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## Gender, Truth & Transition

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# GENDER, TRUTH & TRANSITION

Fionnuala Ní Aoláin & Catherine Turner<sup>1</sup>

The [South African Truth and Reconciliation] Commission's work relied on giving words to experience. Yet, women's 'silence' can be recognised as meaningful. To do so requires carefully probing the cadences of silences, the gaps between fragile words, in order to hear what it is that women say. . . . the specific aim of the Commission, assumes, perhaps patronisingly, that the world is knowable only through words and that to have no voice is to be without language, unable to communicate. The testimonies reported here suggest otherwise.<sup>2</sup>

I simply couldn't understand why I couldn't get this through their heads . . . now I can't content myself with assuming that it was all a mistake, an aberration . . . or that in some way, it never really happened. I could see, I could see clearly that they didn't understand me and that my words were not to their liking, that some even annoyed them outright. . . . and I heard him say: "Let him be. Don't you see he just wants to talk?" . . .

And I did talk, possibly in vain and possibly a little incomprehensively. Still, I did try to get myself across to them: "We can never start a new life. . . . Do you want all this horror and all my previous steps to lose their meaning entirely?"<sup>3</sup>

## I. INTRODUCTION

In societies transitioning from conflict or repressive politics, the construction of truth matters. That truth is usually excavated by examination and accountability for the past, specifically by

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2. FIONA C. ROSS, BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA 50 (2003).

3. IMRE KERTÉSZ, FATELESS 188-89 (1992).

structured examination of serious human rights violations. This backward looking approach is identified as central to the capacity for damaged societies to transform, thereby rebuilding political and social trust.<sup>4</sup> Truth is then poised on the precipice of past and future, deeply contested, but essentially unavoidable as a political matter. Because of this emphasis on dealing with the past, the morality and law of holding human rights abusers accountable at the point of societal change has been central to transitional justice discourse.<sup>5</sup> As a result, the place where most academics and others place their emphasis is on the legal and non-legal settings that operate to satisfy the need for restitution as well as the necessity of moving forward in transitional societies.<sup>6</sup> It makes sense therefore that trials, courts, truth commissions, amnesties, and the degree and form of punishment should all be the primary focus of interest. Missing has been any substantial analysis on how and where gender fits within this institutional scheme. This article redresses those lacunae with a probing analysis of the gender deficit evident in transitional accountability mechanisms, particularly in truth telling processes.

In the extensive discourses that emerged from a focus on past-accountability in many conflicted and post-conflict societies, the notion of justice in transition was critical.<sup>7</sup> Understanding what is meant by "justice" in the dominant discourse is important to assessing the reasons why gender has been a missing part of this analysis. First, the justice discourse takes for granted that accountability for past wrongs is a morally legitimate starting point for assessing the moral, and hence political, standing of any new regime. The framing and subject of those identified wrongs is of vital importance to this article and we will return to this issue below. It is sufficient at this point to note that wrongs have

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4. See, e.g., PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2001).

5. See, e.g., *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (Naomi Roht-Arriaza ed., 1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249 (1996) (arguing that a hard line approach to human rights accountability when negotiating fraught peace agreements, is an impediment to the process of ending conflict and potentially in tension with the imperative to protect life and person by ending violence).

6. See generally Ruti G. Teitel, *Human Rights in Transition: Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

7. See *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 5; see also Orentlicher, *supra* note 5; Anonymous, *supra* note 5.

a markedly gendered constitution. Second, following the principles set at the Nuremberg Tribunal, justice has an individual focus, and does not countenance group harms. This has important implications for any analysis of gender based harms, and will also be explored in depth in this article. Third, in this frame, outcomes are in a sense assumed, namely that there will be some form of accounting/punishment for the actions undertaken in the past by persons who have committed egregious human rights violations. As a result there is ongoing tension in the relationship between forms of punishment (and compromises thereof) in transitional societies, and the needs of women who overwhelmingly experience gender based harms.

In general, justice in the transitional context is viewed as having a restitution function – it restores equilibrium in the political sphere by ensuring that accountability takes place through legal norms. However, when these idealized notions of justice have been more closely examined by liberal theorists (primary among them Ruti Teitel),<sup>8</sup> justice in transitional contexts is revealed as a multifaceted and complex concept. In practice, the idealized view of justice as requiring some form of legal process and punishment to take account of previous wrongs committed gives way, in the transitional context, to a pragmatic series of compromises premised on assumptions about the limits of “justice” in transitional societies.<sup>9</sup> On closer examination, we come to understand that justice operates pragmatically in the transitional context when it functions to facilitate the workings of the political sphere by absolving the need for absolute accountability. The means to achieve this include amnesty for crimes committed, forgiveness, reconciliation, and truth telling. All of these specialized accountability mechanisms have clear and often profound implications for women, which have gone largely unrecorded in the extensive literature generated by transitional justice discourse.

Equally important to note as we look at the workings of transitional accountability mechanisms is that they are frequently promoted because of their apparent informality; the flexibility of the procedures make them ostensibly more suitable for the variedness and complexity of the transitional legal landscape. This article concludes, however, that despite this external appear-

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8. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2002).

9. See Anne Orford, *Commissioning the Truth*, 15 COLUM. J. GENDER & L. 851, 856-64 (2006).

ance, such mechanisms in practice often mimic (unwittingly or otherwise) the kind of procedural formalities and biases that are to be found in formal legal proceedings.<sup>10</sup> To some degree, these procedural formalities seem to be part of the institutional DNA that is activated once legal form and method enter a seemingly informal process in any measure.<sup>11</sup> The combination of procedural limitations and structural biases has an obvious bearing on women's experiences of these processes.

A fundamental premise of this article is that the pragmatics of justice in transition are no less gendered than their formal counterpart, despite the informality and flexibility of operation which might, at face value, lend itself to assumptions about gender neutrality. Moreover, as has been surveyed elsewhere, informal processes are more susceptible to discriminatory factors, as the very lack of due process means that subjective (and often biased) factors can enter the deliberative context.<sup>12</sup> We stress that the liberal critique of justice in transition has frequently overlooked a key reference point, namely the gendered nature of justice in the transitional context, and a sustained analysis of which wrongs are accounted for and which are not. It has also ignored the relationship between a gendered truth and the politics of transformation for both men and women in new political dispensations.

We acknowledge that there is substantial literature concerning accountability in transitional societies and the interplay that exists between both formal and informal mechanisms, at the domestic and international level.<sup>13</sup> Generally, these discourses

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10. See, e.g., *WOMEN, CRIME, AND CRIMINAL JUSTICE: ORIGINAL FEMINIST READINGS* (Clare M. Renzetti & Lynne Goodstein eds., 2001).

11. We note our thanks to Professor Colm Campbell for the origin of this concept and its application to this context.

12. With regard to the negative effects of informal legal processes, see, e.g., Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 *YALE J.L. & FEMINISM* 3 (1999).

13. See e.g., *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA*, (Cesare P.R. Romano, Anré Nollkaemper, & Jann K. Kleffner eds., 2004). For a recent examination of the gendered dimensions to post-conflict reconstruction, see Naomi R. Cahn, *Women in Post-Conflict Reconstruction: Dilemmas and Directions*, 12 *WM. & MARY J. WOMEN & L.* 335 (2006); KIERAN McEVoy, *MAKING PEACE WITH THE PAST: OPTIONS FOR TRUTH RECOVERY REGARDING THE CONFLICT IN AND ABOUT NORTHERN IRELAND* (2006) (concerning the various methods available for dealing with past human rights abuses in Northern Ireland, which contains the same fault lines of ignoring entirely the gender dimensions to the violations experienced on all sides).

have assumed that gender distinctions play no meaningful part in the discussion about appropriate forms of accountability for the abuses of the past.<sup>14</sup> Though an equally substantial literature has been generated by an early lack of criminal accountability for acts of sexual violation perpetrated during recent ethno-national conflicts, specifically the experiences of the Balkans, there is little account of either truth processes or the wider implications of conflict end/regime change for women.<sup>15</sup>

This article is divided into three main sections. Part II will introduce the theoretical and practical dimensions of transitional justice. Part III follows with an overview of the role and function of truth commissions and explores a number of the structural and institutional components which profoundly affect women's experiences of accountability in times of transition. This analysis will develop through an examination of the ways in which transitional justice processes have conceptualized the forms of violence for which accountability is sought, and how conceptualization maps onto a gendered understanding of violent experiences. Part III explores the features of truth commissions, with particular emphasis on the characteristics positively attributed to these processes. Part III then follows with a detailed explanation of the form of accounting, which is generally sought through truth commissions, with a particular emphasis on the kinds of viola-

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14. A notable exception is the report by the International Center for Transitional Justice examining the structure and implementation of truth processes and their effects on women. See International Center for Transitional Justice, *Truth Commissions and Gender: Principles, Policies and Procedures* (2006) [hereinafter *Truth Commissions and Gender*].

