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POLITICAL VIOLENCE AND GENDER DURING TIMES OF TRANSITION

FIONNUALA NÍ AOLÁIN*

At the heart of transitional justice discourse is an ongoing conversation about accountability for human rights violations that occur in a context of regime repression or violent conflict. That accountability dialogue has generally been preoccupied with attempts to define the forms of political violence that should be addressed by various formal and informal mechanisms, such as trials and other truth-seeking processes. This Article will examine the multiple ways in which transitional justice processes have conceptualized political violence, and how that maps onto a gendered understanding of violence experiences and accountability mechanisms in a transitional context.

In general, greater scrutiny of the neutrality of the transitional project has led to a more critical appraisal of the gendered aspects of transition.¹ The premise of this inquiry is that accepted discourses in transitional societies surrounding the nature and form of political violence, as well as the legal accounting for such violence, has been deeply gendered. Specific to this inquiry is the characterization of certain kinds of violent action as linked to the conflict and/or the repressive regime, and the exclusion of other forms of violence from within the definitional boundary. Defining political violence often becomes a contest between opposing political factions as to whose acts of violence are to be defined as “political” (and thus justifiable) and whose are not (and remain subject to ordinary criminal sanction).

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¹ Christine Bell, *Women and the Problems of Peace Agreements: Strategies for Change*, in WOMEN, PEACE-MAKING AND CONSTITUTIONS (Radhika Coomaraswamy ed., 2004) [hereinafter Bell, *Strategies for Change*]; Christine Bell et al., *Justice Discourses in Transition*, 13 J. SOC. & LEGAL STUD. 305 (2004) [hereinafter Bell, *Justice Discourses in Transition*].

Further, underpinning this approach is the understanding that peace processes and processes of political change which prompt or underlie transitional moment(s) are profoundly gendered. For example, “while women have often been at the forefront of peace initiatives throughout a conflict,” men “predominantly, if not exclusively,” negotiate peace agreements.² The conduct of violence and war is predominantly male, leading to a male bias in negotiations.³ This continues today, despite the Platform for Action that emerged from the Fourth World Conference on Women in Beijing in 1995, which asserted that, “in addressing armed or other conflicts, an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively.”⁴ The Beijing Platform approach has been confirmed by the highly visible U.N. Security Council Resolution 1325, which “urges [U.N.] Member States to ensure increased representation of women at all decision-making levels . . . for the prevention, management and resolution of conflict.”⁵ Its requirements are framed by the acknowledgement that women play an important role in “the prevention and resolution of conflict and in peace-building,” and that women and children “constitute the vast majority of those affected by armed conflict.”⁶

This Article reviews the relationship between the legal and political aspects of political violence from the starting point that the gendered nature of transition is positively correlated to the violent masculinities that dominate in times of conflict. Hence, the forms of accountability sought in the post-conflict/post-regime environment reflect the gender biases that

² Christine Bell et al., *Justice Discourses in Transition*, *supra* note 1, at 321 (citing Bell, *Strategies for Change*, *supra* note 1, at 98).

³ KELLY-DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997); JOSHUA S. GOLDSTEIN, *WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA* (2001); NIRA YUVAL-DAVIS, *GENDER & NATION* (1997).

⁴ *Report of the Fourth World Conference on Women*, ¶ 141, U.N. Doc. A/CONF.177/20/REV.1 (Sept. 1995), available at <http://www.un.org/womenwatch/confer/beijing/reports/>.

⁵ S.C. Res. 1325, pmb., U.N. Doc. S/RES/1325 (Oct. 31, 2000), available at <http://www.un.org/Docs/scres/2000/sc2000.htm>.

⁶ *Id.* See generally Jessica Neuwirth, *Women and Peace and Security: The Implementation of U.N. Security Resolution 1325*, 9 *DUKE J. GENDER L. & POL'Y* 253 (2002).

manifest in the prior context. This Article broadly argues that these biases are problematic as a matter of equality and accountability. They result in an accountability approach that stops short of naming certain forms of violence as violations.⁷ The effect of this approach is pronounced for women; the violence experienced by women is generally deemed irrelevant to or outside the frame of accountability for many post-conflict and post-regime societies.⁸

Moreover, the Article asserts that, when violence is understood in specific and narrow ways, it affects broader understandings of which concerns become issues for negotiation and mediation purposes. Arguably, the dual effect of such exclusions is that the scope of problems to be resolved is limited by a male conception of conflict and its biased effects revolving around allocations of power and territory. This limited scope can have substantial effects on the reorganization of political and legal power, and their institutional manifestations, that occurs in transitional contexts, whether by peace treaty negotiation, constitutional settlement, or informal political power change. In these contexts, the matters that are framed as central issues for resolution in transitional negotiations may only peripherally impact many women's day-to-day lives. Negotiators may leave untouched socioeconomic exclusions (which may themselves constitute violent experiences for women), and other forms of violence, which women may not see as compartmentalised into "conflict" and "non-conflict." Rather, women may experience forms of violence on a continuum, only partially addressed, or not addressed at all, by cease-fires.⁹

This Article is divided into four parts. Part I examines what is generally understood by the term "political violence." Part II explores the forms of violence that women experience during conflict and/or regime repression with an emphasis on the relationship between the conflict and/or regime and women's experiences of violence. Part III briefly outlines the forms of harms that are given hierarchical significance in truth-telling processes, and the resulting legal and political significance. In conclusion, the Article reflects upon the nature of forms of violence that shape the

⁷ Bell, *Strategies for Change*, *supra* note 1, at 99.

