawke Research Institute
email: elisabeth.porter@unisa.edu.au*

