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Thinking Past Rights: Towards Feminist Theories of Reparations

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ABSTRACT¹

The notion of reparations encompasses debates about the relationship between individual and society, the nature of political community, the meaning of justice, and the impact of rights in social change. In international law, the dominant approach to reparations is based on individual rights. This normative framework is out of step with the understanding of reparations that circulates among many women activists. This paper develops a theoretical approach to justice and reparations that helps to explain the gap between the international normative framework and activist discourses. Based on distributive, communitarian, and critical theories of justice, I argue that reparations can be thought of as rights, symbols, or processes. Approaching reparations as either rights or symbols is rife with problems when approached from an activist and feminist theoretical standpoint. As decisions about reparations programs are and should be determined by the political, social, economic, and cultural context, a blueprint for ‘a feminist reparations program’ is impractical and ill-advised. However, the strongest feminist approach to reparations would depart from an understanding of reparations as a process.

KEYWORDS: reparations; feminist theory; international law; critiques of human rights; women’s rights activists

RESUMEN

El concepto de reparaciones incluye debates sobre las relaciones entre individuos y sociedad, la comunidad política, el sentido de justicia y el impacto de los derechos en cambio social. En ley internacional, el enfoque dominante a las reparaciones está basado en los derechos individuos. Esta marca normativa es diferente que las interpretaciones de reparaciones que hacen circular con las activistas. Este ensayo desarrolla una marca teórica para la justicia y las reparaciones que ayuda explicar la laguna entre la marca normativa internacional y los discursos activistas. Basada en una teoría de justicia distributiva, comunitaria y crítica, yo sostengo que se puede entender las reparaciones como derechos, símbolos o procesos. Si se entiende reparaciones como derechos o símbolos, hay muchos problemas desde la punta de vista feminista. Porque decisiones sobre los programas de reparación están y deben estar decididos por el contexto político, social, económico y cultural, un anteproyecto de ‘un programa feminista de reparación’ no es viable. Sin embargo, la propuesta feminista más fuerte para las reparaciones se debería apartar del entendimiento de reparación como un proceso.

PALABRAS CLAVE: reparaciones; la teoría feminista; derecho internacional; críticas a los derechos humanos; derechos de las mujeres activistas

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1. Introduction

Gender roles structure human interaction in times of war and peace and inform political, legal, and cultural responses to the task of peace-building. The laws of war and the business of peace negotiations tend to push gender to the sidelines.¹ Women activists have put gender on the agenda, and international law and transitional justice processes now recognize sexual violence in war as an issue. From activist and academic quarters, feminist critiques of the post-conflict justice agenda have emerged. This paper offers a feminist critique of reparations² for massive human rights crimes in times of conflict.

Grave human rights crimes in violent conflict are contexts that have been framed by governments and activists as transitional justice sites. Reparations is a concept that is relevant in other contexts, including reparations between states under the rules of state responsibility, reparations through court processes like suits brought under the US Alien Tort Claims Act, and reparations for historical injustices, like slavery and colonialism. Their exclusion from this paper is not meant to suggest that a gender analysis of these areas is unnecessary. The focus on transitional justice derives from the observation that this context brings with it an institutional structure (UN, states, NGOs), norms (human rights, international law, development), and communities (diplomats, consultants, NGO activists).

A feminist analysis starts from the position that sex and gender matter and that they interact with other important axes of differentiation, like race, ethnicity, class, and age. From this awareness, a common characteristic of feminist analysis is the effort to reveal features of an issue which other methods overlook.³ This includes identifying the gender implications of rules and practices which otherwise appear to be neutral and observing real-life dilemmas from the perspective of the excluded.

According to one framework, a feminist approach to post-conflict prioritizes socioeconomic issues, challenges the capitalist development which unfolds in the transitional context, demands the inclusion of non-elite actors in political processes, and draws attention to the way in which “violence against women often alters in form, rather than prevalence, post-transition.”⁴ Drawing on this framework, the feminist approach that I take in this paper departs from an explicit awareness of the partiality of knowledge and the need to recognize one’s standpoint and travel from it.⁵ Post-modern and Third World feminists have argued that the imposition of one theory may deny the particularity of people’s experiences and privilege the

¹ Christine Bell and Catherine O’Rourke, “Does Feminism Need a Theory of Transitional Justice? An Introductory Essay” (2007) 1 *International J. of Transitional Justice* 23 at 24.

² I refer to reparations, as a concept, in the singular.

³ Katharine T. Bartlett, “Feminist Legal Methods” (1990) 103 *Harvard L. Rev.* 829.

⁴ Bell & O’Rourke, *supra* note 1 at 42-3.

⁵ See: Mari Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11 *Women’s Rights L.R.* 7; Maria C. Lugones & Elizabeth V. Spelman, “Have we got a theory for you! Feminist theory, cultural imperialism, and the demand for ‘the woman’s voice’” (1983) 6:6 *Women’s Studies Int’l Forum* 573; Brenda Cossman, “Turning the Gaze back on Itself: Comparative Law, Feminist Legal Studies, and the Post-colonial Project” (1997) 2 *Utah L. Rev.* 525.

voices of the dominant over the marginal.⁶ In light of these feminist theories and the contextually-bound nature of any transitional justice moment, this paper offers an improved, rather than a true, understanding of reparations, women, and conflict.

The paper begins by exploring the meaning of reparations in international law, human rights law, international criminal law, and UN principles, demonstrating that the dominant approach to reparations is based on individual rights. The next section analyzes the understanding of reparations among activists concerned with women and gender equality. This analysis shows that activists have a very broad understanding of reparations that goes far beyond the dominant rights-based approach to reparations. With the aim of understanding the gap between the international normative framework and activist discourses, the next sections of the paper offer theoretical approaches to justice and reparations. A working framework for defining and analyzing reparations is proposed. It argues that reparations programs incorporate a vision of justice, including a conception of the self, the role of the law, and the remedies to injustice. By asking why reparations programs are established, it is possible to establish a typology of the nature of reparations, as rights, symbols, or processes. The last section offers one feminist theoretical approach to reparations. I analyze the feminist problems raised by approaching reparations as either a right or a symbol. In contrast to the dominant, individual rights-based model, I conclude that understanding reparations as a process best achieves a reconciliation between activist approaches to reparations and theories of justice.

⁶ Chandra T. Mohanty “Under Western Eyes: Feminist Scholarship and Colonial Discourses” in Chandra T. Mohanty, et al., eds. *Third World Women and the Politics of Feminism* (Bloomington, IN: Indiana University Press, 1991) 51.

2. The Dominant Approach to Reparations for Victims

For many victims and survivors struggling to put their lives back together after brutal conflict, reparations may be the policy decision with the most direct impact on their day-to-day lives. The next section discusses the dominant approach to reparations in the transitional justice field.

Reparations occupies a wide analytical and practical field: it is an element of international law and a key feature of many countries' political and legal responses to conflict. The international regimes on state responsibility, human rights, and criminal law and domestic criminal, civil, and regulatory law may be involved in a country's reparations decisions. The term 'reparations' has two main uses: a broad juridical term, chiefly used in international law, which covers all forms of redress for harms suffered as a consequence of certain crimes, and a narrower term to describe administrative programs which attempt to provide benefits directly to certain victims.⁷

Legal and political developments have focused on developing and strengthening a framework for reparations based on individual rights. This can be seen in international law, human rights law, international criminal law, and UN guidelines.

2.1. State Responsibility as a source of Reparations

Under international law, a wrongful act is conduct, attributable to the state, in breach of the state's international obligations.⁸ Reparation by the state must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would have existed but for the wrongful act.⁹ However, the obligations under international law are obligations between states, not obligations between states and individuals, and reparations are paid to the injured state, not to the individual.¹⁰ Where large numbers of victims have been harmed by the wrongful conduct of a state, victims' reparations claims have been settled by claims commissions or arbitral tribunals.

Resistance to an individual right to reparations remains commonplace. For example, in 1995 and 2002, Japan's Tokyo District Court denied compensation to Chinese nationals for atrocities suffered during World War II, on the basis that a state is under no obligation to pay damages to individuals of another state when that state has infringed its obligations under international law.¹¹ The UN Compensation Commission (UNCC) represents a departure from traditional application of the state responsibility rules denying individual rights to reparation.¹² The UN Security Council established the UNCC to process claims and pay monetary compensation for losses during Iraq's invasion and occupation of Kuwait. The UNCC has the

⁷ Pablo de Greiff, "Justice and Reparations" in Pablo de Greiff, ed. *The Handbook of Reparations* (New York: Oxford University Press, 2006) 451 at 452 [de Greiff, 2006].

⁸ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission*, UN GAOR, 56th Sess., Supp. No. 10. UN. Doc A/56/10, chp.IV.E.1, (2001) at Art 31(1).

⁹ *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Merits)*, [1928] PCIJ, ser. A, No. 17 at 47-48.

¹⁰ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001) at 48.

¹¹ Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (Leiden: Martinus Nijhoff Publishers, 2004) at 85.

¹² *Ibid.* at 89-95.

effect of giving individuals limited standing to apply for reparations for breaches of international obligations. Compensation was not provided to injured states, as in the classical framework on state responsibility, but directly to individuals and corporations.

2.2. International Human Rights Law: Treaty-based recognition of right to reparations

The right to redress is enshrined in some international and regional human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) provides the right to a remedy,¹³ but this remedy consists of procedural rights and obligations, like the duty of the state to investigate the violation.¹⁴ In contrast to the ICCPR, the Convention on the Elimination of all forms of Racial Discrimination and the Convention against Torture provide for a specific right to reparation.¹⁵ However, these treaties do not create a right which can be invoked directly at the international level by an individual.¹⁶ Thus, the international human rights framework around reparations is still built around rights and obligations among states.

In contrast to the international human rights treaties, regional human rights treaties may give an individual standing in international law to claim a right of reparation. The European Convention on Human Rights and the American Convention on Human Rights create the possibility that an international court might directly require a wrongful state to make reparations to the injured individual.¹⁷ A landmark decision of the Inter-American Court argued that the individual's right of reparation extended beyond the domestic state's provisions for reparation, thus suggesting an independent individual right of reparation not mediated by the state.¹⁸ Like the Inter-American Court, the European Court of Human Rights has affirmed that the right to a remedy includes compensation and procedural rights.¹⁹

2.3. International criminal law

Contemporary mechanisms of international criminal adjudication have included recognition of victims' right to redress. The Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda contained a limited recognition of an individual's right to reparations, while the Rome Statute of the International Criminal Court (ICC) has gone further.