⁸ Laura Grenfell, *The Participation of Afghan Women in the Reconstruction Process*, 12 HUM. RTS. BR. 22, 22-25 (2004).

⁹ CYNTHIA COCKBURN, *THE SPACE BETWEEN US: NEGOTIATING GENDER AND NATIONAL IDENTITIES IN CONFLICT* 8 (1999).

responses of transitional justice discourse and to which it in turn is responsive.

I. WHAT DO WE MEAN BY THE TERM “POLITICAL VIOLENCE”?

Political violence is an extremely broad and multifaceted term. It is also an “essentially contested concept,”¹⁰ with boundaries and meanings that shift depending on cultural and community-specific circumstances. This section will explore some of the orthodox explanations of the term and the interface of these understandings with transitional justice discourse.

A. Definitional Problems

As a strict matter of academic definition, the concept of political violence is subject to ongoing and intensive interpretation. The term has been defined in a number of ways and a concrete, universal definition remains elusive.¹¹ However, there are some general markers that can be

¹⁰ See W.B. Gallie, *Essentially Contested Concepts*, in THE IMPORTANCE OF LANGUAGE 121 (Max Black ed., 1962) (creating the label “essentially contested concepts” for basic ideas whose definitions are subject to ceaseless disputes); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹¹ See Harold R. Kerbo, *Foreign Involvement in the Preconditions for Political Violence: The World System and the Case of Chile*, 22 J. CONFLICT RESOL. 363, 364 n.1 (1978) (describing in detail the ongoing, contentious debate surrounding the definition of the term political violence); see, e.g., ED CAIRNS, CHILDREN AND POLITICAL VIOLENCE 11 (1996) (defining political violence as “all those acts of an inter-group nature which are seen by those on both sides, or on one side, to constitute violent behavior carried out in order to influence power relations between the two sets of participants”); Donald G. Morrison & Hugh Michael Stevenson, *Political Instability in Independent Black Africa: More Dimensions of Conflict Behavior by Nations*, 15 J. CONFLICT RESOL. 347, 348 (1971) (“Political violence is defined as behavior characterized by the physical injury or subjection of persons or property with intent to bring about an alteration in the structure of the political system.”); Edward N. Muller, *A Test of a Partial Theory of Potential for Political Violence*, 66 AM. POL. SCI. REV. 928, 928 (1972) (defining political violence as “violence directed against the regime (the structure of political authority) and/or against particular authorities occupying positions in the regime.”); Alex Schmid, *Terrorism on Trial: Terrorism—The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375 (2004) (detailing the various definitional characteristics of the word terrorism, many of which overlap with political violence, as both are inherently “politically motivated”); Kaethe Weingarten, *Witnessing the Effects of Political Violence in Families: Mechanisms of Intergenerational Transmission of Trauma and Clinical Interventions*, 30 J. MARITAL & FAM. THERAPY 45, 49 (2004) (“As with many terms, the definition of political violence is contested.”).

used to classify the term. Hibbs has classified political violence as behavior that is (1) anti-system in character, (2) has political significance, and (3) involves collective or "mass" activity.¹² This includes, but is not limited to, incidents of rioting, armed insurgency, and assassinations performed by groups rather than individuals unconnected to a group. In his seminal work on political violence, Ted Robert Gurr brings attention to the definitional distinctions between types of violence labelled "physical," typified by the use of force, and "structural," characterized by more general patterns of denial.¹³

By and large, the discourses concerning political violence have been focused on state responses to violent actions that threaten, or seem to threaten, state hegemony. Responses to such violence are usually motivated by—and thus strongly correlated with—the level of threat acceptable to maintain regime control relative to the violence experienced (or perceived to be experienced).¹⁴ Orthodox discourses about political violence include violence between non-state actors (e.g., in-fighting between discrete populations within a state). While such violence may not directly undermine the legitimacy of the state, it may contribute to general intrastate instability.

The centrality of the use of force to maintain or seek political power is common to both violent conflict and regime repression. In both contexts, the validity of force is invariably challenged. Authority (moral as well as legal) for deploying violence to achieve political ends inevitably constitutes a central aspect of the battle for political legitimacy between opposing

¹² DOUGLAS HIBBS, MASS POLITICAL VIOLENCE 7 (1973).

¹³ See Ted Robert Gurr, *Patterns of Repression and Rebellion: Foundations for a General Theory of Political Coercion*, in PERSISTENT PATTERNS AND EMERGENT STRUCTURES IN A WANING CENTURY 149, 152-161 (Margaret Karns ed., 1986).

¹⁴ Christian Davenport, *Multi-Dimensional Threat Perception and State Repression: An Inquiry into Why States Apply Negative Sanctions*, 39 AM. J. POL. SCI. 683, 683-713 (1995); Scott Sigmund Gartner & Patrick M. Regan, *Threat and Repression: The Non-Linear Relationship between Government and Opposition Violence*, 33 J. PEACE RES. 273, 273-88 (1996). Notably, there is an emerging body of literature that examines the relationship between political violence and elements of democracy. It had historically been presumed that the democracies are more stable in nature since they do not, for the most part, go to war. Newer research focused on the internal conflict within democracies demonstrates that under this marker democracies are just as prone to violence as other types of states. See G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE (1982); Matthew Krain, *Contemporary Democracies Revisited Democracy, Political Violence and Event Count Models*, 31 COMP. POL. STUD. 139, 164 (1998).

parties. Language and definitional constructs are utilized by all parties in the battle for political authority to justify their own use of violence and delegitimize their opponent's use of violence."¹⁵ Once the conflict ends, or the regime is ousted, this definitional contest continues and is central to supporting and/or opposing the validity of the new order. Hence, definitions of what acts constitute political violence are critical to the regime change/conflict's end because certain violent acts gain political legitimacy by inclusion in the definitional category. Such categorization also serves as *post facto* justification for other acts taken pre-transition, thereby bolstering political placement and influence during the transitional period. Practically, it is of enormous significance when the political violence category is the starting point for the legal discussions around which kinds of harmful acts are to be subject to legal process, and which, by virtue of their acceptable political status, will be excluded from the possibility of criminal sanction in the accountability mechanisms that may follow political change. As this Article explores, this complex range of vested interests associated with the political violence category has significant influence on the exclusion of harms to women from its definition.