15. See, e.g., BEVERLY ALLEN, *RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA* (1996); Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Times of War*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197-214 (Julie Peters & Andrea Wolper eds., 1995); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmayer ed., 1994); NOËLLE N.R. QUÉNIVET, *SEXUAL OFFENSES IN ARMED CONFLICT AND INTERNATIONAL LAW* (2005); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326 (1994); Rhonda Copelon, *Women and War Crimes*, 69 ST. JOHN'S L. REV. 61 (1995); Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to From Here?*, 13 EUR. J. INT'L L. 697 (2002); Judith Gardam, *A Feminist Analysis of Certain Aspects of International Humanitarian Law*, 12 AUSTL. Y.B. INT'L L. 265 (1992); Judith Gardam & Hilary Charlesworth, *Protection of Women in Armed Conflict*, 22 HUM. RTS. Q. 148 (2000); Jennifer L. Green, *Uncovering Collective Rape*, 34 INT'L J. SOC. 97 (2004); Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929 (1994); Sarnata Reynolds, *Detering and Preventing Rape and Sexual Slavery During Periods of Armed Conflict*, 16 LAW & INEQ. 601 (1998).

tions that count from a legal perspective. Here the article emphasizes the way in which the public/private distinction operates in the transitional justice context, by elevating the significance of public violations and leaving violation of the private (specifically home and familial contexts) out of the frame. We particularly scrutinize the forms of harm that map onto violations of civil and political rights – harms which gain an elevated status in the context of truth processes. We are interested in assessing the manner in which human rights violations are defined and how such definitional perimeters operate to include or exclude women's experiences. Part III goes on to explore the influence that international human rights law norms have on the construction of harms in the domestic setting. In this context we seek to expose the export of bias from the international norms to the particular context of truth commissions in post conflict societies. Part III concludes with an assessment of three significant biases that we identify in the truth commission context. First, contextualizing the lack of a gender dimension in truth telling processes. Second, an analysis of the tendency to view harms against women solely through a lens of sexual violence and related experiences. Third, the persistent practice of truth commissions to ignore routine or ordinary violence experienced by women in their assessment of sexual and other harms. The third major section of the article, Part IV, then appraises the ways in which women have verbalized (or not) their experiences of harm before truth commissions, and assesses how these verbalizations have been acknowledged in the narrative (and legal reckoning) that truth processes produce. We are particularly interested in noting and denoting significance to the silences or absence of women in the truth commission fora, and we make a number of suggestions as to what can be concluded from these silent or absent narratives.

We note that the exploration of the law and politics of change undertaken in this article is informed by substantive empirical research, specifically a detailed appraisal of two well known truth processes. The first is the Report of the Chilean National Commission on Truth and Reconciliation,<sup>16</sup> and the second is the report of The Commission on the Truth for El Salvador<sup>17</sup>. Both figure prominently in the analysis presented here.

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16. REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip E. Berryman trans., 1993) [hereinafter CHILEAN REPORT].

17. The Secretary-General, *From Madness to Hope: The 12 Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, delivered to the Secur-

Through the lens of this comparative examination, we are particularly interested in identifying the manner in which truth commissions operate to maintain or entrench patriarchal norms. The retrenchment of traditional gender roles for women is a startling feature of change processes which boast their role and function as transformative for societies experiencing political change.

## PART II: INTERROGATING THE GENDER OF TRANSITIONAL JUSTICE

Greater interrogation of the neutrality of the transitional project has led to a more critical appraisal of the gendered aspects of transition. We identify two prisms for this inquiry. The first is an assertion that accepted discourses surrounding the nature, form, and legal accounting for certain forms of violence in transitional societies have been deeply gendered, and the second is an assertion that peace processes and processes of political change are themselves deeply gendered. The effect of these structural biases is not merely to shape mechanisms of accountability and their narrative outcomes, but to mold broader societal understandings about the nature and form of the political imperatives which gave rise to the need for transition in the first place. This ultimately shapes the political and social forms which come to the fore in the post-transitional society, affecting not only public institutions and relationships, but ordering and regulating the private. If truth telling processes are central to creating narrative outcomes that facilitate the realignment of political power and reshape the previous history of a society in a way that works to legitimate certain political actors (and their ideologies) over others, then the kind of narrative that emerges from these processes is critically important to the way women will experience change in such societies.

### A. *The Gendered Nature of Violence Discourses*

Physical violence is consistently at the heart of societal experiences of conflict. It is also the defining feature of authoritarian and repressive regimes. But, as we will demonstrate here, what counts as physical violence for the purposes of classifying conflict or repression in legal terms elevates and recognizes cer-

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*ity President of the Security Council*, U.N. Doc. S/25500 (Apr. 25, 1990) [hereinafter *El Salvador Report*].



tain kinds of violence over others.<sup>18</sup> We argue that when “violence is understood in specific and narrow ways, it affects broader understandings of which concerns become issues for negotiation and mediation purposes.”<sup>19</sup> Consideration of the background to the truth commissions for both Chile and El Salvador reveals the manner in which certain violations of human rights found their way onto the international agenda, whilst others remained on the sidelines. We assert that there is an important link between internationally affirmed harms (specifically those found in multi-lateral human rights treaties) and those which are elevated to facilitate domestic accountability in transitional societies. Notably a hierarchy of violation emerges. This outcome is intimately linked to deeply entrenched patriarchies within the framework of international legal and political discourses operating in tandem with pre-existing patriarchal structures in the conflicted or authoritarian society.

In 1973 the democratically elected government of Chile was overthrown in a military coup led by General Augusto Pinochet. There followed sixteen years of dictatorship, which from the outset were characterized by intense political repression. Human rights abuses were endemic, with thousands of Chileans being subjected to violations such as extra-judicial execution, torture, “disappearance,” and imprisonment or exile.<sup>20</sup> Throughout the duration of the military regime, human rights organizations such as the Peace Committee and the Vicariate de Solidaridad of the Archdiocese of Santiago rigorously documented the abuses taking place.<sup>21</sup> The situation was repeatedly condemned in resolutions of the General Assembly of the United Nations,<sup>22</sup> the

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18. See Christine Bell, *Women and the Problems of Peace Agreements: Strategies for Change*, in *WOMEN, PEACEMAKING AND CONSTITUTIONS* (R. Coomaraswamy ed., 2005); Fionnuala Ní Aoláin, *Political Violence and Gender During Times of Transition*, 15 *COLUM. J. GENDER & L.* 829 (2006).

19. Ní Aoláin, *supra* note 18, at 831.

20. For a general account of the human rights situation in Chile and the international response to it, see Amnesty International, *Chile: An Inescapable Obligation: Bringing to Justice Those Responsible For Crimes Against Humanity Committed Under Military Rule* (Oct. 1, 1998), <http://web.amnesty.org/library/Index/ENGAMR220131998>.

21. See Hugo Fruhling, *Stages of Repression and Legal Strategy for the Defense of Human Rights in Chile: 1973-1980*, 5 *HUM. RTS. Q.* 510 (Frederick Woodbridge trans., 1983).

22. G.A. Res. 3219 (XXIX), at 83 (Nov. 6, 1974); G.A. Res. 3448 (XXX), at 89 (Dec. 9, 1975); G.A. Res. 31/124, at 104, U.N. Doc. A/RES/31/124 (Dec. 16, 1976); G.A. Res. 32/118, at 141, U.N. Doc. A/RES/32/118 (Dec. 16, 1977); G.A. Res. 33/175, at 159, U.N. Doc. A/RES/33/175 (Dec. 20, 1978); G.A. Res. 34/179, at 192, U.N.

Organization of American States,<sup>23</sup> and the UN Human Rights Commission.<sup>24</sup> These international interfaces had a profound influence on the subsequent legal and political negotiations over what harms would be accounted for in the post-regime environment.

The United Nations produced its first report on the situation of human rights in Chile in 1976. This report examined in detail a number of human rights abuses which were claimed to be widespread at the time. These were predominantly abuses of civil and political rights, with careful consideration of cases of extra-judicial execution, torture, detention without trial, disappearances, and exile.<sup>25</sup> Thus, assessment of the human rights situation in Chile had largely been framed around the international standards set in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). UN reports were explicitly based on these two covenants,<sup>26</sup> and were represented as reflecting universal standards, breach of which would constitute a serious violation of human rights. The Chilean case is an early example illustrating the pattern of consistent emphasis by international oversight mechanisms on civil and political rights, and a preoccupation with individual harms taking place in the public sphere. As Hilary Charlesworth has noted in a broader context, the elevation of civil and political rights in international legal discourse represents a profound bias, whereby international human rights hierarchies are set according to the criterion of “what men fear will happen to them”.<sup>27</sup> This article

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Doc. A/RES/34/179 (Dec. 17, 1979); G.A. Res. 35/188, at 203, U.N. Doc. A/RES/35/188 (Dec. 15, 1980); G.A. Res. 38/102, at 205, U.N. Doc. A/RES/38/102 (Dec. 16, 1983); See also G.A. Res. 33/173, U.N. Doc. A/RES/33/173 (Dec. 20, 1978) (regarding disappeared persons).