The Statutes of the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY) permit the Tribunals to order only one form of victim

¹³ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Arts. 2, 3.

¹⁴ Bottiglieri, *supra* note 11 at 116-123.

¹⁵ *Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965, 660 U.N.T.S. 195, Art. 6; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. DOC. A/39/51 (1984), Art. 14.

¹⁶ Riccardo Pisillo-Mazzeschi, "International Obligations to Provide for Reparations Claims?" in Albrecht Randelzhofer & Christian Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 149 at 171.

¹⁷ *Ibid.*

¹⁸ *Velásquez Rodríguez Case, Reparations (Honduras)* (1999) Inter-Am. Ct. H.R. (Ser. C.) No. 7 at paras 30-31; for more on the IACHR, see Judith Schonsteiner, "Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter-American Court of Human Rights" *American University International Law Review* 23(1) (2007) 127.

¹⁹ *Aksoy v. Turkey* (1996), 23 Eur. H.R. Rep. 553 at para. 98.

redress: the restitution of unlawfully taken property.²⁰ The final judgments of the ICTY and ICTR have not issued a single restitution order nor referred compensation matters to a national body.²¹

Faced with criticisms that the Tribunals were participating in denying victims' rights to redress, Carla del Ponte, (then) Prosecutor of the ICTY and the ICTR, called for a more efficient system for victim compensation.²² However, the Security Council and the Judges of both tribunals opposed this suggestion.²³ In spite of the opposition of the Judges, the former Registrar of the ICTR initiated an assistance program targeted at witnesses and potential witnesses. The program provided legal assistance, housing, and psychological assistance, via Rwandan women's NGOs. The most infamous project, the construction of a peace village in Taba, was designed to give something back to the women from Taba who had testified in the watershed *Akayesu* trial (in which rape was recognized as an act of genocide). The program was roundly criticized. In Rwanda, critics complained that only 50% of the promised amounts were transferred, and that the selection of people for the 23 houses built in Taba was unfair. At the UN level, the Security Council was concerned that the Statute of the ICTR did not allow this type of social assistance program, and so the program was officially closed in December 2001.²⁴

In a marked departure from the reticence of the ad hoc international criminal tribunals, the Statute of the International Criminal Court recognizes the right of victims to obtain individual reparations and provides mechanisms for this purpose. Once an individual is found guilty of a crime under the ICC's jurisdiction, the Court may determine the scope and extent of damages, losses, and injuries suffered by victims.²⁵ This can occur either through a request from victims or on the Court's own motion. The Court may make an order directly against the convicted person or may order that the award be made through the ICC Trust Fund. Reparations may be awarded in the form of restitution of property, compensation, rehabilitation, or other forms. Thus, the emergence of an individual right to reparation can be observed in international criminal law.

2.4. UN Standards and Norms

Alongside the development of a right to reparations in international human rights treaties and international criminal law, soft-law, non-binding instruments have stressed the importance of reparations for victims of human rights violations. The most comprehensive attempt to develop a body of principles around reparations occurred under the auspices of the Commission on Human

²⁰ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/827 (1993), Art. 24(1) [ICTY Statute]; *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighboring States*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/955 (1994), Art.23(1) [ICTR Statute].

²¹ *Ibid.* at 202-203.

²² Carla del Ponte, "Address to the UN Security Council by Carla del Ponte, Prosecutor of the ICTY and ICTR" 21 November 2000, ICTY Doc. JL/P.I.S./542-e of 24 November 2000.

²³ Bottigliero, *supra* note 11 at 206.

²⁴ Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A Case-Study on Rwanda* (Antwerp: Intersentia, 2004) at 464-466 [Rombouts, 2004].

²⁵ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998), Art. 75.

Rights, concluding in the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law” (BPG).²⁶

The BPG takes a broad approach to remedy and reparations, incorporating the obligations to prevent violations, investigate and prosecute violations, and provide effective remedies to victims.²⁷ Remedies to victims include equal and effective access to justice, adequate, effective and prompt reparations, and access to relevant information concerning violations and reparations mechanisms.²⁸ The numerous forms of reparations are well described in the BPG: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²⁹

Restitution aims at restoring the victim to the original situation before the violation occurred, and it includes return to one’s place of residence, restoration of employment, return of property, and restoration of liberty, enjoyment of human rights, identity, and citizenship. This affords the concept of restitution breadth beyond the return of property. *Compensation* provides monetary and in-kind payment for harm which can be economically assessed. Harm includes physical or mental harm, lost opportunities (for employment and education), material damage, harm to reputation and dignity, moral damage, and costs required for assistance and medical and psychological services. *Rehabilitation* incorporates medical and psychological care and legal and social services. *Satisfaction* includes cessation of continuing violations, verification of facts and disclosure of truth, official apologies, commemorations, and inclusion of accounts of the violations in educational materials. The last category, *guarantees of non-repetition*, includes measures aimed to prevent reoccurrence of rights violations such as measures to ensure civilian control of the military, strengthen the judiciary’s independence, and prevent social conflict.

2.5. Conclusion

This review of the international legal framework for reparations demonstrates that the normative tide has been towards the recognition of an individual right to reparations for victims of gross violations of human rights. The consensus blurs around how that right should be realized. The classical rules on state responsibility and the approach of international human rights treaties acknowledge the right to reparation but permit it to be claimed only via domestic channels. More recent developments in international human rights and criminal law recognize individual standing at international law to claim reparations. The jurisprudence of the Inter-American Court of Human Rights has recognized a right to reparation and made orders against states for that right to be realized. Most recently, flanked by the new Basic Principles and Guidelines, the establishment of the ICC’s Trust Fund for Victims provides a clear indication of the international community’s recognition of an individual victim’s right to reparation.

²⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law*, UN Human Rights Committee, 56th meeting, chap. XI, E/CN.4/2005/L.10/Add.11 [BPG].

²⁷ *Ibid.* at art. 3.

²⁸ *Ibid.* at art. 11.

²⁹ BPG, *supra* note 26 at articles 15-23.

3. Women's Voices on Reparations

There is thus a relatively clear understanding in international law and transitional justice circles about the definition of reparations and its contours. The most progressive position, though not universally accepted, is that an individual has a right to reparations. The paradox is that this rights-based approach does not match the approach to reparations among many activists. The following section outlines how some women activists talk about reparations, in order to demonstrate the gap between the dominant rights-based approach and activist discourses.

Every conflict is different, and the needs of survivors vary enormously within conflict societies and from conflict to conflict. Women who live through conflict are very different from one another and do not constitute a single group. Nonetheless, a comparative analysis of women's attitudes about reparations in a number of societies emerging from conflict reveals some interesting trends. I present these trends at a macro, generalized level that makes no attempt to reflect the detailed political, historical, economic, and social contexts in which these claims are articulated. The analysis which follows is based on a number of sources.

As part of its project on reparations, the International Center for Transitional Justice (ICTJ) initiated a project on gender and reparations. The first part of the study, produced through two years of on-the-ground case studies, centered on empirical gender analyses of reparations programs in Guatemala, Peru, Rwanda, Sierra Leone, South Africa, and Timor-Leste.³⁰

In parallel to this project, the Coalition on Women's Human Rights in Conflict Situations is engaged in a research action project with activists on gender and reparations.³¹ The Coalition conducted a study that included interviews with activists in South Africa, Rwanda, Sierra Leone, Guatemala, Peru, Chile, and Timor Leste.³² Based on these interviews, a draft of a civil society declaration on gender and reparations was prepared. At an international meeting hosted by the Coalition and the Urgent Action Fund-Kenya, women's rights advocates, activists, and women survivors of conflict from Africa, Asia, Europe, Central, North and South America extensively revised the draft to produce a Declaration that represented the Conference's views. The conference resulted the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.³³

In the following section, findings from the Coalition's research and the interventions from participants in the Nairobi meeting will be integrated into a broader analysis that includes the ICTJ study. I then analyze the Nairobi Declaration as one expression of women's views on gender and reparations.

³⁰ Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006).

³¹ The author is a member of the Coalition and was present at the Nairobi meeting.

³² Vahida Nainar, "Women's Right to Reparation" (Paper presented to the International Meeting on Women's Right to Reparation, Nairobi, March 2007).

³³ "Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation," adopted March 2007. Available at: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

3.1. Analyzing Women's Claims for Reparations

3.1.1. *Broad scope of eligibility for reparations*

When provided the opportunity to talk about what they need from transitional justice, it is common for women to articulate the needs of their families or the harms experienced by members of their families. For example, women testifying before the truth Commissions in South Africa and Peru tended to downplay or omit their harsh treatment and focus on what happened to their male relatives.³⁴ This is one reason that the UNCC in Kuwait was innovative in adopting an inclusive approach to the definition of victims. For claims of loss by individuals, individual victims included victims related to a primary victim, either as spouses, children or parents.³⁵ In lobbying around the creation of the International Criminal Court, the Women's Caucus for Gender Justice also argued for an inclusive definition of victim in reparations.³⁶ The effect is that women's voices have contributed to a broad definition of the class of people eligible to benefit from reparations programs.

3.1.2. *Defining harm in a gendered way*

As war is gendered, the definition of harms that are the basis for eligibility has gendered effects. In South Africa, the Truth and Reconciliation Commission's definition of victims was based on "harm as a result of a gross violation of human rights or an act associated with political objectives for which amnesty has been granted."³⁷ This definition was criticized for its exclusion of the victims of such apartheid policies as forced removals, pass laws, and residential segregation³⁸ and the exclusion of the structural social and economic violence which imperiled day-to-day subsistence under apartheid.³⁹ As women have traditionally been responsible for subsistence (food, care, and shelter), the exclusion of these harms rendered women's experiences of apartheid less visible. Even for events which fell under the umbrella of the TRC, ideologies functioned to deny women's experiences of the conflict. For example, in one case, the TRC's

³⁴ Beth Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa" in Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 55; Julie Guillerot, "Linking Gender and Reparations in Peru: A Failed Opportunity" in Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 146.

³⁵ Judith G. Gardam & Michelle J. Jarvis, *Women, Armed Conflict, and International Law* (The Hague: Kluwer Law International, 2001) at 234.