B. The Definition of Terrorism

In all of this, the contemporary debates about the legitimate use of violence to force political change within states, particularly those that are undemocratic or unrepresentative, have been muddied by the parallel nexus of violent terrorist tactics, in addition to many of the definitional markers identified above. This is most apparent in debates around legitimacy for the use of violence and the characterization of the legal status of combatants. In this debate, political and legal legitimacy justifying the use of violence is key and the terrain is obfuscated by a lack of clarity and definition concerning the key term "terrorism." Equally important to flag in the contemporary post-September 11th political reality is that the term "political violence" has particular resonance, where the notion of "political violence" cuts heavily across the language of anti-terrorism discourses.

Terrorism is not a new phenomenon; it has a long history in both the national and international context.¹⁶ However, the scale of attention

¹⁵ See generally MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* (1998) (describing the use of language in Argentina to change descriptions of violence experienced during the military regime).

¹⁶ See Charles A. Russell et al., *Out-Inventing the Terrorist*, in *TERRORISM: THEORY & PRACTICE* (Yonah Alexander et al. eds., 1979); see also Sharon Harzenski, *Terrorism, A History: Stage 1*, 12 *J. TRANSNAT'L L. & POL'Y* 137 (2003).

generated by terrorism is a relatively modern phenomenon, as are the attempts to regulate terrorist acts through international law. As early as 1937 the League of Nations had drafted the *Convention for the Prevention and Punishment of Terrorism*.¹⁷ Upon its creation, the United Nations inherited and sought to advance this work. In parallel, a number of regional international organizations have addressed the manifestations of terrorism at a national and regional level. These include the Council of Europe,¹⁸ the European Union, the Organization for Security and Co-operation in Europe, the African Union, and the Organization of American States.¹⁹ Much of the work by these bodies can be defined as attempts to agree upon suppression conventions as well as cooperative regional action on a multitude of fronts. Without more general discussion at this juncture, this Article suggests that the suppression conventions stand as the natural result of a failure to agree upon broader definitions of terrorism through enacting a generally agreed upon multi-state treaty.²⁰ The lack of an agreed definition of terrorism both within and between states means that the disputes about the boundaries between political violence and terrorism are likely to be with us for some time. Therefore, definitional uncertainty will continue to plague the dividing line between these two categories, and the contestations over the

¹⁷ See League of Nations, *Convention for the Prevention and Punishment of Terrorism*, (Nov. 16, 1937), League of Nations Doc. C.546(I).M.383(I).1937.V, reprinted in *INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, 1937-2001*, at 71 (M. Cherif Bassiouni ed., 2001).

¹⁸ COUNCIL OF EUROPE, *THE FIGHT AGAINST TERRORISM* (3rd ed. 2005).

¹⁹ Organization of American States [OAS], *Inter-American Convention Against Terrorism*, June 3, 2002, A.G. Res. 1840, OAS Doc.XXXII-O/02, entered into force July 10, 2003; Inter-American Committee Against Terrorism, *Declaration of San Salvador on Strengthening Cooperation in the Fight Against Terrorism*, OAS, OEA/Ser.L/ X.2.3 (Jan. 24, 2003). On June 13, 2002, the EU Council of Ministers adopted a Framework Decision on the European Arrest Warrant. European Arrest Warrant Replaces Extradition Between EU Member States, http://europa.eu.int/comm/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm (last visited March 26, 2006); see also OSCE Charter on Preventing and Combating Terrorism, Org. for Security and Co-operation In Europe, Mc(10).Jour/2 Annex 1, Dec. 7, 2002, available at http://www.osce.org/documents/odihr/2002/12/1488_en.pdf; Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, African Union, Mtg/HLIG/Conv.Terror/Decl. (II) Rev. 2., Oct. 14, 2004, available at <http://www.africa-union.org/Terrorism/DECLARATION%20Algiers%20REV.pdf>.

²⁰ See OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS* ch. 7 (forthcoming 2006) (on file with author).

legitimate use of force in situations of regime repression and internal conflicts are unlikely to abate.

C. The Definition of Political Violence and Gender Violence

Some tentative conclusions can be drawn from the preceding definitional discussions specific to our examination of the relationship between gender and political violence in transitional contexts. First, the discourse is overwhelmingly state-focused, with even the violence between non-state parties representing a peripheral edge of the discussion. This state-centric focus means that much of the intellectual and policy-driven energy around defining and exploring the contours of political violence has been focused on the relationship between violent acts (including the actors perpetrating it) and the state as object of the action. There is very little room in this discourse to tease out the extent to which gendered violence forms part of the landscape when the state is actively engaged with and/or against third party violence. Even more importantly, perhaps, it leaves little scope to explore the extent to which dynamics of state and third party violence affect the societal experiences of women more generally.