23. Organization of American States, General Assembly Resolution 618 AG/Res.618 (XII-0/82) (1982).

24. U.N. Comm'n H. R., Res. 3 (XXXII), at 57, U.N. Doc. E/5768 (Feb. 18, 1976) (“Study of reported violations of human rights in Chile, with particular reference to torture and other cruel, inhuman or degrading treatment or punishment.”)

25. U.N. Econ. & Soc. Council (ECOSOC) *Report of the Ad Hoc Working Group on the situation of human rights in Chile*, ¶¶ 477-490, U.N. Doc. A/31/253 (Oct. 8, 1976) [hereinafter ECOSOC Report on Chile].

26. *Id.* ¶ 10.

27. She further notes that “[t]he traditional primacy given to civil and political rights by western international lawyers and philosophers is directed towards the protection for men within public life — their relationship with government. . . .” See Hilary Charlesworth, *What are “Women’s Human Rights”?*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 58, 71 (Rebecca J. Cook ed., 1994).

demonstrates that this bias spills over to the contexts in which international institutions play an oversight role in naming and categorizing human rights violations domestically.

The same influence is seen in El Salvador, a country which experienced twelve years of civil war, where conflict was characterized by human rights abuses committed both by state forces and armed opposition.<sup>28</sup> Here, internationally mediated peace agreements provided for the establishment of a truth commission to address the legacy of human rights abuse.<sup>29</sup> The Truth Commission report identified the Charter of the United Nations, the ICCPR, and the American Convention on Human Rights as being in force throughout the conflict and thus as key texts for the purposes of defining the human rights situation.<sup>30</sup> The cost of this emphasis, as we explore further below, was and remains the exclusion of broader and multiple types of harm. The forms and depths of these harms are critical to understanding the experiences of women in conflicted and authoritarian contexts.

The effect of such exclusions is to narrow the problems faced to a male conception of conflict, with the focus revolving around allocations of power and territory. The subjects that are framed as issues for resolution in the negotiation towards transition may impact only peripherally on many women's day-to-day lives. They may leave untouched socio-economic exclusions (which may themselves constitute violent experiences for women),<sup>31</sup> and other forms of violence, which women may not see as compartmentalized into "conflict" and "non-conflict" related, but rather

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28. See generally U.N. Commission on Human Rights, Final Report on the situation of human rights in El Salvador submitted to the Commission on Human Rights by Professor José Antonio Pastor Ridruejo in fulfillment of the mandate conferred under Commission resolution 1985/53. U.N. Doc. E/CN.4/1986/22 (Feb. 3, 1986) [hereinafter Human Rights Commission Report on El Salvador].

29. Mexico Agreements, El Sal., April 27, 1991, U.N. Doc. A/46/553-S/23130.

30. El Salvador Report, *supra* note 17, ¶ 20. The Report states "[t]he international human rights law applicable to the present situation comprises a number of international instruments adopted within the framework of the United Nations and the Organization of American States (OAS). These instruments, which are binding on the state of El Salvador, include, in addition to the Charters of the United Nations and OAS, the following human rights treaties: the International Covenant on Civil and Political Rights and the American Convention on Human Rights."

31. Indeed some of these socio-economic exclusions may be the result of other human rights abuses that do come within the remit of a truth commission. The Chilean Truth Commission heard, "[t]here were five of us brothers and sisters when they killed my father. We were very little. My mother began to work washing clothes outside the house. She became chronically asthmatic as a result of her weakness and our poverty. She died of her suffering. Everyone called us 'the urchins.'" CHILEAN REPORT, *supra* note 16, at 792.

as a continuum, only partially addressed or not by cease-fires.<sup>32</sup> It also underestimates and fails to conceptualize the ways in which socio-economic harms, which are always felt more acutely in situations of conflict or repression, can constitute direct and physical harms to the person. Empirical evidence consistently demonstrates that women experience these harms more pervasively than men.<sup>33</sup> The persistent exclusion of socio-economic harms as human rights violations thus constitutes another fundamental bias of truth telling processes, with particular and negative implications for women. Moreover, the elevation of certain kinds of violence creates a clear bias in the outcomes of negotiations, most often demonstrated by the marginalization of those issues and experiences that are central to a gender sensitive understanding of conflict resolution or intervention. Finally, it often translates into a bias that is reflected in the form and substance of accountability intended to provide closure on the past experience of a conflicted or authoritarian society, and thus allow it to transition successfully. This is a question to which we shall return in considering the mandates given to individual truth commissions.

### B. *The Gendered Nature of Peace Processes*

Peace processes and processes of political change are typically deeply gendered.<sup>34</sup> This structural issue is critically important to a focused feminist analysis because these political processes give rise to the forums and forms in which political elites agree to end conflict and/or agree to political reform in repressive societies.

Most notably, while women will often have been at the forefront of peace initiatives throughout a conflict, peace agreements are usually negotiated predominantly, if not exclusively, by

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32. CYNTHIA COCKBURN, *THE SPACE BETWEEN US: NEGOTIATING GENDER AND NATIONAL IDENTITIES IN CONFLICT* 8 (1998). Testimony at the Chilean Commission described, “[u]ntil recently we hoped to find them alive. Today we are going around looking for the bones. This is never going to end . . . this long nightmare from which I don’t know if I can wake up, because I’ve forgotten what it means to live a normal life.” CHILEAN REPORT, *supra* note 16, at 784.

33. See, e.g., ECONOMIC AND SOCIAL COMMISSION FOR WESTERN ASIA, *FEMALE-HEADED HOUSEHOLDS IN SELECTED CONFLICT-STRICKEN ESCWA AREAS: AN EXPLORATORY SURVEY FOR FORMULATING POVERTY ALLEVIATION POLICIES* (2001), available at <http://www.escwa.org.lb/information/publication/edit/upload/worn-01-1-e.pdf>.

34. Bell, *supra* note 18, at 98-100.

men.<sup>35</sup> As Lori Handrahan has succinctly noted, "The term 'post-conflict' generally refers to a period when predominantly male combatants have ceased to engage in 'official' war."<sup>36</sup> As has been well documented by feminist theorists, the conduct of violence and war is predominantly male,<sup>37</sup> leading to a male bias in negotiations, and mediators are usually men.<sup>38</sup>

The peace process in El Salvador provides a cogent illustration of such exclusionary outcomes. The human rights situation in El Salvador had been the focus of much international attention since the early 1970's, which saw the emergence of leftist anti-governmental guerilla units from a context of deep social inequities, a poor economy, and the repressive measures taken by a right wing dictatorship.<sup>39</sup> The United Nations appointed a Special Rapporteur to investigate the situation, and in 1986 a report was produced.<sup>40</sup> During his time in El Salvador the Special Rapporteur met with a number of local church and human rights groups, including the "Committee of mothers of persons who disappeared, were detained or were killed for political reasons in El Salvador."<sup>41</sup> However, when the report was produced, the Special Rapporteur chose only to address "those developments most clearly related to the question of human rights, particularly . . . the dialogue between the government on one hand and the Frente Democratico Revolucionario (FDR) and Frente Farabundo Martí para la Liberación Nacional (FMLN) on the other."<sup>42</sup> The result of this narrow focus was that "human rights" were interpreted as referring to those matters at issue between the government forces and the rebels, namely physical atrocities resulting from military operations.<sup>43</sup> This definition then became

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35. *Id.* at 98.

36. Lori Handrahan, *Conflict, Gender, Ethnicity and Post-Conflict Reconstruction*, 35 *SEC. DIALOGUE* 429 (2004).

37. This does not, however, mean that there have not been constructions of women as warriors throughout history. See NIRA YUVAL-DAVIS, *GENDER AND NATION* 94 (1997).

38. Bell, *supra* note 18, at 98-100. See also 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).

39. See *THE CAMBRIDGE HISTORY OF LATIN AMERICA* (Leslie Bethell ed., 1984).

40. See generally Human Rights Commission Report on El Salvador, *supra* note 28.

41. *Id.* ¶ 18.

42. *Id.* ¶ 26.