³⁶ Women's Caucus for Gender Justice in the International Criminal Court, "Part III: Recommendations and Commentary for the March 1998 PrepCom, Reparations" (18 Mar 1998), Women's Initiatives for Gender Justice: <<http://www.iccwomen.org/index.php>>.

³⁷ Lovell Fernandez, "Reparation for Human Rights Violations Committed by the *Apartheid* Regime in South Africa" in Albrecht Randelzhofer & Christian Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 173 at 176.

³⁸ Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas" 27 *Hastings International & Comparative L. Rev.* 157 at 178.

³⁹ Pumla Gobodo-Madikizela, "Women's Contributions to South Africa's Truth and Reconciliation Commission" Women Waging Peace Policy Commission, Boston, February 2005 at 14.

Amnesty Committee rejected the notion that a sexual crime could be politically motivated, in effect denying that a woman could have been raped just because she was from another political party.⁴⁰ Similarly, Chile's decision to define victims as those killed or "disappeared" excluded the significantly larger number of torture survivors or those forced into exile.⁴¹

In contrast, the UNCC's approach to the definition of compensable harms resulted in the recognition of women's experiences during the invasion of Kuwait. Being forced to flee was in itself recognized as leading to compensable harm, as were injuries sustained in refugee camps.⁴² The UNCC also made important strides in recognizing sexual violence as a serious personal injury, compensable on a par with aggravated assault and torture.⁴³

3.1.3. *Root Causes and Continuity of Violence*

Participants at the Nairobi Meeting agreed that returning victims to the point they were in before the conflict is not an understanding of reparations that can work if one is concerned with a gender-sensitive approach to reparations. Activists from South Africa, Darfur, Peru, Sierra Leone, and Rwanda called attention to the discriminatory laws and practices which denied women's rights. A similar concern was found by ICTJ's researchers in Guatemala: indigenous women's organizations argued that the material restitution component of reparations would not help women because they were denied rights to own land before the conflict.⁴⁴

The conclusion that reparations cannot be about restitution to pre-conflict conditions leads many women to articulate a theory of reparations that calls for addressing the root causes of the conflict. This could be seen at the Nairobi Meeting in the interventions of activists from South Africa, Burundi, and Argentina.

In some cases, interrogating the root causes of conflict as part of the goals of reparations leads women to draw connections between pre and post-conflict forms and levels of violence against women. Activists in Peru and Argentina argued at the Nairobi Meeting that there is continuity between violence today and violence under the dictatorships. Empirical studies have found that conflict increases and exacerbates pre-conflict forms and levels of violence against women.⁴⁵ As communities break down during conflict, intimate partner violence increases, and women are exposed to new forms of violence, as victims of rape by soldiers, occupying armed forces, or peacekeepers.⁴⁶ Feminist research on sexualized violence in conflict has demonstrated

⁴⁰ Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (NY: Routledge, 2001) at 80.

⁴¹ Roht-Arriaza, *supra* note 38 at 178.

⁴² Gardam & Jarvis, *supra* note at 240.

⁴³ *Ibid.* at 238.

⁴⁴ Claudia Paz y Paz Bailey, "Guatemala: Gender and Reparations for Human Rights Violations" in Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 110.

⁴⁵ Sheila Meintjes, Anu Pillay and Meredith Turshen, eds. *The Aftermath: Women in Post-conflict Transformation* (New York: Zed Books, 2002) at 4.

⁴⁶ Amani El Jack, "Gender and Armed Conflict: Overview Report" (Brighton: Institute of Development Studies, 2003) at 16.

the connections between the cultural acceptance of domestic violence and the use of rape as a weapon of war.⁴⁷

However, other studies have found that activists are not drawing connections between gender violence in the conflict and present-day violence. Though South Africa has endemic violence against women, women's organizations have not often linked past sexual crimes to current sexual crimes.⁴⁸ A similar pattern was observed in Peru and Guatemala, as the feminist organizations concerned with violence against women focused very little on 'political violence', and human rights organizations ignored women's experiences of the conflict.⁴⁹

3.1.4. Compensation

Money helps to relieve some of the burdens caused by human rights violations, and women survivors will often articulate monetary compensation as one element of reparations. Participants from Rwanda and Peru in the Nairobi Declaration meeting argued that compensation for economic losses should be included in reparations programs, particularly as many women will have lost male breadwinners or the means of making a living. Victims in Sierra Leone asked for individual monetary compensation as one aspect of their understanding of reparations.⁵⁰ Through interviews with women from civil society organizations in East Timor, researchers learned that one priority was some form of material support for survivors of the conflict.⁵¹ In South Africa, many of those who gave testimony to the TRC were disappointed that it had no immediate power to help with day-to-day survival needs.⁵² Those who did eventually receive Urgent Interim Reparations awards from the South African government felt that the amounts given were of no use to their pressing material needs.⁵³ The ability to choose how to utilize a monetary award is also an issue. In South Africa, the money has helped to give women some status and independence.⁵⁴ In Rwanda, Avega, the Association for Genocide Widows, advocated for monetary reparations as this would allow survivors to choose how to spend their award.⁵⁵

However, there are limitations to understanding reparations as purely monetary compensation. In Latin America, monetary compensation is controversial because many regard these payments as "blood money" intended to silence or deflect attention from larger issues of

⁴⁷ Caroline O.N. Moser & Fiona C. Clark, eds. *Victims, Perpetrators or Actors?: Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001).

⁴⁸ Goldblatt, *supra* note 34 at 74.

⁴⁹ Guillerot, *supra* note 34 at 146; Paz y Paz Bailey, *supra* note 44 at 104.

⁵⁰ Jamesina King, "Gender and Reparations in Sierra Leone: The Wounds of War Remain Open" in Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 255.

⁵¹ Galuh Wandita, Karen Campbell-Nelson, and Manuela Leong Pereira, "Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims" in Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 300.

⁵² Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 105 [Minow, 1998].

⁵³ Goldblatt, *supra* note 34 at 66.

⁵⁴ *Ibid.* at 69.

⁵⁵ Rombouts, 2004, *supra* note 24 at 427.

impunity and recognition.⁵⁶ In Japan, the “comfort women” rejected the monetary reparations offered by the Japanese government on the basis that it came from private sources, and not from the government’s funds.

3.1.5. *Dignity*

A clear common message is the need to go beyond monetary compensation to acknowledge responsibility. The ‘Comfort Women’ rejected the Japanese government’s offer of compensation, not because of the amount but because the government did not acknowledge any responsibility. The six women (out of 500) who *did* accept the funds emphasized that, despite their acceptance, no monetary repayment could repair the harm they had suffered.⁵⁷ In contrast, most Asian-Americans detained by the US government during World War II accepted a small sum, arguably inadequate to compensate for their financial and moral losses, because it was offered with an official acknowledgement of responsibility and a government apology.⁵⁸

In addition to the call for an acknowledgement of responsibility, victims have stressed the importance of measures which bear public witness to the crimes committed. For example, in South Africa, it was common for relatives to demand a death certificate for someone disappeared by the regime or a tombstone for a murdered relative. Information about the dead and disappeared and measures to restore the dignity of those wrongly convicted are also common themes in reparations debates in Argentina, according to a participant in the Nairobi Meeting. Similarly, the ‘Comfort Women’ have demanded that a historical account of what happened to them be included in school textbooks.⁵⁹ In Latin America, survivors and relatives have called for public monuments to be built and named in honor of the murdered and disappeared.⁶⁰ According to Nairobi Meeting activists who work with victims of sexual violence in Rwanda and Sierra Leone, actions to restore the dignity of sexual violence victims are a crucial component of reparations. This theme also appears in ICTJ’s interviews with women from civil society organizations.⁶¹

3.1.6. *Health Services*

Victims articulate reparations claims around their physical and mental health needs. Access to health services appears in the ICTJ’s case studies as a reparations claim from women victims in South Africa,⁶² Sierra Leone,⁶³ and East Timor.⁶⁴ It is a central concern among survivors of

⁵⁶ Roht-Arriaza, *supra* note 38 at 180.

⁵⁷ Minow, 1998, *supra* note 52 at 105.

⁵⁸ *Ibid.* at 100.

⁵⁹ *Ibid.* at 105.

⁶⁰ Guillerot, *supra* note 34 at 147.

⁶¹ Wandita, *supra* note 51 at 300.

⁶² Goldblatt, *supra* note 34 at 69.

⁶³ King, *supra* note 50 at 255.

⁶⁴ Wandita, *supra* note 51 at 299.

the genocide in Rwanda.⁶⁵ As parts of its reparations program, the government of Rwanda implemented a form of reparations through preferential access to health services.⁶⁶

At the Nairobi meeting, women from Rwanda, Argentina, and Peru called for mental and social counseling to help survivors recover from the conflict, either individually or in groups. This fits with a common theme in the ICTJ case studies. ICTJ's studies in Guatemala,⁶⁷ South Africa,⁶⁸ Peru,⁶⁹ and Sierra Leone⁷⁰ that victims called for psychological reparations measures as a form of reparation. Indigenous women's groups argued for psychosocial counseling in their communities, implemented from the viewpoint of Mayan spirituality and based on respect for knowledge of community elders, including women.⁷¹ Gender norms influence the design and delivery of counseling programs, and often it is the men who are hardest to reach. Organizations in Guatemala setting up self-help groups found that it was relatively easy to gather women to talk about their feelings, whereas as men were much more reluctant to participate.⁷² This problem was also encountered in Rwanda.⁷³

3.1.7. Housing

Housing comes up as a common need among victims in the reconstruction process. Ninety percent of the victims who gave testimony to the South African Truth and Reconciliation Commission included housing in their requests for reparations.⁷⁴ A subsequent study on how victims used their monetary compensation awards showed that many used it for housing-related costs.⁷⁵ Women's groups interviewed as part of the ICTJ's study in Sierra Leone stressed that housing was a common need.⁷⁶ The ICTJ East Timor study included interviews with a sample of

⁶⁵ Heidy Rombouts, "Women and Reparations in Rwanda: A Long Path to Travel" in Ruth Rubio-Marin, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 224 [Rombouts, 2006].