Second, there is a complete absence of any notion of private, intimate violence forming part of the overall assessment or definitional power in what constitutes political violence. There is also very little analysis which seeks to explore the extent to which forms of anti-state driven violence plays a role in encouraging and facilitating intimate violence. Third, state use of formal collective violence is generally privileged and there are formidable barriers to delegitimizing state use of force (either domestically or externally).²¹ This emphasis detracts from a broader capacity to focus on the regulation of violence, in its myriad manifestations, with consequences for the safety and security of women more generally.

Fourth, as transitional processes address, to varying degrees, the tense boundaries between the legitimate use of violence (defined as political violence) versus criminal, terrorist, or morally impermissible violence, gendered harms will struggle to find a space. As predominantly male actors continue to dominate the processes of change where conceptual—and thus political—boundaries are marked out, the view of political violence as public, be it conflict or regime-related, in the narrowest sense will continue to triumph. The requirement of this public element is intimately linked to

²¹ See Kathleen A. Cavanaugh, *Interpretations of Political Violence in Ethnically Divided Societies*, 9 *TERRORISM & POL. VIOLENCE* 33, 33-54 (1997).

broader nationalist or ethnic projects. Moreover, in this frame, much is assumed about the “ordinary” nature of sex-based violations, and only egregious sexual harms, as defined by key male elites, will be included. This Article suggests that, when these core sexual harms are included, they form, *inter alia*, part of a broader political objective, served at that juncture by the inclusion of the sexual violation of women in the accountability or narrative process. The myriad other harms experienced by women, and outlined below, simply do not fit the frame and are typically excluded.

II. WHAT KINDS OF VIOLENCE DO WOMEN EXPERIENCE?

As I and others have noted elsewhere, “[o]nly relatively recently has the gendered dimension of war, and of international law in particular, been closely examined.”²² Moreover, “[t]his analysis has been supplemented by consideration of the gender dynamics of ethnic conflict, and internal conflict more generally.”²³ It also reveals that there is a tangible link between the experience of women during conflict and the exclusions identified in the transitional context.²⁴

Women experience violence in multiple forms in many societies. Violence is experienced in both the public and private spheres. Much of feminist theory has rightly concentrated on bringing the sphere of private intimate violence into the public domain and ensuring, in policy terms, that its “private” categorization does not mean that it is therefore entirely unregulated by the state.²⁵ In conflicted societies, women remain vulnerable

²² ASKIN, *supra* note 3, at 12-17; Fionnuala Ní Aoláin, *Sex-based Violence and the Holocaust—A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43, 43-84 (2000).

²³ Bell et al., *Justice Discourses in Transition*, *supra* note 1, at 320 (citing YUVAL-DAVIS, *supra* note 3, at 94.)

²⁴ *Id.* (citing generally ASKIN, *supra* note 3; Ní Aoláin, *Sex-based Violence and the Holocaust*, *supra* note 22).

²⁵ See, e.g., Kelly Dawn Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 347 (2003) (“The gender jurisprudence of the ICTY and ICTR will help in the struggle to ensure that gender crimes in other places . . . are prosecuted and punished.”); Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT’L L. 103 (2001) (discussing feminist interpretations of concepts such as democracy, citizenship, and human rights within the gendered transitional context of the General Framework Agreement for Peace in Bosnia and Herzegovina); Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371 (2003) (utilizing a public/private analysis to argue that domestic violence should be reconceptualized as torture under

to intimate violence but are also, as has been extensively documented, the target of sex-based violence that is intimately related to the methods and means of warfare used by combatants.²⁶ International law has historically avoided regulating such sex-based violence. As armed confrontations between and within states was carried out by male combatants, the laws of war were generally constructed from the point of view of a soldier who needed ordered rules within which to wage war on behalf of the state. Consequently, women's interests fared notoriously poorly when accountability was sought for the behaviour of combatants. Accountability for acts of violence directed at women during armed conflict has grown,²⁷ but problems still persist.

First, despite legal reforms and increased accountability, there remains a limited understanding of the forms and functionality of sex-based violence in war, peace, and transition. Second, there remains ongoing intellectual and legal resistance to accepting the extensive empirical evidence that women's bodies have been specifically targeted to further military-political objectives, and that traditional categorizations of violence, as well as their appropriate sanctions, are ill-suited to deal with the pervasiveness of violence experienced by women in multiple forms across a wide range of societies. Finally, there has been little exploration of the extent to which the violence that has been grafted on legal accountability norms, such as genocide, crimes against humanity, war crimes, and serious and systematic violations of human rights norms, actually maps onto

international law); Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 45 (1997) (utilizing a public/private analysis to address the mandate upon the International Criminal Tribunal for the former Yugoslavia to prosecute sexual assaults committed during the conflict and analyze the Tribunal's obstacles in fulfilling the mandate).

²⁶ This Article uses "sex-based violence" to mean a wide variety of violence and victimizing acts directed at women because of their gender.

²⁷ See *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1, Judgment (Feb. 22, 2001); *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Judgment (Nov. 16, 1998); *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment (Dec. 10, 1998); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-I, Judgment (Sept. 2, 1998). Indictments for rape have been issued by the ICTR: *Prosecutor v. Karemera, Ndirumpatse, & Nzirorera*, Case No. ICTR-98-44-I, Amended Indictment (Feb. 23, 2005); *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-I, Indictment (Nov. 11, 2000); *Prosecutor v. Bizimungu, Nzuwonemeye, & Sagahutu*, Case No. ICTR-00-56-I, Indictment (Sept. 25, 2002); *Prosecutor v. Bikindi*, Case No. ICTR-01-72-I, Amended Indictment (June 15, 2005); *Prosecutor v. Nzabirinda*, Case No. ICTR-01-77-I, Indictment (Dec. 6, 2001).

women's subjective experiences, and whether or not there are a range of other experiences which women would name as violence but are not legally categorized as such.²⁸ One firm conclusion is that extensive empirical work is needed to measure more accurately women's experiences of violence and to measure the gap between existing legal categories and what women name as harms experienced by them in conflict and post-conflict situations.