43. *Id.* ¶¶ 145-173.

the general basis for negotiation between the key political players in the context of accountability. Consequently, throughout the negotiation process there was no specific provision made for the human rights violations uniquely experienced by women but not named as such, specifically sexual or sex-based violence, nor was substantive account taken of the differential effect of certain violations on women over men.<sup>44</sup>

Negotiations preceding the El Salvador peace agreement had resulted in the Agreement on Human Rights being reached between the government and representatives of the FMLN, who signed the agreement on July 26, 1990.<sup>45</sup> This agreement set out the basic principles of human rights to which the parties agreed to adhere, and included statements on the human rights situation in El Salvador at the time. The agreement commences:

All necessary steps and measures shall be taken immediately to avoid any act or practice which constitutes an attempt upon the life, integrity, security or freedom of the individual. Similarly, all necessary steps and measures shall be taken to eliminate any practice involving enforced disappearances and abductions. *Priority shall be given* to the investigation of any cases of this kind which may arise and to the identification and punishment of the persons found guilty.<sup>46</sup>

Though the importance of addressing such substantive violations is not to be under-estimated, it is evident that this mandate was highly specific, with a very pointed focus. Sexual violence does not appear in the highlighted list of violations. Moreover, this conclusion contains the explicit assumption that gender does not make a difference with regard to how these more generalized vi-

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44. *Id.* Dealing specifically with the question of human rights in armed conflict, the report focuses on violations such as the killing of men in a village, or the destruction of the houses and crops. These examples include the destruction of the home of a woman and her three children based on allegations she was guarding weapons (§ 151), and the destruction of crops following the murder of the man tending them (§154). Whilst women are telling these stories to the Special Rapporteur, they are cast solely as witnesses to violation rather than being considered to have suffered harm themselves. The negotiating process was also predominantly concerned with the question of what is to be done with the armed forces and armed opposition groups, as evidenced in the provisions of the Chapultepec Peace Agreement. This was despite the presence of at least one, and often more, women in the FMLN delegation throughout the negotiating process. See El Salvador Peace Agreement, El Sal., U.N. Doc. A/46/864-S/23501 (Jan. 16, 1992) (noting the composition of the FMLN negotiating team who are signatories to the Agreement).

45. Agreement on Human Rights, San Jose, U.N. Doc. A/44/971-S/21541 (July 26, 1990), available at [http://www.usip.org/library/pa/el\\_salvador/pa\\_el\\_07261990\\_hr.html](http://www.usip.org/library/pa/el_salvador/pa_el_07261990_hr.html).

46. *Id.* § 1 (emphasis added).

olations might have been experienced. While presented in gender neutral terms, the practical impact is to place a greater emphasis on violations experienced by men and to leave out those violations experienced by women. This narrowness of scope was evidently a product of the negotiation and peace making process. Where such processes across a range of jurisdictions invariably produce the same kinds of accountability outcomes with a persistent gap in gender accountability, it is evident that the nexus between negotiation biases and the patriarchy embedded in international human rights norms produce negative accountability outcomes for women.

Both the Chilean Commission and the truth commission in El Salvador preceded the Platform for Action, which emerged from the Fourth World Conference on Women in Beijing in 1995. The Platform for Action recognized the absence of a gender perspective in most peace processes as problematic, and in attempting to address this lacuna 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."<sup>47</sup> The Beijing Platform approach has been confirmed by the highly visible UN Resolution 1325, which "urges UN Member States to ensure increased representation of women at all decision-making levels . . . for the prevention, management and resolution of conflict."<sup>48</sup> The Resolution's requirements are framed by the acknowledgment that women play an important role in "the prevention and resolution of conflict and in peacebuilding[,]"<sup>49</sup> and that "women and children constitute the vast majority of those affected by armed conflict."<sup>50</sup> Notwithstanding the significant "soft-law" augmentations made by the Beijing Platform and the Resolution, their effect on the practice of peacemaking remains marginal and

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47. The United Nations Fourth World Conference on Women, Beijing, China, *Platform for Action*, ¶ 141, U.N. Doc. A/CONF. 177/20, (Sept. 4-15, 1995) [hereinafter *Platform for Action*]. See also S.C. Res. 1325, ¶ 13, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

48. S.C. Res. 1325, ¶ 1, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

49. *Id.* pmb1.

50. *Id.*

contested, as evidenced by the lack of meaningful change in the gender profile and outcomes of ongoing peace processes.<sup>51</sup>

We suggest that essentializing women's experiences of conflict and political repression, in combination with women's exclusion from peace processes, has a compound effect on our understanding of conflict (including its potential resolution) and on what happens or ought to happen in the transitional phase. In this context, it is persistently unacknowledged that women play a series of complex and potentially paradoxical roles in a conflicted society. These can include a combatant role or a supportive role in the perpetration of violence, as well as the more traditional and highly visible roles of victim and peace maker in informal community and family settings. If these multiple capacities were imaginatively harnessed, women could arguably make significant contributions both to the resolution of conflict as well as providing a substantial resource in embedding change processes in conflicted or politically fractured societies. The recognition of multifaceted roles for women in conflicted societies also avoids essentializing women and women's experiences, and can provide a platform from which broader social and individual transformations take place.

Perhaps paradoxically, it is also increasingly acknowledged that in some cases conflict can act as a springboard for women's emancipation, at least in the short term. As Rosemary Ridd has noted, "[W]hen a community is involved in open conflict and all resources are directed towards an external threat . . . there is likely to be some fluidity in social ordering."<sup>52</sup> The obvious pitfall is that once the war is over, such gains are easily lost as conventional conceptions of masculinity, femininity, and gender roles reassert themselves with vigor.<sup>53</sup> These "losses" are first

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51. See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *NEGOTIATING JUSTICE? HUMAN RIGHTS AND PEACE AGREEMENTS* (2006) [hereinafter *NEGOTIATING JUSTICE?*].

52. See ROSEMARY RIDD & HELEN CALAWAY, *WOMEN AND POLITICAL CONFLICT: PORTRAITS OF STRUGGLE IN TIME OF CRISIS* (1987), as cited by Simona Sharoni, *Rethinking Women's Struggles in Israel-Palestine and in the North of Ireland*, in *VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE* 85, 87 (Caroline O. N. Moser & Fiona C. Clark eds., 2001).

53. As Rick Wilford noted, "[w]omen . . . are commonly constructed as the symbolic form of the nation whereas men are invariably represented as its chief agents and, with statehood achieved, emerge as its major beneficiaries." Rick Wilford, *Women, Ethnicity and Nationalism*, in *WOMEN, ETHNICITY, AND NATIONALISM: THE POLITICS OF TRANSITION* 1 (Rick Wilford & Robert L. Miller eds., 1998). See also KUMARI JAYAWARDENA, *FEMINISM AND NATIONALISM IN THE THIRD*



seen when formal and informal accountability processes are activated by both national and international political elites to end the war or agree on political reform. We assert that accountability processes compound the exclusions and discriminations experienced by women, and can operate to reverse gains made during periods of societal instability. We shall return to this point in Section C below.

### PART III. EVALUATING GENDER AND TRUTH PROCESSES

Accountability processes vary considerably across conflicted and transitional societies.<sup>54</sup> But, as outlined above, accountability for egregious human rights abuses constitutes a critical aspect of negotiating processes of political change.<sup>55</sup> There is a well-identified tension between the need for accountability and the pragmatics of peace making.<sup>56</sup> Some societies, or more accurately the political elites within them, make strategic choices not to engage in discussions about the past in the process of political accommodation.<sup>57</sup> In doing so they are represented as making the political calculation that the "peace is too fragile" to be endangered by raking up difficult issues, and that the most pressing need for a society experiencing violence is to bring hostilities to an end.<sup>58</sup>

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WORLD 259 (1986) ("Once independence had been achieved, male politicians, who had consciously mobilized women in the struggle, pushed them back to their 'accustomed place.')" See also Cynthia H. Enloe, *Feminists Thinking about War, Militarism, and Peace*, in ANALYZING GENDER: A HANDBOOK OF SOCIAL SCIENCE RESEARCH 526 (Beth B. Hess & Myra Marx Ferree eds., 1987).

54. See BRANDON HAMBER & STEVE KIBBLE, FROM TRUTH TO TRANSFORMATION: THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA, CIIR REPORT 1-3 (1999).

55. See NEGOTIATING JUSTICE?, *supra* note 51.

56. See, e.g., Anonymous, *supra* note 5; Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500 (1994); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

57. See, e.g., Sara B. Miller, *Spain Begins to Confront its Past: A campaign to dig up the mass graves of thousands murdered during the civil war has begun*, CHRISTIAN SCI. MONITOR, Feb. 6, 2003, available at <http://www.csmonitor.com/2003/0206/p06s01-woam.html>; Madeleine Davis, *Is Spain Recovering its Memory? Breaking the Pacto del Olvido*, 27 HUM. RTS. Q. 858 (2005). See also 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).