⁶⁶ Negotiations on the establishment of government reparations programs have been on-going since the genocide in Rwanda. There are two funds: the FARG (Fonds national pour l'assistance aux victimes les plus nécessiteuses du genocide et des massacres perpétrés au Rwanda) and the FIND (Fonds d'indemnisation). The FARG provides social assistance to rescapés of the genocide, but it does not provide compensation. The FARG has paid secondary school fees for students who qualify as 'needy rescapés', helped to build housing, and provided free medical assistance. The FARG was established in 1998, but the FIND was never established. The FIND is meant to address claims for compensation, as well as extend reparations to a class of beneficiaries beyond the needy rescapés currently included in the FARG fund. The social assistance measures under the FARG will be incorporated into the FIND, which will also fund commemoration activities. Rombouts, 2004, *supra* note 24 at 371-379.

⁶⁷ Paz y Paz Bailey, *supra* note 44 at 112.

⁶⁸ Goldblatt, *supra* note 34 at 69.

⁶⁹ Guillerot, *supra* note 34 at 148.

⁷⁰ King, *supra* note 50 at 255.

⁷¹ Paz y Paz Bailey, *supra* note 44 at 113.

⁷² *Ibid.* at 112.

⁷³ Rombouts, 2006, *supra* note 65 at 209.

⁷⁴ Goldblatt, *supra* note 34 at 59.

⁷⁵ *Ibid.* at 69.

⁷⁶ King, *supra* note 50 at 255.

50 female victims across 11 districts. These women listed adequate housing as a component of reparations.⁷⁷ A Rwandan survey of victims' needs found that 80,000 women and 53,000 men were without shelter.⁷⁸ In response, the government built 3000 houses and distributed the homes (often only partially built) as part its FARG program to assist needy rescapés.

3.1.8. *Education for children*

Victims and survivors have also looked to the future in pursuit of reparations for the past. In a multi-country study of Latin American victims, many survivors emphasized the need for education of the children of those killed, disappeared, tortured, or imprisoned.⁷⁹ South African victims demanded that perpetrators pay for the education of victims' children.⁸⁰ They also felt that they should be given preferential access to government programs for their children's education.⁸¹ Women in Peru called on the government for increased support for children's education.⁸² Discussions in women's groups in Sierra Leone revealed that women felt that the government had an obligation to provide free education to children born as a result of war-time conflict.⁸³ In the ICTJ studies in East Timor, education for children came at the top of the list of priorities among women victims, and many used the funds received through the Urgent Reparations program to pay for children's school fees.⁸⁴ In Rwanda, Ibuka, a victims' organization, demanded that school fees for all rescapés be provided by the government's reparations program.⁸⁵ However, some female victims have criticized the school fees policy because women whose children died cannot benefit and the fund does not cover adult education.⁸⁶

3.1.9. *Economic measures*

In the ICTJ research, there are a number of case studies which point to victims' calls for economic development measures, although it is interesting to note that this did not appear in discussions at the Nairobi meeting. In East Timor, women victims included in their definition of reparations a demand for the government to do something to ensure fair prices for their agricultural products.⁸⁷ Funds disbursed by the government in the forms of urgent reparations

⁷⁷ Wandita, *supra* note 51 at 299.

⁷⁸ Rombouts, 2006, *supra* note 65 at 222.

⁷⁹ Roht-Arriaza, *supra* note 38 at 180, citing a multi-country study conducted by a Chilean human rights organization under the auspices of the Association for the Prevention of Torture.

⁸⁰ *Ibid.*

⁸¹ Goldblatt, *supra* note 34 at 71.

⁸² Guillerot, *supra* note 34 at 147.

⁸³ King, *supra* note 50 at 255.

⁸⁴ Wandita, *supra* note 51 at 299-304.

⁸⁵ Rombouts, 2004, *supra* note 24 at 442.

⁸⁶ Rombouts, 2006, *supra* note 65 at 223.

⁸⁷ Wandita, *supra* note 51 at 299.

were used by some of the beneficiaries to launch income-generating activities.⁸⁸ The study in Peru found that jobs figured high in the list of needs among Peruvian women.⁸⁹ In meetings about reparations in Sierra Leone with urban women, women called for micro-credit facilities and skills training for victims.⁹⁰ Women in rural areas argued that agricultural equipment, transportation, and marketing facilities should be included in the government's reparations efforts.⁹¹ Women's organizations felt that the government should rehabilitate markets to make them accessible to women with disabilities, a concern for the many women who survived amputations in the war.⁹²

3.1.10. *Women's rights reforms*

Attention to pre-existing gender discrimination compels many women to push for reforms to laws, practices, and customs that discriminate against women. Nairobi meeting participants from Rwanda, Sierra Leone, and Burundi argued that reforming laws on sexual violence and raising awareness on women's rights should be understood as part of government reparations programs. Activists from Peru argued that denial of reproductive rights, such as rights to abortion, caused some of the conflict violations, through forced pregnancies from rapes. This injustice continues post-conflict and requires legislative change, as part of dealing with the legacy of the conflict. Reforms to laws restricting women's rights to own or inherit land were singled out by activists from Darfur. Calls for legal reform also appear in the ICTJ's research, particularly in the Sierra Leone case study, where women advocated reform to laws on domestic violence and inheritance.⁹³

3.1.11. *Ending impunity*

For many activists, reparations includes a broad understanding of justice. At the Nairobi meeting, activists from Peru, Rwanda, and Argentina stressed that reparations is incomplete if perpetrators of sexual violence go unpunished. Findings from the ICTJ's study in East Timor echo this demand for justice.⁹⁴

3.1.12. *Political participation of women in post-conflict government*

A further theme found in various contexts is an emphasis on political participation of women in decision-making. Women argue that they must be included in decisions about how reparations programs and policies are designed and implemented and in the broader agenda of the post-conflict reconstruction process. They see laws and customs that inhibit women's active participation in public life as part of the transitional justice project, and measures to improve

⁸⁸ *Ibid.* at 304.

⁸⁹ Guillerot, *supra* note 34 at 147.

⁹⁰ King, *supra* note 50 at 255.

⁹¹ *Ibid.*

⁹² *Ibid.* at 260.

⁹³ *Ibid.* at 255.

⁹⁴ Wandita, *supra* note 51 at 299.

women's participation in politics as part of reparations. Activists from Chile, Darfur, Sierra Leone at the Nairobi meeting called for increased participation of women in the post-conflict politics. Calls for women's participation in transitional justice decision-making signal the efforts of women activists to position women as equal citizens, thus challenging post-conflict reconstruction of patriarchy.

3.2. Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparations

The Nairobi Declaration borrows from and pushes beyond international frameworks on the right to reparation.⁹⁵ The Declaration uses many of the terms found in the Basic Principles and Guidelines (restitution, compensation, and re-integration), but the context, tone, and spirit of the Declaration offer a unique civil society perspective. The Declaration begins by adopting a wide definition of harm, as the basis for a claim to reparation. It includes harm to physical integrity, psychological and spiritual well-being, economic security, social status, and the social fabric of the community. There is also wide understanding of how gender identity is constructed.⁹⁶ The Nairobi Declaration references age and customary and religious law as factors that must be analyzed in understanding diverse needs for reparations.

The Declaration views women as having an important public role in rebuilding and maintaining their families, communities, and societies. This connects to the Declaration's message that the design, implementation, and evaluation of reparations programs must be participatory. Participation of women and civil society organizations in the transitional justice process is essential.⁹⁷ Though the decision-making process should be participatory, the Declaration asserts that the state bears the primary responsibility for reparations. Governments should not undertake development activities instead of reparation, as women and girls risk being excluded from the opportunities provided by development.

The understanding of reparations that drives the Declaration is broad. Reparations should include: 1) physical and mental health services and other services for rehabilitation; 2) provisions for compensation and restitution; 3) justice initiatives including ending impunity for sexual violence crimes; 4) programs aimed at restoring victims' dignity using symbolic tools like public apologies; 5) truth telling, including the acknowledgement of women's suffering; 6) educational initiatives, including raising awareness on women's rights and gender sensitivity; 7) the reform of discriminatory laws and customs against women.⁹⁸

The Declaration has a broad understanding of reparations because the Declaration contains a theory of gender-based violence and a prescription for post-conflict social transformation. It argues that gender-based violence in conflict is the result of inequalities between women and men, girls and boys that predate the conflict. These inequalities structure violations during the conflict and are aggravated in the post-conflict period. Because the origins of violations of rights predate the conflict, reparations must aim to transform these socio-cultural injustices and must,

⁹⁵ Valérie Couillard, "The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence" (2007) 1 *International J. of Transitional Justice* 444 at 445.

⁹⁶ *Ibid.* at 449.

⁹⁷ *Ibid.* at 450.

⁹⁸ Anne Saris and Katherine Lofts "Reparation Programmes: A Gendered Perspective", in Carla Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, (The Hague: Brill, 2008) 79 at 93.

by definition, not attempt to restore the victims to their pre-conflict conditions. The Declaration thus calls for an understanding of reparations that is driven by the goal of social transformation.

3.3. Conclusion

Listening to the stories, expectations, and demands of victims demonstrates that victims have a very broad understanding of the idea of reparations. It is clearly much more than an individual right to reparation, as understood in international law. It includes the following elements:

- Broad scope of eligibility for reparations
- Defining harm in a gendered way
- Compensation
- Dignity
- Health services
- Housing
- Education for children
- Economic measures
- Ending impunity
- Understanding the root causes of conflict and acknowledging the continuity of gender-based violence
- Women's rights reforms
- Political participation of women in post-conflict government

The challenge is to explain the gap between the normative framework in international law, human rights law, and criminal law and the understanding of reparations developed at the ground-level. The gulf, I argue, is caused by a different normative approach to the meaning of justice. In the next sections, I offer theoretical models for reparations, based on theories of justice, and then elaborate a feminist critique of these models.

4. Three Theoretical Models of Justice

The aim of reparations is to achieve justice for victims. But defining justice and the means to achieve it is a much deeper conceptual and practical challenge. Based on work by Nancy Fraser, the following section proposes three models for defining justice.⁹⁹ Each model carries with it a conception of identity and a remedy to injustice.