III. WHAT KIND OF HARMS ARE ACCOUNTED FOR BY TRANSITIONAL PROCESSES?

It is evident that societies coming out of conflict and/or moving towards more democratic forms of governance have been at the forefront of developing legal and other means to explore the effects of, record, and, in certain contexts, create criminal liability for violations that have taken place in their recent history.²⁹ This section briefly explores the extent to which transitional justice discourse and the lived experience of transitional accountability have gone beyond the international law responses to gross violations of human rights. It also examines the extent to which transitional processes have been able to give a more nuanced and meaningful narrative of the multiple harms experienced by women. Specifically, this part of the Article examines the extent to which political and legal processes, often established to respond to the consequences of political violence, have captured, or failed to capture, gender violence in their frame. While reference will be made to a number of transitional justice mechanisms in this context, it is important to qualify the analysis by recognizing the variety of forms and institutional settings in which such accountability has been sought; therefore, the comments reflect a level of general statement rather than precision for all transitional accountability contexts.

²⁸ The author's empirical work on gender-based violence and the Holocaust has clearly demonstrated this link in the context of violence as experienced by women during the Holocaust. See Ni Aoláin, *supra* note 22, at 43-84.

²⁹ See generally RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (1999); IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991); *Human Rights in Peace Negotiations*, 18 *HUM. RTS. Q.* 249 (1996) (arguing that a hard line approach to human rights accountability when negotiating fragile peace agreements is an impediment to both the process of ending conflict, and potentially in conflict with the imperative to protect life by ending violence); *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST KOSOVO, AND CAMBODIA* (Cesare P.R. Romano et al. eds., 2004).

A. The Politics of Transitional Accountability Measures

First, where transitional justice mechanisms are activated, they generally form part of a package of measures designed to either stop violence and/or encourage regime change. As such, they constitute, to some degree, an inherently political response to what is generally a broader political problem. In a context where the political climate of change is dominated by group politics, whether ethnic or religious, vying for political power, it seems evident that there will be an effect on the mechanisms created to account for violations. This observation holds true across a number of truth-telling processes where the definition of harms, sufficient to activate examination by the truth commission or body, have a direct relationship with the kinds of harms that were of most concern to those elites now in position to mandate review and oversight. In this context, harms experienced by women fare badly in the hierarchy of examination.

The Guatemalan peace process and ensuing truth-telling process provide a good example. The Guatemalan Peace Accords brought an end to more than thirty years of armed conflict between the Guatemalan government and insurgent groups (URNG). It is noteworthy that the Peace Accords took place in a society that has the most inequitable distribution of wealth, income, and land ownership in Latin America, with about eighty percent of the population living below the World Bank poverty standard.³⁰ Guatemala established a National Reconciliation Commission,³¹ which played a central political role in the verification process associated with the enforcement of the peace process. Two particular kinds of human rights violations dominated the discussions around accountability in Guatemala: forced disappearances and extra-judicial executions. While not devaluing the importance of review for these systematic violations, it is clear that the emphasis on these acts reflects a hierarchy of harms, and a consensus among the elite that these harms required review over all others. Arguably, this reflects a capacity for such truth-telling processes to create and enforce silences that exist in relation to other harms.

Furthermore, while forced disappearances were classified as a crime in the state of Guatemala, there has been no state investigation into

³⁰ Inter-American Commission on Human Rights, *Fourth Report on the Situation of Human Rights in Guatemala*, 5, U.N. Doc. OEA/Ser.L/V/II.83 (1993).

³¹ COMMISSION ON HUMAN SECURITY, HUMAN SECURITY NOW (2003), available at [http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5MCML7/\\$FILE/chs-security-may03.pdf?OpenElement](http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5MCML7/$FILE/chs-security-may03.pdf?OpenElement).

past disappearances, nor, critically for women, was a provision made to recognize the category of absence due to forced disappearance to facilitate the civil affairs of family members.³² Given that those who disappeared were predominantly male members of households, women were required to assume tremendous practical responsibilities following such a forced removal. The legal impediments operated particularly harshly, and evidently contained fundamental gender biases, in the applicable legal definitions as to who was considered to be a head of household. Finally, the lack of recognition for the outworking of the disappeared category for women underscores the point that the harm assumed was constructed from a male rather than a female point of view.

B. The Elevation of Civil and Political Rights

The harms for which accountability is sought in most transitional societies are invariably violations of civil and political rights. Within that broad category, there are certain kinds of rights violations that have a higher status than others. Most often, the process of transitional accountability restricts itself to examining a narrow band of civil and political rights violations, generally those related to direct physical violation of the person's bodily integrity. There is a clear link between these harms and those that neatly fit into categories of causality—hence their linkage with political violence. These harms also frequently directly comprise those rights considered immutable by international human rights law treaties.³³ Vaskui Nesiiah has described this as an inherent “bias” of transitional justice accountability mechanisms.³⁴ The narrowing of defined harms will catch some of the violations that women experience—though it has taken substantial time and effort for women's particular experiences of sexual violation to be recognized by international law and other criminal legal

³² This measure had been specifically recommended by the Commission on Historical Clarification. COMMISSION ON HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION, Recommendations, pt. 1, ¶27 (1999), available at <http://shr.aas.org/guatemala/ceh/report/english/toc.html>.