58. For a useful analysis of these trade-offs, see Tom Hadden, *Punishment, Amnesia and Truth: Legal and Political Approaches*, in DEMOCRACY AND ETHNIC CONFLICT: ADVANCING PEACE IN DEEPLY DIVIDED SOCIETIES 196 (Adrian Guelke ed., 2004). Note also the case of Chile, where the decision to establish a truth commis-

Because of this variation in accountability processes,<sup>59</sup> it is important to stress that methodological differences in accountability mechanisms and the variance of societal responses to the demands for accountability necessitate caution in any comparative analysis.<sup>60</sup> In the evaluative context, a genuine problem is that the experience of women is varied both within and across particular transitional societies for cultural, social, and political reasons. Such matters as the status of women prior to a conflict or before a repressive regime, as well as the specific indicators of education, health, and reproductive liberties, may make a substantial difference to the overall experience of women.<sup>61</sup> It should also be noted that women can experience an intersectionality of violence because of factors such as religion, ethnicity, sexual orientation, age, and disability, and that this intersectionality affects any gender analysis of accountability.<sup>62</sup> Here women experience violence explicitly because they are women and may additionally experience harms as a result of their religious, ethnic, or other identifications. Acknowledging intersectionality adds to the complexity of the truth-telling process in a conflicted society, because it will inevitably produce narrative outcomes that are more layered and complicated. We assert that such narratives have greater resonance and meaning, and offer a more compelling story of its past to societies in transition because they expose the complex ways in which women experience and articulate harms.

The conditions in which truth processes are established vary from country to country. The more formal processes, specifically truth commissions, have an organic and substantial relationship

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sion was seen as a pragmatic one, necessary because of the constraints placed on the new regime by the amnesty laws passed by Pinochet before leaving office.

59. See HAMBER & KIBBLE, *supra* note 54.

60. See, e.g., HAYNER, *supra* note 4 (cogently illustrating, in the most comprehensive analysis of truth commissions across jurisdictions, that what is in question is the restructuring of the public sphere – the private does not figure in the transformative discourse).

61. See, e.g., Nahla Abdo, *Nationalism and Feminism: Palestinian Women and the Intifada – No Going Back?*, in GENDER AND NATIONAL IDENTITY: WOMEN AND POLITICS IN MUSLIM SOCIETIES 148, 152-57 (Valentine M. Moghadam ed., 1994) (discussing the relationship between gender, class and the Palestinian national struggle).

62. See generally, Eilish Rooney *Engendering Transitional Justice: Questions of Absence and Silence*, L. IN CONTEXT (forthcoming 2007) (outlining the complex theoretical relationship between transitional justice discourse and intersectionality).

with the political context of their birth.<sup>63</sup> Specifically, as outlined above, the context of negotiations will have a clear bearing on what will be included within a truth commission's terms of reference and what will be excluded. As this article will explore below, the terms of reference for a truth process are critical to its success generally, but are particularly pivotal to understanding where gender fits into the frame of accounting, if at all.

#### A. *General Features of Truth Commissions*

Truth processes, and particularly truth commissions, emerged to some extent as a compromise on the evident inflexibility and formality of criminal legal processes,<sup>64</sup> and/or because of unwillingness to pursue any form of criminal accountability for human rights violations which occurred during periods of conflict or authoritarian rule. Hayner identifies five essential goals for a truth commission. These include: discovering, clarifying and formally acknowledging past abuses; responding to specific needs of victims; contributing to justice and accountability; outlining institutional responsibility and recommending reform; and promoting reconciliation and reducing conflict over the past.<sup>65</sup> Thus, the stated aims of truth commissions, as a means of delivering accountability, are to provide a detailed account of patterns of abuse and create an accurate record of a society's past. Across truth processes there is a general consensus that the aim of a truth commission is not criminal prosecution,<sup>66</sup> but rather to

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63. As Angela Hegarty critically notes, truth processes should not be assumed to have positive political motives. Rather they can be established as mechanisms to hide, distort and manipulate the truth. See Angela Hegarty, *Truth, Law and Official Denial: The Case of Bloody Sunday*, 15 CRIM. L.F. 199 (2004).

64. Former ICTY Prosecutor Richard Goldstone has argued (in the context of Bosnia) that "[w]hile [the international] judicial process is essential for reconciliation to begin, it is insufficient alone to satisfy the human need for knowing the truth of a tragic series of events. In addition to criminal prosecutions, it is necessary for a damaged society to arrive at a wider understanding of the causes of its suffering. For no matter how well the tribunal does its job, the scope of history is far broader than proving the guilt of a few specific individuals." Richard J. Goldstone, Opinion, *Ethnic Reconciliation Needs the Help of a Truth Commission*, INT'L HERALD TRIB., Oct. 24, 1998, at 6.

65. HAYNER, *supra* note 4, at 24-31.

66. Although some truth processes premise the absence of criminal accountability on full and frank disclosure see, e.g., *id.* at 43, discussing South African's Amnesty provisions, there is increasing agreement that certain categories of crime cannot be excluded from the scope of criminal accountability, notably Genocide and Crimes Against Humanity. For consideration of the status of amnesties for international crimes, see the decision of the Special Court for Sierra Leone in *Prosecutor v. Kallon* (Case No. SCSL-2004-15-AR72(E)) and *Prosecutor v. Kamara* (Case No.

build a picture of what happened on a systematic basis in order to prevent recurrence. Thus the focus appears to move from individual acts or crimes to the broader context in which such crimes were committed.<sup>67</sup> A truth process is often intended to represent a break from the past, not only by drawing a line under a history of human rights abuses, but by providing a symbolic gesture to over-arching political accountability, thereby facilitating the rebirth of political legitimacy within the society. Truth processes therefore carry a greater social and political weight than is immediately apparent, and this further heightens the need to pay close attention to the gender biases that accompany them.

Truth commissions are lauded because they provide a more flexible approach to dealing with a history of human rights abuse than trials do.<sup>68</sup> While trials are characterized as legalistic and narrowly focused on individual perpetrators, truth commissions are regarded as a means of placing the victim at the center of the process and dealing with abuse at a collective or societal level.<sup>69</sup> Thus, according to Kirk Simpson,

[Truth recovery] is arguably about creating new beginnings. Beyond the rhetoric, which can be facile political posturing if not supported by adequate mechanisms and processes for the achievement of this objective, this is about creating a new public space in which people (often those previously liminal in the context of political transition, such as victims) are allowed to debate the past, to exchange information and perspectives, to externalise grief, loss and anger, and to try to reach some form of consensus as to a way forward.<sup>70</sup>

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SCSL-2004-16-AR72(E)). These decisions considered, *inter alia*, the effect of Security Council Resolution 1315, which states that the "United Nations hold the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law." S.C. Res. 1315, pmb., U.N. Doc. S/RES/1315 (Aug. 14, 2000).

67. See CHILEAN REPORT, *supra* note 16, at 47. The first chapter of the Report is dedicated to the political context in which the violations under consideration occurred. The Report states, "it is absolutely essential that we understand the crisis of 1973, both in order to understand how subsequent human rights violations we were charged to investigate came about and to prevent their recurrence." *Id.*

68. See Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 MOD. L. REV. 1 (2000). Asmal argues that "the entire quest to establish a truth commission is best seen . . . as an attempt to avoid the intrusion of narrow legalism." *Id.* at 2.

69. See, e.g., HAYNER, *supra* note 4, at 27-28.

70. Kirk Simpson, *Victims of Political Violence: A Habermasian Model of Truth Recovery*, J. HUM. RTS. (forthcoming 2007).

It follows that a persistent claim made in favor of truth processes in general and truth commissions in particular is the central role played by the victims of human rights violations in the proceedings. Hayner contends that “[a] fundamental difference between trials and truth commissions is the nature and extent of their attention to victims.”<sup>71</sup> She writes that in a truth commission most of the focus is on victims, and that consideration is given to a “broad array of testimonies when analyzing and describing the greater pattern of abuse.”<sup>72</sup> The effect of this, according to Hayner, is to “give victims a public voice and bring their suffering to the awareness of the broader public.”<sup>73</sup> In Part C we probe the extent to which this victim-centered identity is meaningful across the range of victims who come before these truth processes. We argue that for women, the experiences of truth processes may negatively result in greater marginalization and a lack of recognition for their specific experiences of their victimhood. Moreover we critically probe the extent to which truth commissions in fact deliver on their promises of victim-centeredness.

Truth commissions are further vaunted for facilitating historical or communal narratives on the past communal experiences of a society, thereby enabling broad political and social outcomes through a politically driven change process.<sup>74</sup> However, this broad focus is not as expansive as the rhetoric that accompanies it suggests. Specifically, the broader picture refers only to the political context in which such acts were undertaken and is usually not intended to probe intersecting, and perhaps more compelling, narratives related to economic and social deprivations of rights.<sup>75</sup> The narratives produced by truth commission often frame the way in which societies then proceed to move towards fundamental legal and political reforms across a range of social and political contexts. We assert that the thinness of such narratives operates to the detriment of truth telling generally, but par-

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71. HAYNER, *supra* note 4, at 28.

72. *Id.*

73. *Id.*

74. *Id.* at 24-31.

75. Indeed the Report continues, “[o]ur study of the crisis will deal basically with its immediate causes, especially with those of a political and ideological nature. The Commission is well aware that the crisis had deeper social and economic roots, but to explore them any further than simply mentioning them would have meant going beyond its task and beyond the direct object of the present chapter.” CHILEAN REPORT, *supra* note 16, at 47.

ticularly limits what truth commissions will say about women's experiences. If gender is left out of the narrative that shapes the change process, then we assert that legal and political transformations that follow are gender deficient.