According to some schools of thought, justice can be defined as “a standard whereby the distributive aspects of the basic structures of society are to be assessed.”¹⁰⁰ If justice is about distribution, then injustice is about imperfect distribution. The ‘stuff’ of distributive justice is material resources, rights and liberties, and opportunities. Other thinkers argue that just distribution should include attention to culture and community. These opposing views all depart from the ‘justice as distribution’ paradigm – the debate is a question about what is distributed and how much.¹⁰¹ Another possibility is to step out of the ‘justice as distribution’ paradigm to define ‘justice as [a] process’ that concentrates on action, decisions about action, and provision of the means to develop and exercise capacities.¹⁰²

4.1. Justice as Distribution of the Material

In defining justice as distribution, liberal thinkers emphasize distribution to correct socio-economic inequality. This includes not only material resources, but also rights, liberties, and opportunities, which have been constructed as material things.¹⁰³ The liberal paradigm conceives of a right as something one actually has, in a proprietary sense, rather than as creating the conditions for relationships with others.¹⁰⁴ This line of thought is concerned with socio-economic views of injustice, whereby the solution is egalitarian redistribution.¹⁰⁵ The response to injustice of egalitarian liberal theory is redistribution of the material, or material-like, goods of society in a more equitable fashion, through the creation and protection of individual rights. The central unit of analysis is the abstract, autonomous individual.

⁹⁹ Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Post-socialist’ Condition* (New York: Routledge, 1997); note: For an application of Nancy Fraser’s framework on transitional justice prosecutions, see Katherine M. Franke, “Gendered Subjects of Transitional Justice” (2006) 15:3 Columbia J. of Gender and Law 813 at 824..

¹⁰⁰ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 9.

¹⁰¹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 16.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at 25.

¹⁰⁴ Costas Douzinas and Adam Gearey, *Critical Jurisprudence: the Political Philosophy of Justice* (Oxford: Hart Publishing, 2005) at 183.

¹⁰⁵ Martha Nussbaum has contributed a considerably more complex theory of egalitarian liberalism that addresses many of the feminist critiques of the traditional model I present here. See Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999) and Martha Nussbaum, *Women and Human Development: the Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

4.2. Justice as Distribution of the Symbolic

Another school of thought argues that injustice can be cultural and symbolic and can arise from domination, non-recognition, and disrespect.¹⁰⁶ The cultural group or community appears as a key site in which justice and injustice are meted out. The individual cannot be understood abstracted from his cultural setting, because culture is vital to making individual choices.¹⁰⁷ Identity is thus not pre-constituted but shaped by cultural interaction and relationship. The remedy for injustice is to develop and protect the rights of cultural groups. For the communitarian, interested in cultural distributive justice, the remedy is to enhance recognition.

4.3. Justice as Process

In theories which define justice as a process, attention is placed on the institutional context and the structures, practices, rules and norms that guide decisions and the language and symbols that drive them.¹⁰⁸ From this paradigm, justice cannot be achieved through distributing things or symbols, but by encouraging a participatory and empowering democratic process. In this model, the self is neither a pre-constituted individual nor culturally-determined group member. The self is dynamic, responsive, and contingent, and “identity is constituted relationally, through involvement with—and incorporation of – significant others and integration into communities.”¹⁰⁹ The individual and group need to be theorized together, because individuals identify with a group as a result of their similar experiences or ways of life. Thus, groups and individuals are not inherently or essentially bound together – they come together through social relations.

Defining justice as a process leads to conceptions of rights not as things or tools, but as “communally recognized rituals for securing attention in a continuing struggle over boundaries between people.”¹¹⁰ An attention to process suggests that liberal rights and communitarian relationships co-exist. There is no need for an either/or choice between redistribution and recognition.¹¹¹ The redistribution view rests on the abstract, universal individual as the unit which justifies redistribution; the cultural recognition view celebrates the differences among individuals which must be better affirmed. Yet, people experience injustice in both cultural and material (economic) terms, so claims for redistribution and recognition are not mutually exclusive. The opposition between justice as socio-economic or cultural rests on a false opposition, because both understandings of justice rest on the ‘right to have rights.’¹¹² Classical liberalism is built around the individual as holder of legal personality. Legal personality brings

¹⁰⁶ Charles Taylor, *Multiculturalism and “The Politics of Recognition”* (Princeton: Princeton University Press, 1992) at 25.

¹⁰⁷ Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989) at 165.

¹⁰⁸ Young, *supra* note 101 at 22.

¹⁰⁹ *Ibid.*

¹¹⁰ Martha Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990) at 383.

¹¹¹ Fraser, *supra* note 99 at 4.

¹¹² Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1973) at 296.

both formal recognition of the material (e.g. property rights) and abstract recognition of the symbolic (e.g. honor and respect).¹¹³

Neither theory of justice – as fundamentally about socio-economic or cultural injustice – emphasizes transformation, according to Fraser.¹¹⁴ There is no effort to “restructure the underlying generative framework.”¹¹⁵ Policies aimed at addressing socio-economic injustice frequently seek to correct the inequity produced by existing political and economic structures without changing the underlying causes. The politics of identity has focused on affirmation, which “corrects the inequitable social outcomes without disturbing the underlying framework that generates them.”¹¹⁶ It is possible to define justice and the remedies to injustice in such a way that both the redistribution and recognition challenges are included.¹¹⁷ By focusing on transformation, the processes which produce injustice, rather than their effects, can be analyzed and tackled.¹¹⁸ Young argues that the remedy to injustice can be found in processes which “support the development and exercise of people’s capacities and their ability to express themselves and be heard.”¹¹⁹

In the next section, I apply these different theoretical approaches to justice to a theoretical framework on reparations.

¹¹³ Douzinas and Gearey, *supra* note 104 at 184-186.

¹¹⁴ Fraser, *supra* note 99 at 23.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 31.

¹¹⁸ *Ibid.* at 33.

¹¹⁹ Young, *supra* note 101 at 38.

5. Three Theoretical Models of Reparations

The following section suggests three models of reparations: reparations as rights, as symbols, or as processes. These differing conceptions in turn connote differences in the nature and goals of reparations. They can be mapped on to the three theoretical models of justice outlined in the preceding section.

5.1. Reparations as Right

The assertion that a breach of a victim's rights generates a right to compensation is the paradigmatic example of reparations as a right.¹²⁰ This formulation is the organizing principle in international law's understanding of reparation and is based in a juridical understanding of the appropriate actions in the wake of breaches of law. Reparation can be achieved through restitution of things (like property) or rights (restitution of citizenship rights or rights to legal personality). The rights-based architecture of reparations explains why the restoration of individual property rights was the only form of reparations permissible under the ICTY and ICTR statutes.

Rights-based conceptions of reparation can be understood as part of the liberal paradigm of "Justice as Distribution", with the injustice being repaired understood in material and socio-economic terms. Rights-based understandings of reparations dominate when justice is understood in material distributive terms. This kind of reparations emphasizes better distribution through compensation, with the liberal individual as the core unit of reparations.

Reparations sometimes include giving recognized victims access to services and public goods. Turning health care or schooling into a good which can be preferentially allocated is another example of reparations framed as rights. The right to reparations operates to transform a service into a material, thing-like entitlement. Pushing victims to 'the head of line' might help to address the substantive problems which victims continue to endure as a result of the violations committed against them – for example, their increased need for health care or public transportation due to disabilities.

The reality is that it is not possible to provide full reparations to any victim of massive human rights crimes because "no market measures exist for the value of living an ordinary life, without nightmares."¹²¹ At it is impossible to repair the harms caused by massive human rights violations, perhaps reparations understood as a distribution of the material is too narrow.

5.2. Reparations as Symbol

Reparations could instead be thought of as a symbolic act. Symbolic forms of reparations include burials of the dead or disappeared, commemorations, and the re-naming of public monuments after victims. Here, the social, moral, psychological and religious meanings are at the heart of reparations, as opposed to transfers of material things.¹²² Emphasizing the symbolic

¹²⁰ Pablo de Greiff, "The Role of Reparations in Transitions to Democracy" (Paper presented to the Justice and the World Economy: Achieving Global Justice Seminar Series, May 2004).

¹²¹ Minow, 1998, *supra* note 52 at 104.

¹²² *Ibid.* at 104-107.

nature of reparations does not imply rejecting monetary compensation. Rather, in view of the inherent limits of compensation, any material transfers become symbolic objects around which wrongs are acknowledged.¹²³ In this understanding, programs that give survivors preferential access to services may be a way of honoring the debt that society owes them.¹²⁴ Understandings of reparations which stress their symbolic rather than rights-based nature lead to aims related to constructing meaning in the public sphere. Reparations work individually to restore the honor of victims.¹²⁵

For victims of sexual violence and torture, the restoration of dignity may be the most essential element of rehabilitation, both individually and as members of society.¹²⁶ They also function collectively, beyond repairing individual victims or groups of victims, as they signal that a line has been drawn between past and present.¹²⁷ Reparations as symbol look for an acknowledgement of responsibility and apology by the wrongdoer, frequently the state. Acknowledgement and apology have a symbolic reparatory effect for the individual and society because they help to reflect and reconstitute a moral community.¹²⁸

Understanding reparations as a symbol implies a communitarian approach to justice, which regards injustice as caused by mistakes of recognition. The unit to be repaired is not only the individual, but the individual as part of her society. In this understanding, both individuals and collectivities have rights to reparation.

5.3. Reparations as Process

In characterizing reparations as a process, emphasis is placed on the role of reparations in the complex transition out of a period of human rights violations, for individuals and for society. Reparations programs can be defined as administrative processes.¹²⁹ As processes, reparations are backward-looking, as they aim to repair the violations of victims' rights, and forward-looking as they seek to advance the purposes of peace and reconciliation and embed the protection of such rights in the future.¹³⁰ In a process-oriented definition of reparations, a number of broader aims, such as reconciliation and development, may be possible goals.

Process-centered understandings can emphasize the role of reparations in forging a path towards reconciliation. Reparatory measures, like cash compensations and public acts of commemoration, facilitate reconciliation by recognizing the victim's humanity and signaling the

¹²³ Christopher Kutz "Justice in Reparations: The Cost of Memory and the Value of Talk" (2004) 32:3 *Philosophy & Public Affairs* 277 at 279.

¹²⁴ Roht-Arriaza, *supra* note 38 at 198-99.

¹²⁵ Nancy L. Rosenblum, "Justice and the Experience of Injustice" in Martha Minow, ed. *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton: Princeton University Press, 2002) 75 at 98-99.

¹²⁶ Judith L. Herman, "Peace on Earth Begins at Home: Reflections from the Women's Liberation Movement" in Martha Minow, ed. *Breaking the Cycles of Hatred, supra* note 125 at 195.

¹²⁷ Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) at 127.

¹²⁸ Minow, 1998, *supra* note 52 at 114.