³³ See, e.g., European Convention on Human Rights, art. 15, Nov. 4, 1950, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (“ECHR”). This article specifies the right to life, the right to be free from torture, freedom from slavery, and freedom from ex-post facto laws as the sole non-derogable rights under the ECHR.

³⁴ See generally Vasuki Nesiiah, Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice, 15 COLUM. J. GENDER & L. 799 (2006).

processes that have recently become a feature of the transition projects in many states. Often, however, naming certain violations as privileged for the purposes of public accountability (the list may often include torture, extra-judicial killing, disappearances, and acts which can be defined as gross and systematic violations of human rights) will leave untouched the myriad experiences that women might describe as the pivotal experiences of violation they endured. As Nthabiseng Motsemme has affirmed: "Various studies exploring the ways ordinary women speak about their traumatic pasts under violent regimes have consistently shown how they tend to place their narratives within everyday lived experience, rather than nationalist concerns."³⁵

Moreover, the forms and places of violation that may be of particular significance to women may simply not be recognized by accountability mechanisms as such. For example, the El Salvador transition, and its preceding peace process, has been vaunted for the centrality of human rights to the inter-party negotiations.³⁶ Final peace accords were signed in 1992 and included a provision for an Ad Hoc Commission to engage in a process of lustration with the military and the formation of a Truth Commission to examine past human rights abuses.³⁷ The El Salvador conflict was characterized by human rights and humanitarian law violations committed by both state and non-state actors.

³⁵ Nthabiseng Motsemme, *The Mute Always Speak: On Women's Silences at the Truth and Reconciliation Commission*, 52 CURRENT SOCIOLOGY 905, 909 (2004); see also LUISA PASSERINI, MEMORY AND TOTALITARIANISM (1992); FIONA ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA 50 (2003); Veena Das, *The Act of Witnessing: Violence, Poisonous Knowledge and Subjectivity*, in VIOLENCE AND SUBJECTIVITY (Veena Das et al. eds., 2000); JUDITH N. ZUR, VIOLENT MEMORIES: MAYAN WIDOWS IN GUATEMALA (1998).

³⁶ El Salvador Agreement on Human Rights, U.N. GAOR, 44th Sess., Annex, Agenda Item 34, U.N. Doc. A/44/971- S/21541 (July 26, 1990).

³⁷ See generally COMMISSION ON THE TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR: REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR, UN Doc. S/25500, Apr. 1, 1993, available at <http://documents.un.org> (Upon entering the website to the Official Document System of the United Nations, select "Simple Search." In the space provided for "Full Text Search," enter the phrase "Commission on the Truth for El Salvador. Upon receiving the search results, select the hyperlink to "S/25500" at the bottom of the page. This selection will link you to the paginated, English version of the Report that is cited to by this Article). [hereinafter EL SALVADOR REPORT].

The Truth Commission was charged with investigating both individual incidents of violence and a series of cases that revealed a systematic pattern of abuse, but stressed that these types of violent acts were not necessarily “mutually exclusive.”³⁸ In presenting its report, the Commission noted the limitations to investigation of violence on such a large scale, and suggested that cases had been chosen based on their representative nature. The Commission was also given the power to make general recommendations that “may include measures to prevent the repetition of such acts, and initiatives to promote national reconciliation.”³⁹ The report of the El Salvador Commission determined what violent acts would be classified as most serious. The report itself states that, “[c]learly, not every violation of a right guaranteed in those instruments [ICCPR, American Convention] can be characterised as a ‘serious act of violence.’ Those instruments themselves recognise that some violations are more serious than others.”⁴⁰ The report then goes on to characterize those acts described as a “serious act of violence” as those from which no derogation is permitted—thereby determining prioritization based on the text of the treaties themselves. The Commission concludes “it is appropriate, therefore, that the Commission should classify the seriousness of each ‘act of violence’ on the basis of the rights which the two instruments list as not being subject to derogation, in particular, rights related directly to the rights to life and to physical integrity.”⁴¹

The Commission report does not include any consideration of the social context of the events it investigated. Group harm is taken to mean similar acts perpetrated on a number of persons, therefore making them representative of the overall situation, rather than exploring the widest range of harms that resulted from such acts. Women, where they are included in the report, are named by virtue of having been victims of the

³⁸ *Id.* at 19.

³⁹ *Id.* at 17. (quoting the Annex to the Mexico Agreement of 27 April, 1990, The United Nations and El Salvador, 1990-1995, 17, ¶ 4, UN Doc. A/46/553-S/23130, available at <http://documents.un.org> (Upon entering the website to the Official Document System of the United Nations, select “Simple Search.” In the space provided for “Full Text Search,” enter the phrase “Mexico Agreement” and the date “27/04/90.” Upon receiving the search results, select the hyperlink to “A/46/553” at the bottom of the page. This selection will link you to the paginated, English version of the Annex, which is cited herein)).

⁴⁰ EL SALVADOR REPORT, *supra* note 37, at 20.

⁴¹ *Id.* at 21.

same “serious act of violence” as men, resulting in harms that come within the scope of the definition. Evidently, at the heart of the Commission’s preoccupations were violations of civil and political rights, and within those terms of reference, those rights that were particularly focused on bodily harms.