### B. *Terms of Reference and Harms Defined*

The tension between the stated aims of a truth commission and that which it is capable of achieving can be demonstrated by examination of the scope of harms which have been addressed by particular commissions. Some general conclusions about the limitations of truth commissions as a form of accountability can be drawn from the specific experiences in Chile and El Salvador.

The institutional aims of accountability mechanisms are often to be found in their formal terms of reference, which outline the scope of their mandate and purpose. For example, the Commission on Truth and Reconciliation in Chile was charged with four key objectives. The objectives were: to establish as complete a picture as possible of key events, as well as their antecedents and circumstances; to gather evidence that might make it possible to identify the victims by name and determine their fate or whereabouts; to recommend such measures of reparation and the restoration of people's good names as it regarded as just; and to recommend the legal and administrative measures which, in its judgment, should be adopted in order to prevent further grave human rights violations from being committed.<sup>76</sup>

A reference to building the foundation for true national reconciliation in its mission statement<sup>77</sup> suggested that the Commission would take a broadly based approach to remedying the experiences of the Pinochet dictatorship. Implicitly this suggested that a new social consensus would be built upon these foundations, marking a break from the past and resulting in a new, more equitable society for all. The reference to national reconciliation implied that the harms experienced, or a substan-

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76. Supreme Decree No. 355: Creation of the Commission on Truth and Reconciliation, Chilean Executive Branch, Ministry of Justice, Undersecretary of the Interior, April 25, 1990, reprinted in CHILEAN REPORT, *supra* note 16, at 5-9.

77. *Id.* at 13. The objectives of the Commission are stated to be "to help the nation come to a clear overall understanding of the most serious human rights violations committed in recent years in order to aid in the reconciliation of all Chileans." *Id.* It was also stated that the President believed that "for the sake of the nation's moral conscience the truth had to be brought to light, for only on such a foundation. . . would it be possible to satisfy the most basic requirements of justice and create the necessary conditions for achieving true national reconciliation." *Id.*

tial proportion thereof, would be addressed in order to prevent reoccurrence and make a visible break from the past. In this view, one might expect that gendered harms would be included and that a broad social narrative on the past would emerge.

This last idea helps to highlight the importance of the societal and communal nature of truth reckoning. Defending the South African truth commission against those who posit that its approach sacrificed justice, Kader Asmal broadly assesses the truth commission in the context of a social system created under apartheid.<sup>78</sup> He writes that the idea of a truth commission was linked with notions of reparations and social justice.<sup>79</sup> The point of a truth commission was to embed legal form and value in a systematic process which would acknowledge the illegitimacy of the apartheid system and force the establishment of equality before the law.<sup>80</sup> Addressing the criticisms of those who saw prosecutions as the only legitimate accountability process, Asmal argues that, “[i]n a system that killed far more infants through malnutrition and the unavailability of water than it killed adults with bullets and bombs, the drama to be had from placing militarists on trial might easily overshadow the equally real atrocity of the system itself.”<sup>81</sup> While substantial criticisms have been made of the extent to which the South African truth commission achieved this stated goal in practice,<sup>82</sup> the essential point about the need for truth processes to engage with the broadest aspect of harms experienced by a society is aptly taken in relation to the broader narrative capacity of truth commissions. In this vision of a broad and deep truth lies the space for a gendered narrative on the past to emerge.

Disappointingly, closer examination of how truth commissions operate in practice reveals that despite the broad scope of social objectives purported to underpin their functioning, when mandates and powers are drafted, the range of harms which are to be considered as human rights abuses inevitably narrows. Frequently, what constitutes human rights abuse for the purposes of the truth commission is limited to violations of civil and political rights, particularly that narrow core of rights that are defined as

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78. Asmal, *supra* note 68, at 11-12.

79. *Id.*

80. *Id.* at 12.

81. *Id.* at 16.

82. See, e.g., Mahmood Mamdani, *The Truth According to the TRC*, in *THE POLITICS OF MEMORY: TRUTH, HEALING AND SOCIAL JUSTICE* 176 (I. Amadiume & A. An-Na'im eds., 2000).

non-derogable under international human rights treaties.<sup>83</sup> For example, in the Chilean context the scope of what came to be investigated was limited to abuses, which were considered to be the most serious.<sup>84</sup> The decree establishing the Commission explicitly stated, “[s]erious violations are here to be understood as situations of those persons who disappeared after arrest, who were executed or who were tortured to death . . . .”<sup>85</sup> The effect of these definitional limitations was to leave out a range of harms, which coincidentally overlapped with those rights violations most often experienced by women.

A parallel story of the gap between accountability and actual delivery emerges from examination of the conflict in El Salvador which raged between leftist guerrillas, the FMLN, and the El Salvador government for twelve years.<sup>86</sup> During hostilities, tactics such as arbitrary arrests and severe repression were used as a means of spreading fear and mistrust amongst the civilian population and fragmenting opposition.<sup>87</sup> Civilians came to be seen as legitimate targets, and the destruction of entire communities was used as the mechanism for depriving the guerrillas of the means of survival.<sup>88</sup> The period immediately preceding the signing of the peace accords was one of the most violent of the whole conflict, with the arrest, torture, and murder of hundreds of civilians.<sup>89</sup>

The El Salvadorian truth process, despite having as its objective the “restoration of peace, national reconciliation and the reunification of Salvadorean society,”<sup>90</sup> produced a Commission report which makes clear that the Truth Commission had its origin in the “need to clarify and put an end to any indication of impunity on the part of officers of the armed forces.”<sup>91</sup> The in-

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83. See Section C, *infra*.

84. The Commission Report states, “[t]he decree creating the Commission on Truth and Reconciliation stated that its purpose should be to contribute to the overall clarification of the truth about the most serious violations of human rights committed in recent years.” CHILEAN REPORT, *supra* note 16, at 27.

85. Supreme Decree No. 355, *supra* note 76.

86. Beginning in 1980, and ending with the U.N. brokered peace accords in 1992. See El Salvador Report, *supra* note 17, at 10.

87. *Id.* at 27.

88. *Id.* at 32.

89. *Id.* at 39.

90. *Id.* at 184. The Commission on the Truth for El Salvador was established under the Mexico Agreements, *supra* note 29.

91. The U.N.-brokered Salvadoran Peace Accords called for the establishment of a Commission on the Truth for El Salvador. The Commission was comprised of three prominent international jurists appointed by the Secretary-General who were



vestigation, therefore, was firmly focused on violations of a military nature, based on the actions of certain groups rather than on the consequences of those actions on society at large. In this scheme, the story of harm that is told invariably leaves out large swathes of societal experience, and in particular misses the harms experienced by women.

As a result, a significant gap emerges between the chronology of abuse experienced in the conflict and the way in which the Commission identified the most serious harms it intended to investigate. While the Truth Commission report explicitly found that torture and arrest were prevalent, pervasive references in the report reveal much broader forms of harm – including violations of the home and the community, the effect of which may have been constant insecurity of individuals and families.<sup>92</sup> We contend that social conditions such as these are predominantly endured by women in the private sphere, out of sight and ignored in public accounts of the conflict, and experienced in ways which are devastating yet rarely acknowledged in the transitional phase. Most specifically, the formal terms of reference for the truth process do not recognize them and they are rarely “interpreted in” once a truth commission starts to operate.<sup>93</sup> This is

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tasked with investigating “serious acts of violence” occurring between 1980 and 1991, and in particular acts with a broader impact on society as a whole. The mandate of the Commission also included formulating proposals for legal, political, and administrative measures for preventing the repetition of serious acts of violence. The mandate did not state whether the Commission would identify individual perpetrators in its final report, however. Once it became clear that the commissioners interpreted their mandate to require the naming of names, Salvadoran President Alfredo Cristiani launched an unsuccessful diplomatic campaign at the U.N. and in several capitals to prevent the Commission from identifying individual perpetrators. In its final report the Commission named government and military personnel as well as insurgents believed to have committed grave human rights abuses during the Salvadoran civil war, and recommended a series of steps to ensure that the identified individuals were removed from public office and other positions of authority. Days after the publication of the Commission’s report, the Salvadoran legislature adopted a law granting amnesty to all persons who committed serious acts of violence. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 497, 498-503, 513-22, 533-38 (1994).

92. Thus the Chilean Report states, “[p]ersecution was accompanied by raids, theft, security forces occupying homes, people being followed. The families tell of how they were humiliated, lied to, insulted, and threatened as they were searching, visiting detention sites, picking up bodies, and looking for traces of those who had disappeared.” CHILEAN REPORT, *supra* note 16, at 795.