¹²⁹ Jaime E. Malamud-Goti and Lucas Sebastián Grosman, "Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies" in Pablo de Greiff, ed. *The Handbook of Reparations* (New York: Oxford University Press, 2006) at 540.

¹³⁰ Teitel, *supra* note 127 at 127.

society's intention to transform itself. For example, the belief in the South African TRC's potential for reconciliation lay in the idea that the process *itself* of truth-telling and acknowledgement would build the foundations for a new nation.¹³¹

Process-based understandings of reparations can lead to assertions that reparations should be understood as tools to promote social and economic development. The aims of reparations become integrated into the process of social transformation following a period of conflict. Victims' rights to reparations and their claims are recognized as they are compatible with the government's plans for social, political, and economic development.¹³²

These process-based understandings of reparations contrast to the other models based on Justice as Distribution. Rights-based and symbolic understandings of reparations see the realization of rights and symbols as tangible outcomes which emerge at a definable post-conflict moment. They see the 'reparatory transaction' – with a clear start and endpoint – as the culmination of a successful reparations program. In understanding reparations as a process, the rights and symbols of reparations are folded into a broader idea of reparations that is defined by the process, rather than the individual component parts. Process-based understandings of reparations incorporate rights, symbols, and social measures like rehabilitation and development. But rather than 'being reparations', these are the building blocks of a process of transition that is specific to each post-conflict context, dynamic, contingent, open-ended, and participatory.

The following chart summarizes these three understandings of reparations in the context of different theories of justice.

<u>Definition of Justice</u>	<u>Justice as Distribution</u>		<u>Justice as Process</u>
<u>Core to Justice</u>	Material / Socio-economic	Culture	Processes, structures, institutions
<u>Identity, Self, Community</u>	Pre-existing, abstract, universal individual	Culturally-determined, Groups need rights	Dynamic, responsive, contingent, relational
<u>Law's Role</u>	Rights for individuals	Rights for groups	Discursive site, plural normativity
<u>Remedy</u>	Better Redistribution	Better Recognition	Better democratic process, participation, empowerment
<u>Reparations are ...</u>	Rights	Symbols	Processes
<u>Repair through ...</u>	Respect for legal rights to property and personality (e.g. compensation, equal citizenship)	Restoring honor and bearing witness	Inclusive, participatory, and democratic processes that see transition as both forward & backward-looking

¹³¹ Brandon Hamber & Richard Wilson, "Symbolic Closure through Memory, Reparation, and Revenge in Post-conflict societies" (Paper presented at Traumatic Stress in South Africa Conference, January 1999).

¹³² Teitel, *supra* note at 147.

6. Towards Feminist Theories of Reparations

The power of international institutions and processes may mean that their normative frames are preferred over activist discourses: “The structural underpinnings of conflict may be intentionally or inadvertently omitted from the transitional justice account through the adoption of the dominant scripts.”¹³³ As transitional justice has tended to be framed in ways which reflect male experiences of war, interrogating the hidden approaches to justice in understandings of reparations is important to developing a feminist approach. In the following section, I explore feminist concerns with understanding reparations as rights or symbols. I conclude by arguing that a feminist theory of reparations should understand reparations as a process.

6.1. Reparations as Right: The Dominant Paradigm

The Reparations-as-Rights model dominates contemporary practice and discourse on reparations. In international law, reparations has been clearly defined in rights-based terms. Originally an inter-state remedy, the right to reparation is now protected for individual victims through human rights law and international criminal law. There is reluctance to wade into the terrain of collective rights, as shown by the curtailment and eventual abandonment of the ICTR’s programs which tried to give housing and access to medicines to some victims, survivors, and witnesses of the genocide in Rwanda. The new procedures established in the International Criminal Court for reparations may be the first sign of a retreat of a narrow, rights-based conception to reparations.

Among activists and commentators, the predominance of the “reparations as right” model can be seen. For example, De Greiff of the International Center for Transitional Justice posits that reparations have three inter-linked goals: Recognition, Civic Trust, and Solidarity.¹³⁴ The hallmark of a constitutional democracy is the ability to recognize one another not only as individuals but as rights-bearing citizens.¹³⁵ Reparations foster the recognition of citizenship based on equal rights. Although using terms like ‘Recognition’ and ‘Solidarity’ to describe the goal of reparations, de Greiff departs from an understanding of reparations as rights. The claim for Recognition as an equal citizen is not a cultural or symbolic process to acknowledge the specific needs of marginalized social groups. Instead, such a call for recognition is consistent with the liberal emphasis on the individual as a rights-bearer and justice as formal respect of individual rights by the state and society. The goal of Solidarity is an argument for equality and respect among citizens, with reparations as a tool to achieve this equality, in part through a distribution of tangible (like monetary compensation) and intangible (like full citizenship) goods from the advantaged to the disadvantaged. The concern for rebuilding Civic Trust is premised on a notion of citizens interacting in the public sphere as neutral and inter-changeable individuals, rather than socially-situated members of a range of social, cultural, and political communities.

¹³³ Lorna McGregor, “International Law as a ‘Tiered Process’: Transitional Justice at the Local, National and International Level” in Kieran McEvoy and Lorna McGregor, eds. *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008) at 59.

¹³⁴ De Greiff, 2006, *supra* note 7 at 459.

¹³⁵ *Ibid.* at 460.

6.2. Problems with Reparations as a Right

Although it is the dominant model, defining reparations solely as a right presents several pitfalls. First, the ‘reparations as right’ model implies that justice is to be achieved through re-distribution of the material (including property and legal rights). As reparations recognize individual rights over communitarian interests, a right is used to select those most eligible for reparation from among all those harmed.¹³⁶ Thus, the right shifts the focus from harm to (all) victims to a recognition of (a few) individuals’ rights to bodily and property rights. With the instrument of rights, the liberal conception frames and then sidesteps distributive justice questions.

Framed as rights, then, the quest for reparations is not a project to transform the distribution of wealth and power in a post-conflict society. Indeed, Torpey argues that reparations is part of the “‘juridification’ of politics”.¹³⁷ In this regard, de Greiff is correct to caution against a narrow, legal approach to reparations decisions, calling instead for a fundamentally political approach.¹³⁸

While rights-based conceptions of reparations do consider public and societal acknowledgement and respect for victims, the resulting remedies, like compensation or restitution, repair the individual’s ‘private sphere’ interests – their patrimony. Led by this normative framework, the policy decision to focus on material restitution serves to exclude women and other marginalized groups from reparations, as often they lacked assets before the conflict. It can continue to disadvantage them if post-conflict laws maintain that women do not have rights to own land.¹³⁹

The focus on individual harm is a weakness of individual reparations measures, because it prevents a comprehensive picture of the period of human rights violations.¹⁴⁰ Incorporating the restoration or recognition of legal personality helps to correct the narrow focus on patrimonial interests, but it does not necessarily broaden the reparatory transaction beyond the individual victim/citizen and state. This narrowing has an exclusionary effect when considering the aftermath of conflict from a gendered perspective. Women tend to be victims of conflict-related violations which are dispersed through a community, such as forced displacement, economic insecurity, starvation, and increased care-giving responsibilities due to breakdown of social services.

The existing architecture of reparations is thus built on a liberal framework of individual rights and an understanding of justice based on material distribution. This maps onto an understanding of conflict as intra-male public violence which does not reflect women’s experiences.¹⁴¹ A gendered understanding of reparations must push beyond an understanding of harm built on civil and political rights violations to incorporate economic conditions, structural

¹³⁶ Teitel, *supra* note 127 at 133.

¹³⁷ John Torpey, “Reparations Politics in the 21st Century” (2000-2003) *Third World Legal Studies* 43 at 61 at 62.

¹³⁸ De Greiff, 2006, *supra* note 7 at 465.

¹³⁹ Ruth Rubio-Marín, “The Gender of Reparations: Setting the Agenda” in Ruth Rubio-Marín, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, (New York: Social Science Research Council, 2006) at 33.

¹⁴⁰ De Greiff, 2006, *supra* note 7.

¹⁴¹ Fionnuala Ní Aoláin and Eilish Rooney, “Underenforcement and Intersectionality: Gendered Aspects of Transition for Women” (2007) 1 *International J. of Transitional Justice*, 338 at 343.

violence, and pre-existing inequality and discrimination.¹⁴² Efforts to engender reparations processes challenge this architecture by expanding the definition of harms. Sexual violence is an endemic feature of conflict, but an exclusive focus on rape in wartime risks sexualizing women.¹⁴³ Expanding the definition of harm beyond the male-centered, political violence norm would need to include elements like forced domestic labor, women's increased caretaking responsibilities, and forced displacement. Reparations would need to address economic, social, and cultural harms in order to fully address women's experiences of conflict.¹⁴⁴

Reparations programs that include preferential access to education, housing, and health care can help to address the narrow focus on compensation and harm to civil and political rights, as these programs help to repair non-patrimonial interests. Nevertheless, they remain within a rights-based understanding of reparations. For individual victims to feel that preferential access constitutes reparations, they must see that access as an entitlement based on their status as victim. Access to a service thus acquires the characteristic of a right associated to their personhood.

There are some pitfalls to delivering reparations through preferential access to services. The program might fail to establish a connection between the redistributive program and the acknowledgement of responsibility by the state or perpetrator. Preferential access to services is not of much use if the victim has no need of the services. When there is little overall service provision or when many victims have a right to such measures, being granted preferential access may mean little in practice. Affirmative action may provoke resentment from others who feel they have just as much right to the public good being 'granted' by the government in this preferential manner. For example, the Rwandan program of granting medical cards to rescapés,¹⁴⁵ permitting them access to medical services for non-genocide and genocide-related issues, has contributed to tensions between classes of survivors in Rwanda. Many men and women no longer dare to use their medical cards because they fear mistreatment and stigma.¹⁴⁶

The individual at the center of the reparatory effort in a rights-based understanding is imagined in abstract and neutral terms. Feminist and communitarian critics have exposed liberalism's impoverished understanding of the individual, disembodied from the social context that forms her. Applying this analysis to understanding reparations suggests that positioning a gender-neutral citizen at the heart of reparations will obscure the social factors which produce

¹⁴² Ruth Rubio-Marín and Pablo de Greiff, "Women and Reparations" (2007) 1 *International J. of Transitional Justice* 318 at 326.