C. Transitional Accountability Processes Uphold the Public/Private Dichotomy

A third feature of transitional accountability is the marked emphasis on public acts for the purposes of recording, as well as constructing, a societal narrative, while private acts are simultaneously neglected. What generally matters is what occurred on streets, in public spaces and in formal institutional settings. For violations occurring within the home, or close to private intimate spaces that women themselves describe as central to their experiences of vulnerability, lack of security and violation are deemed to fall within the “private” domain in most legal and social systems, and frequently outside the circle of notice and accountability. Thus, what happens within people’s homes is not deemed important and is often entirely invisible.⁴² It is also evident that the exclusion of harms experienced in the home (or domestic context) emphasizes the importance of the overarching political context in the transitional justice setting, and the under-charted relationship between political settlements, political violence, and political accountability. This is particularly true when we consider the public message that “private” gendered (and/or domestic) violence communicates in transitional societies. It says that private violence between certain non-state actors is not of interest to the accountability process. This statement sends out a very specific message about gender roles and gender inequality for the larger society. In consequence, there is a knock-on effect on full democratic and citizenship participation for victims who remain unrecognised by broader political processes, and outside the sphere of full political and legal inclusion.

⁴² For example, there is an extensive literature on the experiences of Indian Sikhs following the assassination of Indira Gandhi (Oct. 31 1984), specifically in New Delhi. As Amrit Srinivasan notes: “The violation of the home, whether religiously or domestically defined, formed a common thread in the Sikhs’ own perception of Operation Bluestar (a military action) as an outrage of essentially the same order as the November killings (a populist action).” Amrit Srinivasan, *The Survivor in the Study of Violence*, in *MIRRORS OF VIOLENCE: COMMUNITIES, RIOTS AND SURVIVORS IN SOUTH ASIA* 305, 311 (Veena Das ed., 1990).

D. The Avoidance of Transitional Accountability

An important and final matter to consider is that some societies have deliberately chosen not to seek accountability in the post-conflict and/or regime change context. Mozambique provides an interesting lens for this approach. By 1992, after sixteen years of bloody civil conflict, with massive loss of life, the creation of over four million refugees, and the economic effects of conflict, both state and non-state parties were prepared to sit at the negotiation table.⁴³ A General Peace Accord was affirmed in October 1992. This Accord is notable because, while it deals with issues of military, political, and humanitarian concern, it almost entirely excludes provisions for dealing with grave and systematic human rights violations by all sides. Some have argued that the lack of provision for accountability was recognition of the sober political reality that the key concern was an end to violence (meaning specifically the violence between the parties at the negotiation table) and that the negotiations were too fragile to endanger by including human rights wholesale in the transition arrangements. Notably, no truth commission was established and no provisions were made to indict or prosecute war criminals.

There has been no analysis of the extent to which there were any gender differences in the general view that it was better to “move on” than to remain pre-occupied with accounting for the past. Bartoli has argued that a Western judgment on this question of conflict end versus accountability (peace versus justice, if you will) may be different from a Mozambican view, or even an African view.⁴⁴ This *is* an important question, but it requires a further refinement—namely, what a gendered African or Mozambican view of accountability would be and how that might differ from the views of the male elites negotiating the cessation of violence. Particularly, some writing on Mozambique has stressed the uniquely African modes of accommodation. For example, Lundin has stressed the importance of such methods as reconciliation and re-insertion of persons back into the community (particularly ex-combatants).⁴⁵ While not doubting the authenticity of the specific cultural viewpoint, it remains obvious that this approach also glosses over any specific issues of gender differences

⁴³ See Andrea Bartoli, *Learning from the Mozambique Peace Process: The Role of the Community of Sant'Egidio*, in *PAVING THE WAY: CONTRIBUTIONS OF INTERACTIVE CONFLICT RESOLUTION TO PEACEMAKING* 79 (Ronald J. Fisher ed., 2005).

⁴⁴ *Id.* at 98-100.

⁴⁵ See Iraê Baptista Lundin, *Mechanisms of Community Reception of Demobilised Soldiers in Mozambique*, 3 *AFR. J. POL. SCI.* 104-18 (1998).

around such accommodation. In particular, this issue is highly fraught for women when the question of combatant re-integration is promoted, as such individuals may have been, and may continue to be, responsible for the most heinous of intimate violent crimes, and their re-introduction to a community presupposes no particular hindrances for women. It also presupposes no specific difficulties for female ex-combatants who are attempting to reintegrate into communities which before, during, and after transition manifest strong patriarchal and conservative aspects. A political compromise over the limits of accountability for what elites agree to be a line drawn on “political violence” can fundamentally fail to engage with the harms that fall outside the realm of the agreed *détente*, or ultimately, may reflect a failure to sufficiently discriminate between the forms of harms experienced.

IV. POLITICAL COMPROMISE AND OTHER TRANSITIONAL ISSUES

It is also useful to note that a number of other intersecting issues arise for women in the post conflict/successor regime context. The matters that are generally agreed by elite male actors at the negotiation table have a substantial effect on the capacity of gender to be a meaningful point of reflection or inclusion in transitional legal and political landscapes.

For example, disarmament frequently constitutes a core element of transition processes. Its presence or absence poses complex questions with respect to deconstructing the notion of political violence from a gender perspective. Key issues to be posed here include, first, that what may constitute disarmament sufficient to satisfy a ceasefire may not in fact entail the removal of all such weapons from the public, and more importantly, the private sphere. Second, a perhaps trite but true observation is that the disarmament of weapons is not the disarmament of minds. Therefore, the underlying social and psychological dimensions of a conflicted society that have supported the resort to violence, and the elevation of particular forms of masculinity that accompany it, are not in any sense undermined or addressed by a formal disarmament process. Thus, a key issue to be addressed concerning violence in conflict zones is what is meant by the term “ending violence.” In the parlance of ending public violence or internal conflict, this conversation revolves around decommissioning weapons and getting armed paramilitaries/insurgents to swap violent contestation for peaceful debate about contested issues. However, this kind of discussion rarely engages with the fundamental requirement of changing attitudes toward the use of violence. Attitudinal change is critical and undervalued. For women, it means that, while guns may physically no

longer be present in public spaces, the social psychology that made the use of violence acceptable, whether in the private or public sphere, does not change.