93. Some more recently established Truth Commissions have sought to “mainstream” gender. This has been advanced by creating specific gender units working on issues that are identified as concerning women particularly as well as seeking to identify how gender structures and ideologies shaped the particular human rights

evidenced in the “norms, concepts and criteria” upon which the conclusions of the truth commissions are based.<sup>94</sup>

C. *The Interface between International Norms and Local Accountability*

We outlined in Section B the important link between internationally recognized harms and those which are elevated to frame domestic accountability forums in transitional societies. This pattern of international-local interface is seen across a range of societies and a variety of transition processes. We have previously alluded to the bias that is imported into the local context from this relationship of oversight and regulation. We now address some specific examples of this.

In identifying what human rights abuses should be investigated, the Commissions for both Chile and El Salvador drew heavily upon those international human rights reports which had served to define human rights abuse throughout the conflicts. These reports were used as a frame of reference for establishing what acts should come within the ambit of the Commissions' investigative powers, and therefore be classed as a human rights abuse, and which should be excluded. Therefore, the fact that the focus of such reports lay with civil and political rights was not co-incidental to the types of violation which were deemed to come within the scope of the Commissions' powers.

The El Salvador report made an explicit link between the scope of international human rights law and its own terms of reference when considering the laws relevant to the work of the Commission. The report evidences the influence of international human rights standards and the extent to which the Commission felt implicitly bound by international human rights law. It stated, “Clearly not every violation of a right guaranteed in [the ICCPR and the American Convention on Human Rights] can be characterized as a ‘serious act of violence.’”<sup>95</sup> Having outlined this dis-

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history being examined (see e.g. The Peruvian Commission). See *Truth Commissions and Gender*, *supra* note 14, at 3-5.

94. CHILEAN REPORT, *supra* note 16, at 27-44. The Commission identifies the ‘norms’ upon which ‘human rights’ are based, specifically those contained in the Universal Declaration of Human Rights, ‘Laws of War’ and the role of government agents in human rights abuses. The ‘concepts’ include examination of where responsibility lies for the violations, and the ‘criteria’ include consideration of perpetrators and their motivation, as well as ‘determination of causal connections and the fate of victims.

95. El Salvador Report, *supra* note 17, at 20-21.

inction as being based on the derogable nature of certain rights under both the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the Commission concluded, "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 right to life and to physical integrity."<sup>96</sup> Thus there is an obvious distinction drawn between rights, with a hierarchy of violation being reflected in the formal terms of reference which regulate the truth commission. Vasuki Nesiiah has described this form of classification as an inherent "bias" of transitional justice accountability mechanisms.<sup>97</sup>

Scholars have asserted that the tendency to focus on physical violations is consistent with the habit within the international human rights community of drawing a distinction between so-called first and second generation rights.<sup>98</sup> First generation rights are generally taken to mean civil and political rights protected by international human rights treaties signed in the immediate aftermath of the Second World War. Second generation rights generally reference rights of the economic, social, and cultural variety which have taken longer to imbue with enforcement capacity at the international level. The focus on physical violations contributes to the exclusion of socio-economic violations, even when they are experienced as direct harms to the person. As pointed out previously, given that these socio-economic violations are particularly experienced by women, the result is to produce a narrative that fails to capture the harms endured by women in conflicted and repressive societies. As an interpretative matter,

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96. *Id.* at 20-21.

97. 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); Ní Aoláin, *supra* note 18. See also *Truth Commissions and Gender*, *supra* note 14, at 8-10.

98. Asmal, *supra* note 68, at 17 (arguing that, in this context, the Promotion of National Unity and Reconciliation Act, the legislation providing for the creation of a Truth Commission left ample scope for the investigation of violations of both civil and political rights and social and economic rights). See also Ralph Wilde, *Casting Light on the "Legal Black Hole": Some Political Issues at Stake*, 5 EUR. HUM. RTS. L. REV. 552, 556 (2006) ("An exclusive focus feeds into the skewed agenda of much mainstream human rights policy, with its pattern of dominant and subaltern issues: the focus on civil and political rights and not also economic, social and cultural rights; on the exceptional and the extreme not the pervasive and the everyday; on the male and not the female.").

it is useful to consider that, notwithstanding that the terms of reference of many truth commissions have been based in large part on the International Covenant on Civil and Political Rights, this treaty standard does not *per se* preclude consideration of a broader range of harms. Much lies in the interpretation of what constitutes harm and with whom the power of assignment rests. The home, for example, is protected under Article 17 of the Covenant, as is the family under Article 23.<sup>99</sup> Nonetheless, in the South African context Asmal acknowledges that the Commission “seemed hesitant to venture beyond the traditional civil and political offences”<sup>100</sup> and that media attention was disproportionately focused on violent political acts for which perpetrators sought amnesty.<sup>101</sup> This observation is equally true for the commissions for both Chile and El Salvador.

Paradoxically, this fixation with violations of civil and political rights has also been part of the rationale for not proceeding with any form of accountability mechanism in some specific cases. The Mozambique peace process illustrates how decisions to evade accountability for physical violence come with virtual disregard of the effect that such policies may have on women. That peace process was the result of a bloody and complicated civil war involving Remano, an anti-communist grouping sponsored variously by Rhodesia in the mid-1970’s, and subsequently by South Africa, against the socialist one-party state established by FRELIMO (the Front for the Liberation of Mozambique), a collection of anti-colonial political groups which initiated an armed response against Portuguese colonial rule in 1964. In Mozambique, the parties, with the support of church-based mediators, decided not to establish a truth commission or any other form of accountability mechanism, preferring instead to focus on the reintegration of offenders back into their communities.<sup>102</sup> Part of the stated rationale for this decision was that there had been too many atrocities committed by multiple actors

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99. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

100. Asmal, *supra* note 68, at 17.

101. *Id.*

102. Andrea Bartoli, *Forgiveness and Reconciliation in the Mozambique Peace Process*, in FORGIVENESS AND RECONCILIATION: RELIGION, PUBLIC POLICY & CONFLICT TRANSFORMATION 351, 368-69 (Raymond G. Helmick & Rodney L. Petersen eds., 2001). For an interesting comparative assessment of the costs of reintegrating former combatants for women in Congo, see Cahn, *supra* note 13.

on both sides, making it impossible to deliver any meaningful form of accountability.<sup>103</sup> This calculation overlooked the effect that reintegration of former combatants would have on communities, and particularly on the women who had been their victims. It is useful to recall that because men generally dominate peace deals, these calculations are made by male political elites, many of whom have been combatants themselves, with all the bias that position encompasses. In this sense, the negotiating side may matter little, because in key areas of negotiations, male elites may have the same protective instincts aimed at protecting their combatants, and these interests are mutual across bargaining sides. The result may be protection for combatants on all sides with little appreciation for the specific detriments to women (and other victim groups) that such deals may have. Notably, where women are included in negotiation processes, female representation does not necessarily translate into gender sensitive or feminized negotiation, but may be merely tokenistic and marginalized.<sup>104</sup>

Two conclusions can be drawn here. First, it should not be assumed that international legal and political preoccupation with conflict or repressive situations whether active, such as intervention, or merely passive interest delivers uniformly positive outcomes for women. Frequently, what is produced operates a form of reinforced patriarchy in which seemingly liberal institutions operate to detrimental and conservative effect, at least as regards women's rights and protections. Second, the distinction between direct physical harms and other forms of harms has identifiable and specific consequences for women. Such narrowing will *catch* some of the violations that women experience, such as sexual violation, though it has taken substantial time and effort for women's particular experiences of sexual violation to be recognized by law and the criminal legal processes that have come to accompany the experiment of transition in many societies.<sup>105</sup> Often, however, naming certain violations as privileged for the purposes of public accountability will leave untouched the myriad of experiences that women might describe as constituting the pivotal incidents of violation for them. These experiences include forced

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103. Bartoli, *supra* note 102, at 369-70.

104. Note for example the composition of the FMLN negotiating team who became signatories to the Agreement on Human Rights, *supra* note 45.

105. See, e.g., Dixon, *supra* note 15. We will discuss the recent development of laws on sexual violation in the following section.

familial separation, harms to their children (usually designated as secondary rather than primary harms), destruction and insecurity of their private spaces, humiliation and discrimination based on sex, economic deprivations, and a range of sex-based acts that constitute violent experiences to the female person not formally acknowledged as such by legal norms.

#### D. *Theory vs. Practice*

When engagement with the past is a part of the political negotiation towards transition, a number of similar features generally tend to be present, regardless of whether formal criminal accountability is sought or a truth telling format of some kind is in place instead. First, truth commissions and criminal courts generally lack a gender dimension. Second, where violence against women is examined in these fora, it is generally through a lens of sexual violence. Third, specific to truth commissions the general context of “ordinary,” routine, and deeply entrenched gendered violence in most societies is not counted as part of the transitional context of examination. More specifically, we identify a number of quite clear-cut features across truth telling processes that negatively impact upon or deny the experiences of women.