¹⁴³ *Ibid.*

¹⁴⁴ Daniel Aguirre and Irene Pietropaoli, "Gender Equality, Development and Transitional Justice: The Case of Nepal" (2008) 2 *International J. of Transitional Justice* 356 at 358; Makau W. Mutua, *Transitional Justice in Sexual and Gender-Based Violence* (July 17, 2008). Buffalo Legal Studies Research Paper No. 2008-18 at 2.

¹⁴⁵ The notion of rescapé is central to Rwandan understandings of eligibility for reparations, but it is complex and multi-faceted. The first aspect of rescapé identity limits the notion of harm to the fact of being pursued, hunted down, or persecuted. The second parameter broaches the supposed ethnic-neutrality: most acknowledge that both moderate Hutu and Tutsi were persecuted, and therefore qualify as rescapés, although complexities arise with regard to inter-ethnic marriages. However, victims of RPF crimes are denied rescapé status. The third parameter concerns the belief that presence in the country during the 1994 events is fundamental to being a rescapé. In the fourth parameter family ties, relations, and circumstances play a role in determining rescapé status. This becomes particularly relevant for children and widows of inter-ethnic marriages. Rombouts, 2004, *supra* note 24 at 201.

¹⁴⁶ Rombouts, 2006, *supra* note 65 at 224.

identity and the structural inequalities which position individuals in communities.¹⁴⁷ Looking at preferential access forms of reparations reveals some of the resulting problems of the liberal notion of identity. If women are the primary beneficiaries of these forms of reparations, they may contribute to stereotypical views of women as “passive recipients of assistance measures rather than active citizens who require recognition and compensation for the fact that their rights have been violated.”¹⁴⁸ In societies where unequal or preferential access to state services were characteristics of colonial or oppressive rule, disparities in access to services, as a form of reparation, might fan conflict instead of encouraging reconciliation.¹⁴⁹ Furthermore, these programs might easily overlook that, given unequal starting points in society, women and men are unlikely to get the same benefits from the same program.¹⁵⁰ The existing infrastructure upon which preferential access programs are based may contain pre-existing gender biases.

This problem is part of the broader feminist critique of the model of ‘Reparations as Right’: it is impossible to talk of ‘repair’ and ‘restitution’ when the pre-conflict situation was marked by inequality based on gender, ethnicity, class, and other social markers. A feminist approach cannot be a search for social stability or a return to an old way of life. As Saito asks:

as we struggle for compensation, for reparations and for the reconstruction of societies, ... are [we] struggling in ways that support accommodation and reconciliation with wrong, or ... are [we] honouring resistance to wrong and participating in the dismantling of broader structures of oppression.¹⁵¹

Echoing the voices of women activists, feminist critics have concluded that reparations cannot produce justice by repairing to a pre-existing condition of injustice.¹⁵² According to Louise Arbour, then High Commissioner for Human Rights, “Transitional justice must reach ... into the human rights violations that pre-existed the conflict and caused, or contributed to it.”¹⁵³ The structural problems that preceded the conflict – like domestic violence, socio-economic inequality, and systemic discrimination – come into view as part of the reparations debate.¹⁵⁴ High levels of “post-violence violence” throw into question the ‘peace’ that supposedly underpins reparations decisions.¹⁵⁵ Massive economic deprivation is most likely to affect women

¹⁴⁷ Colleen Duggan, Claudia Paz y Paz Bailey and Julie Guillerot “Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru” (2008) 2 *International J. of Transitional Justice* 192 at 197.

¹⁴⁸ Aguirre and Pietropaoli, *supra* note 144 at 333.

¹⁴⁹ Roht-Arriaza, *supra* note 38 at 199-200.

¹⁵⁰ Rubio-Marin & de Greiff, *supra* note 142 at 333.

¹⁵¹ Natsu Taylor Saito, “The Symbolism and Substance of Redress and Reconstruction” (2000-2003) *Third World Legal Studies* 161 at 168.

¹⁵² Rubio-Marin & de Greiff, *supra* note 142 at 331; Christine Chinkin “Gender, Human Rights, and Peace Agreements” (2003) 18 *Ohio State J. on Dispute Resolution* 867 at 876; Saris & Lofts, *supra* note 98 at 81; Aguirre and Pietropaoli, *supra* note 144 at 363.

¹⁵³ Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (Second Annual Transitional Justice Lecture, New York University School of Law Center for Human Rights and Global Justice and the International Center for Transitional Justice, New York, 25 October 2006) at 2.

¹⁵⁴ Duggan et al, *supra* note 147 at 207; Rubio-Marin, *supra* note 139 at 30.

¹⁵⁵ Kimberly Theidon, “Reconstructing Masculinities: The Disarmament, Demobilization, and Reintegration of Former Combatants” (2009) 31 *Human Rights Quarterly* 1 at 34.

and children, but transitional justice norms do not define this as a threat to security and peace. A feminist approach to reparations must ask whether “an emphasis on ending or containing political violence per se constitutes a full and thorough response to the multitudes of harms that both accompany and survive past the ending of formal ... hostilities.”¹⁵⁶

Paying attention to the pre-existing conditions of those claiming reparations unravels the logic of reparations. It exposes that rights-based understandings of reparations are essentially aimed at correcting errors produced by conflict in the distribution of resources. This correction, as Kutz explains, relies on a normativity, constructed independently, by the pre-conflict distribution of rights and entitlements.¹⁵⁷ A ‘right to reparations’ is intrinsically incapable of analyzing whether pre-conflict distributions were fair or just.

6.3. Problems with Reparations as a Symbol

The dominant account of reparations, as a right, thus presents a number of problems from a feminist standpoint. However, the solution does not lie in swinging to a ‘reparations as symbol’ approach that protects groups through recognition and social standing.

Moving away from the individual’s right to reparation to focusing on collective rights to symbolic forms of reparation may have negative effects for women and other marginalized groups. The communitarian notion of the embodied socially-situated self leaves little room for agency and self-determination, important feminist concerns.¹⁵⁸ Feminists have also critiqued the romantic view of community adopted by communitarians. The recognition of groups may in some cases be used as a justification for perpetuating inequality among and within groups.¹⁵⁹

Advocating an approach to reparations based exclusively on symbolic forms of reparation may find little support among women who articulate their concerns for reparations around day-to-day survival needs. Many women victims’ groups call for material forms of reparations and stress the need for their recognition as rights-bearing individuals. Given the importance of rights in the understanding of reparations advanced by women activists, it does not make sense to argue that a feminist understanding of reparations must concentrate only on its symbolic dimensions.

Nevertheless, women articulate a need for measures to restore the dignity of survivors of the conflict, and very often these measures will take a symbolic form. Even the rights-based forms of reparation, like compensation or preferential access to services, function in a symbolic register: no amount of money or free health care will repair the victim, but the public choice to provide those forms of reparations sends a symbolic message about the desire to repair their dignity and standing in the community.

For feminists, however, dignity is a bit of Trojan horse. Sexual violence as tool of war is decried by feminist activists because it physically and psychologically damages the woman or girl, and because it tarnishes her reputation in the community, sometimes leading to her permanent banishment. Reparation programs that aim to restore her dignity attempt to achieve a

¹⁵⁶ Fionnuala Ni Aolain “Political Violence and Gender during Times of Transition” (2006) 15 Columbia J. Gender & Law 829 at 847.

¹⁵⁷ Kutz, *supra* note 123 at 302.

¹⁵⁸ Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998) at 54.

¹⁵⁹ Catherine O'Rourke, “The Shifting Signifier of ‘Community’ in Transitional Justice: A Feminist Analysis” (2008) 23 Wisconsin J. Law Gender & Society 269 at 272.

reconciliation between the victim and the family and community. But the stigma associated with surviving sexual violence is deeply enmeshed with attitudes that a woman's sexual chastity determine her worth and that a woman's body is an object which certain men, but not others, may legitimately access.¹⁶⁰ In this context, restoring her dignity may reinforce collective meanings attached to women's sexuality.¹⁶¹ Feminist ways to recognize the harm of sexual violence and restore dignity are far from obvious.

6.4. Redefining Reparations as Processes

Understanding reparations as rights or symbols presents some theoretical problems and fails to capture how women articulate their understanding of reparations. Instead of thinking of reparations as a program aiming to achieving material or symbolic justice goals, it makes more feminist sense to think of reparations as a *process* which is both forward and backward-looking and has an open outcome.

Victims of human rights crimes need both rights to property and symbolic respect in the social sphere: "a fundamental goal should be to ensure that any reparations model includes both material and symbolic components."¹⁶² Feminist theory has critiqued the ways in which rights both limit and structure claims for equality and recognition.¹⁶³ By rejecting a dichotomy between rights and symbols, 'reparations as process' has the possibility of answering both women's needs for material compensation and their needs for rehabilitation, recognition, and respect. For survivors of sexual violence or other highly-stigmatized crimes, a strong connection exists between income generating opportunities and personal reputation, so the decision to pursue both types of reparations is crucial. Victims need to be respected as citizens, but in a way which recognizes that they are situated and contextually-influenced individuals.

A process-based approach to reparations, in corresponding to a process-based understanding of justice, also better responds to feminist concerns about a false opposition between socio-economic and cultural justice.¹⁶⁴ The material or cultural definitions of justice and the remedies of redistribution or recognition lead to measures which affirm rather than upset the root causes of inequality. If either the rights or symbol-based theories of reparations are taken in isolation, there is little room for questioning the assumptions that structure women's unequal citizenship and their roles as symbols of national purity. This focus on transformation explains

¹⁶⁰ Meintjes, *supra* note 45 at 12.

¹⁶¹ Rubio-Marin, *supra* note 139 at 33.

¹⁶² Ernesto Verdeja, "Reparations in Democratic Transitions" (2006) 12 Res Publica 115 at 122.

¹⁶³ See: Elizabeth M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" in Bartlett & Kennedy, Katharine T. Bartlett and Rosanne Kennedy, eds. *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 321; Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, K.D. Ewing, & Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 335; Frances Olsen, "Statutory rape: a feminist critique of rights analysis" (1984) 63 Tex. L. Rev. 387; Stephanie Palmer, "Feminism and the Promise of Human Rights: Possibilities and Paradoxes" in Susan James & Stephanie Palmer, eds., *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford: Hart Publishing, 2002) 91; Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991).