The complexities of the disarmament discussion underscore the important point that an emphasis on direct physical violence tends to exclude the relevance of the language of security for women. The term “security” is not without its problems; namely, that the discourse on security has been state-based and infused with a militaristic and paternalistic perspective. However, amongst others, the Commission on Human Security (2003) has started to move the discourse to a more inclusive basis, beginning with the premise that achieving human security requires not only protection, but also a strategy to empower people to fend for themselves.⁴⁶ A real and pressing question is whether we consider massive economic deprivation as a security threat, particularly when those made most vulnerable in most societies as a result of such deprivations are women and children. In that context, the Secretary-General of the U.N. has recently stated in his report, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, that the relationship between massive economic deprivation and violence needs to be more carefully considered in transitional processes.⁴⁷ Reflection on security in a transitional context should make us consider the extent to which 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 political and military hostilities between rival factions.

In expanding our conceptualization of security and in addressing specific harms experienced by women, both during and after the formal ending of conflict/changeover of regime, a key concern is domestic and intimate violence. This issue has been raised in many societies in the transitional phase; particular examples include South Africa and Northern Ireland.⁴⁸ One obvious quandary raised by some empirical assessment is that reported domestic and intimate violence rates increase after the end of

⁴⁶ HUMAN SECURITY NOW, *supra* note 31.

⁴⁷ The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

⁴⁸ See, e.g., Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 AM. U. J. GENDER SOC. POL'Y & L. 847, 856-57 (2003) (describing the “society in transition” theory of domestic violence within the South African context).

conflict.⁴⁹ However, this specific empirical finding may be more complex than it initially appears. Williams has argued that domestic violence experienced by women during conflict may be more severe in its form because, particularly in ethno-national conflicts, the resort to external mediation of such violence (e.g., access to police) may have been entirely absent.⁵⁰ Thus, increased reporting at the end of conflict may not mean absolute statistical increases in violence per se. Rather, it may simply mean that reporting is possible where it was previously impossible, despite the fact that many forms of violence may remain unacknowledged. However, what is more generally evident, at least on preliminary empirical assessment, is that the post-conflict or transitional phase holds as many, if not more, quandaries of accountability for women, rarely addressed either by accountability processes or by the legal and institutional rebuilding that often frames the broader political transformations that are being advanced. It is also evident that such violence is rarely if ever considered political in nature, and often falls entirely outside the immediate mechanisms of accountability established in the changeover phase. Given the pervasiveness of intimate and domestic violence and strong anecdotal evidence that it has a heightened appearance and effect in societies which are in crisis (for whatever reason), there are very good reasons why it should not be excluded from the formal accountability and truth-telling processes put in place as part of the transitional compact. Indeed, there are important reasons to explore in such formal settings what the experiences and forms of such violence tell us about the relationship between political violence experienced in a society more broadly and the manifestations it takes in the domestic setting for women.

V. CONCLUSION

The absence of women in the processes of transition has become a matter of preoccupation in international circles. Indeed, we now have an important and highly visible U.N. Resolution 1325, which “urges U.N. Member States to ensure increased representation of women at all decision-

⁴⁹ *Id.*

⁵⁰ See MONICA MCWILLIAMS ET AL., TAKING DOMESTIC VIOLENCE SERIOUSLY: ISSUES FOR THE CIVIL AND CRIMINAL JUSTICE SYSTEM 103 (1996) (noting that “most women who reported no police action came from West Belfast and other nationalist areas.”) (citing MONICA MCWILLIAMS & JOAN MCKIERNAN, BRINGING IT OUT IN THE OPEN: DOMESTIC VIOLENCE IN NORTHERN IRELAND (1993)).

making levels . . . for the prevention, management and resolution of conflict.”⁵¹ Its requirements are framed by the acknowledgement that women play an important role in “the prevention and resolution of conflict and in peacemaking” and that “women and children constitute the vast majority of those affected by armed conflict.”⁵² The resolution mandates that all actors involved in negotiating and implementing peace agreements adopt a gender perspective, which in theory and practice ought to consist of inclusion in framing and creating the accountability mechanisms for “political” violence in post-conflict societies. Notwithstanding this highly visible and symbolic resolution, it remains the case that women’s rights are generally the most ignored and under-enforced category of norms in a transitional context. Women will often have been at the forefront of peace initiatives throughout a conflict, or the face of a call for state accountability for human rights violations, such as the Mothers of the Disappeared in Argentina or the visible face of the Peace People in Northern Ireland, but peace agreements and transitions are negotiated predominantly by men. This reality results in a domination of transitional justice discourse by men.

Gender-sensitive research across transitional societies suggests that women have an expansive notion of what and where transformation is required, and it is not limited to the public domains that so often monopolize peace agreements and transitional deals between internal political factions. Women’s notions of accountability and harms also manifest a clearly different conceptualisation than the gendered approach that dominates the peace deals and transition mechanisms that pervade transitional societies. Women experience both the public and private aspects of an authoritarian society and/or conflicted society, and they articulate the need to transform politics and practice in both contexts. Once again, the lived experience of women in conflicted societies suggests that the term “transition” has much more territory to occupy than it has hitherto, and that much work is needed to both ground and empirically quantify this difference.

⁵¹ S.C. Res. 1325, *supra* note 5, at 1.

⁵² *Id.*