¹⁶⁴ This mirrors the argument in the development studies field that gender-sensitive approaches to development must address both women's practical and strategic gender needs; see C.A. Moser, *Gender Planning and Development: Theory, Practice and Training* (London: Routledge, 1993).

why a feminist approach to reparations needs to address pre-existing laws that deny basic legal rights. It is impossible to realize the right to reparation, understood even in its narrowest terms as a right to monetary compensation, if the laws that deny rights to hold title to land or open bank accounts are not changed.

Feminist concerns about the construction of identity are better addressed through a process-based approach to reparations. The liberal individual behind rights-based theories is, in practice, a description of the relatively privileged man, while the emphasis on culture and social groupings in communitarian theories often comes loaded with norms about women as symbols and protectors of the nation.¹⁶⁵ To jettison this distinction, it is necessary to examine the reality of privilege and discrimination, across lines of race, gender, class, and other social markers, and construct reparations processes which disturb these structures.

Understanding reparations as a process helps to explain why local participation and decision-making are at the heart of reparations.¹⁶⁶ The process of debating, designing, and implementing reparations becomes reparatory in itself. In every conflict, there persists a ‘meta-conflict’, or a conflict about what the conflict is about, and the reparations process can facilitate open and inclusive dialogue about these meanings.¹⁶⁷ The justice in reparations is thus to be found not in the ideal allocation of rights and symbols, but in a process which the society perceives as having achieved a reparatory effect. This view helps to explain why women activists regard their active participation in politics as part of reparations.¹⁶⁸ Their exclusion from political life is part of the structure of injustice before and after the conflict. For reparations to achieve justice, they must, in the process of their design and implementation, remedy the gaps in representation in public life by specifically including women and other marginalized groups. The process of reparations must be participatory, inclusive, and democratic. Analyzing this process from a feminist perspective could usefully draw on the wide-ranging literature in feminist political science on political transitions.¹⁶⁹

With a process-based justification of reparations, a range of goals can be pursued with a variety of policy instruments – legal claims, symbolic commemorative processes, public hearings, and monetary compensation, for example. A process-based definition ensures that a range of suitable remedies are available to a diverse pool of potential beneficiaries of reparations. For example, preferential access to services could allow cash-strapped governments to forego special funds to individually compensate victims, while at the same time providing a public recognition of victims’ suffering.¹⁷⁰ As some victims emphasize health and education needs over controversial compensation awards, such programs may directly meet victims’ expectations. ‘Reparations as process’ provides an umbrella concept for the broad definition of reparations adopted by women’s rights activists.

¹⁶⁵ Colleen Duggan and Adila M. Abusharaf, “Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice” in Pablo de Greiff, ed. *The Handbook of Reparations* (New York: Oxford University Press, 2006) 623 at 626-7.

¹⁶⁶ Duggan et al, *supra* note 147 at 205.

¹⁶⁷ O’Rourke, *supra* note 159 at 290.

¹⁶⁸ Duggan and Abusharaf, *supra* note 165 at 643.

¹⁶⁹ O’Rourke, *supra* note 159 at 285.

¹⁷⁰ Roht-Arriaza, *supra* note 38 at 198-99.

A more pragmatic view of a post-conflict transition process may also justify the ‘reparations as process’ approach.¹⁷¹ A reparations program competes with other state priorities in the post-conflict period, such as investing in education, infrastructure, health care, and the judiciary. Governments may try to accommodate demands of victims’ groups, the broader population, businesses, the international community, and other stakeholders. Permitting certain development measures to be understood as part of a reparations program allows the government room to respond to all these constituencies. This epitomizes reparations understood as a process, as it permits reparations to be both backward looking (in responding to victims) and forward looking (in responding to society’s interests). To the extent that the conflict may have its roots in underlying inequalities and socioeconomic conditions that arose from chronic government underinvestment in its citizens’ welfare, such measures could help to set the country on a path towards both reconciliation and a more stable future.

Should reparations, as a process, be thought of as part of development? This is hotly contested.¹⁷² The central objection is that the reparations-as-development formulation permits the government to fulfill its obligations by funding developmental activities which it is already bound to undertake, thus denying victims justice.¹⁷³ Related to this criticism is the concern that the concept of development as reparations lacks the link between the individual victims and the reparations measure.¹⁷⁴ A third objection concerns the practical impossibility of achieving social development through a short-term reparations program, no matter how well-funded. Some feminist commentators argue that there should be a bright line between reparations and development.¹⁷⁵

Others, however, argue that the rigid distinction between reparations and development should be abandoned.¹⁷⁶ Activities which might be classified as development could be framed in ways which give them reparatory effects and meanings. There seems to be some support for this more expansive approach to reparations in the views of women activists. Women include in the concept of reparations claims that might look like development: education, housing, economic policies to improve access to markets, and reforms to discriminatory laws and practices.

But many activists are emphatic that the government cannot “undertake development instead of reparations.”¹⁷⁷ One way of understanding this concern is that it is about lack of political will: victims are concerned that their needs will be overlooked in the name of general policy goals. The relationship between reparations and development raises some tough questions. How does one reconcile the rejection of development as a goal of reparations with a feminist approach to reparations that reveals and repudiates pre-conflict structural inequalities and injustices? When approached from a feminist perspective, the relationship between reparations and development is arguably where the rubber hits the road.

¹⁷¹ *Ibid.* at 189.

¹⁷² For an overview, see Pablo de Greiff & Roger Duthie, eds. *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).

¹⁷³ Roht-Arriaza, *supra* note 38 at 189.

¹⁷⁴ De Greiff, *supra* note 120 at 7.

¹⁷⁵ Goldblatt, *supra* note 34 at 211

¹⁷⁶ Saris & Lofts, *supra* note 98 at 91; Aguirre and Pietropaoli, *supra* note 144 at 366.

¹⁷⁷ Nairobi Declaration, *supra* note 33 at 3-B.

Notwithstanding these disagreements, it can be argued that development would bring to the reparations agenda norms and ways of working.¹⁷⁸ A strand of development theory and practice values local knowledge, agency, participation, bottom-up planning, and empowerment, with practical working methods to achieve these goals.¹⁷⁹ Policy and practice on reparations could learn from this experience.

From the vantage point of feminist theory and women activists, ‘reparations as process’ offers the best theoretical model for understanding reparations. There is no blueprint for approaching reparations as a process, as it requires negotiation in the specific post-conflict context in which reparations decisions are being made. There are some characteristics of such an approach that can be discerned. It is easiest to begin by describing what reparations are not: they are not only rights, or symbols, and they cannot be achieved simply with technical or juridical methods. ‘Reparations as a process’ result in an approach which incorporates rights-based, symbolic, and redistributive goals. As ICTJ’s study noted, the most just approaches to reparations are complex and multi-faceted.¹⁸⁰ Reparations are hybrid and both forward and backward-looking. They demand an inter-disciplinary approach, as they trample through the delineations between law, politics, economics, development, and public policy. A feminist theoretical approach to reparations requires an acknowledgement of the importance of rights and symbols, framed by a broader concern for the contexts in which reparations decisions are made and the public processes that produce them. It must see the individual as both a rights-bearing citizen and a member of a community. At the center of reparations should be an understanding of the self as contingent and constructed relationally and socially. This understanding of identity would provide the theoretical room for the dynamic and sometimes conflicting identities performed by women in the aftermath of conflict (for example, a reparations claim from a woman who joined a fighting force and was then forced into sexual slavery, as both a victim and perpetrator). This process-based understanding opens space for a definition of justice, and a justification for reparations, that is open-ended, inclusive, and able to be adapted to the societal context. Most fundamentally, a feminist approach to reparations questions what we are trying to ‘repair’ and pushes for an understanding of ‘post-conflict’ as an opportunity for transformation.

¹⁷⁸ Aguirre and Pietropaoli, *supra* note 144 at 369.

¹⁷⁹ See: Arturo Escobar, *Encountering Development: the Making and Unmaking of the Third World* (Princeton, N.J.: Princeton University Press, 1995); Uma Kothari & Martin Minogue, eds. *Development Theory and Practice: Critical Perspectives* (Houndmills, UK: Palgrave, 2002); Majid Rahnema & Victoria Bawtree, eds. *The Post-development Reader* (London: Zed Books, 1997); Andrea Cornwall, *The Participation Reader* (London: Zed Books, forthcoming); Kriemild Saunders, ed. *Feminist Post-development Thought: Rethinking Modernity, Post-colonialism & Representation* (London: Zed Books, 2002); Robert Chambers, *Ideas for Development* (London: Earthscan, 2005).

¹⁸⁰ Rubio-Marin & de Greiff, *supra* note 142 at 321; Pablo de Greiff, "Repairing the Past: Compensation for Victims of Human Rights Violations" in Pablo de Greiff, ed. *The Handbook of Reparations* (New York: Oxford University Press, 2006) at 9-13.

7. Conclusion

The notion of reparations encompasses debates about the relationship between individual and society, the nature of political community, the meaning of justice, and the impact of rights in social change. The prevailing transitional justice winds reflect “a highly limited politics intended, for the most part, less at democracy-building, than at the threshold aims of peace and stability”¹⁸¹ and “a broader attempt to create a new world order of liberal democracies in which politics is forever deferred and history comes to an end.”¹⁸² The dominance of rights-based approaches to reparations is consistent with these trends. This predominant normative framework is out of step with the understanding of reparations circulating among many women activists. The theoretical approach to justice and reparations developed in this paper helps to explain the gap between the international normative framework and activist discourses. Based on distributive, communitarian, and critical theories of justice, I argued that reparations can be thought of as rights, symbols, or processes. Approaching reparations as either rights or symbols is rife with problems when approached from activist and feminist theoretical standpoints. As decisions about reparations programs are and should be determined by the political, social, economic, and cultural context, a blueprint for ‘a feminist reparations program’ is impractical and ill-advised. However, the strongest feminist approach to reparations would depart from an understanding of reparations as a process. Reparations are fundamentally political, meaning that there will be compromise and that there might be mistakes. Neither the hard language of rights nor the resonance of symbol can, on their own, provide answers to the long-view, structural transformations that the post-conflict moment demands.

¹⁸¹ Ruti Teitel, “Transitional Justice in a New Era” (2003) 25 *Fordham International Law J.* 893 at 898.

¹⁸² Anne Orford “Commissioning the Truth” 15 *Columbia J. Gender & Law* 851 at 852.