##### 1. Truth Processes Generally Lack a Gender Dimension

From the foregoing discussion, we conclude that the range of harms considered by truth processes is delimited in such a way as to exclude much of the experience of women. That is not to say, however, that women do not testify before truth commissions or that women are uniformly excluded from consideration as victims. For example, the United Nations report on the human rights situation in Chile produced in 1976 included statistics on women political prisoners, the torture of women, and the conditions in which they were detained.<sup>106</sup> Nonetheless, such reporting should not necessarily be represented as an attempt to understand the particular experience of women. Rather, we should understand it as a means of fitting women into the existing definition of a human rights victim, which typically elevates the integrity of the physical self—the body—over psychological or emotional harms which may have an equal or greater im-

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106. ECOSOC Report on Chile, *supra* note 25, ¶¶ 477-490.

pact.<sup>107</sup> So, in the Chilean context, whilst women are included as human rights victims in the report, the fact that violation of this type disproportionately affects men is evidenced by the reporting of the fact that out of 2,279 confirmed victims of human rights abuse throughout the period of the military dictatorship in Chile, only 126 of these were women, a mere 5.5%.<sup>108</sup>

Statistics such as these suggest that women did not experience the conflict/regime in Chile in the same way as men did. We do not imply that women did not experience similar violations to men or that such violations should be excluded from the accountability process. Rather, we suggest that women tend to become marginalized simply for the reason that their experiences were different. While women may not have been persistently targeted for torture and execution in the same way as men, it is important to understand as we calculate the nature of harms experienced that the 2,153 male victims were not autonomous unattached social beings.<sup>109</sup> Those 2,153 men had mothers, wives, sisters, daughters, all of whom will have experienced the conflict through the death of a loved one, harassment by security forces, guilt at not having done more to protect their family, or the social stigmatization that often resulted from being the relative of someone that had been killed or disappeared.<sup>110</sup> We will discuss the effect of such violations on the family and on social networks in Part C below.

Despite the fact that most of those identified as victims by the Chilean commission were men, it is clear from the report that

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107. The impact of psychological and emotional harms is acknowledged by the U.N. in its report on the situation in Chile. *Id.* ¶ 123-124.

108. See CHILEAN REPORT, *supra* note 16, at 901.

109. In this regard see the recent decisions of the Inter-American Court of Human Rights, which recognize the families of the disappeared as victims solely by virtue of their status as next of kin; Villagran Morales et al. Case (the "Street Children" case), Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999); Bámaca Velásquez Case, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

110. This is documented in both the U.N. reports on the situation of human rights in Chile. See ECOSOC Report on Chile, *supra* note 25, ¶ 490 (where the working group recognizes the "anguish" caused to a family where the children are being taught in school that only bad people are sent to jail); CHILEAN REPORT, *supra* note 16, at 777-800. Contemporary Country Reports of the Inter-American Commission on Human Rights also identified the effect such violations had on families: "it may also be stated that torture has a particularly intense effect on the family unit through the consequent maladjustments in the personal relations of the victims. It is no exaggeration to state that the spouse and the children come to be additional victims." Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Chile*, ¶ 71, OEA/Ser.L/V/II.66 Doc. 17 (Sept. 9, 1985).

women came to the Commission to tell stories, whether their own or the stories of others. The statistical gap between the women formally identified as victims by the truth commission and what is known of the pervasive effects of the dictatorship correlates to findings concerning other truth processes that demonstrate either a dearth of women testifying before such commissions or evidence that they tend to testify about the experiences of men.<sup>111</sup> Similarly, the report of the El Salvador commission contains testimony from women about the deaths of loved ones and the destruction of homes and crops,<sup>112</sup> but this is told by way of background information on the main event, which is the killing of persons by the military. Comparative research by social anthropologists and psychologists indicate strongly that the secondary harms are no less intensely felt, nor are their effects less significant, but the narrative frame of the truth telling operates to constrain both the actual stories that are told and the consequences that follow from them for the victim.<sup>113</sup>

While the El Salvador Commission pronounces deaths and disappearances of individuals to be serious violations of human rights, this violation attaches only to the physical loss or harm of that singular person. In this context we argue that the accompanying multitudes of communal and familial harms are broadly excluded from the frame of review. The emphasis by many truth commissions on a form of accountability that gives primacy to certain civil and political rights violations restrains their capacity to articulate the full experience of harms that follow in conflicted or repressive societies where violence is a highly sophisticated and differentiated tool used by state (and non-state) agents to achieve their political objectives. The design of accountability processes is weighted against a gendered analysis. It is also weighted against narratives which do not neatly fit the formula prescribed, or which may be compromised by virtue of the status of the victim or the kinds of harms they experience making such

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111. See Ross, *supra* note 2. For example, the Chilean Commission heard women testify about their male relatives: “[t]hey shot him on the road near our house. I heard the shots, and I came out and found his body. They yelled at me to go bury the dog that had just been killed. That dog was my only son. They gave me three hours to bury him and get out of town. . . I don’t know if it was my husband’s body or not. My father had to identify it, but he wasn’t sure either because it was all mutilated.” CHILEAN REPORT, *supra* note 16, at 780.

112. El Salvador Report, *supra* note 17, ¶¶ 151-157.

113. See generally WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA (Meredith Turshen & Clotilde Twagiramariya eds., 1998).



harms harder to comprehend or accept by the Truth Commission and the society beyond. In traditional or conservative societies, harms to women may be heard as compromised narratives because of deeply embedded cultural and social beliefs about the inferiority of women. When women fail to fit expected stereotypes (for example, selfless mother or innocent victim) they may not find a space to speak at truth commissions that are bounded in terms of time and limited in their willingness to accommodate narratives that are difficult politically or socially.

As calls for greater gender awareness in accountability forums have grown,<sup>114</sup> attempts have been made to include offenses against women within the scope of accountability measures such as trials and truth commissions. Rather than rethinking the definition of harms at play, however, attempts at integration have focused on fitting women into the existing narrow framework of human rights abuse, namely that abuse consists only of violation of the physical body.<sup>115</sup> Women are included as victims only where they explicitly experience certain kinds of sexual violation or suffer the same type of abuse as men. We now turn to examine the emphasis on sexual harms in accountability settings including truth commissions.

## 2. Harms against Women are Generally Examined through a Lens of Sexual Violence

A clear pattern to emerge from an analysis of the interface between truth processes and gendered violence is the tendency of such processes to focus exclusively on sexual violence, and within that frame, on a narrow range of penetrative sexual acts.<sup>116</sup> To argue against accountability for sexual violence is problematic, as feminist scholars and lawyers have struggled to require an engagement by law with the pervasive reality of violence in women's lives, whether experienced in times of conflict or not.<sup>117</sup>

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114. See *Platform for Action* and S.C. Res. 1325, *supra* note 47.

115. See Ross, *supra* note 2, at 19.

116. See Ross, *supra* note 2, at 87. See also SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT (2001) (which, *inter alia*, includes analysis of rape trials as oral pornography).

117. For a good overview of the treatment of rape in international law, and developments in international jurisprudence, see Evelyn Mary Aswald, *Torture by Means of Rape*, 84 GEO. L.J. 1913 (1996); see also Katherine Lusby, *Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story*, 25 U. TOL. L. REV. 911 (1995).

Nonetheless, we want to suggest that there are some limitations with this approach.

We caution that a narrow focus on bodily violation can operate to obscure the wider social context in which this violation occurs. The danger with placing too great an emphasis on sexual violence is that other experiences will become marginalized due to a perception that the gender aspect has been covered if sexual violence has been addressed.

Ross's analysis of the marginalization of other aspects of women's experiences resulting from a fixation on sexual violence as the site of abuse is instructive. Describing the treatment of one woman's testimony before the South African Truth and Reconciliation Commission, Ross writes:

[S]he located the sexual violation as one harmful incident among many, but the questions posed . . . returned her on several occasions to the event of sexual harm. Indeed . . . it seemed this violation was presumed to be *the* traumatic event and the *primary* violation. The process appeared to be predicated on an assumption that that which happens to or is inflicted on the body endures as pain remembered in a different and more profound fashion than the pain of, for example, a loss of community trust and engagement.<sup>118</sup>

Ross goes on to describe how testimony concerning other harms and the consequences that woman had suffered were marginalized, effectively expunged from the record, simply because they were assumed to be of lesser significance than the act of sexual violation.<sup>119</sup>

A concentration of attention on sexual violence alone is not without practical and theoretical problems. Primarily, there is a danger of obsession with the woman as a sexual object, as the focus on accountability inevitably results in an emphasis on the sexual experiences and sexual vulnerability of women. Equally the elevation of sexual violation fails to fully capture the myriad of vulnerabilities created for women by conflicted and repressive societies. We acknowledge of course, that the focus on sexuality is generally lessened in situations of conflict or repression by virtue of the competing reality of violence prevalent in such situations. But inevitably the result essentializes the woman's experience to victimhood only, and primarily to that of sexual

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118. Ross, *supra* note 2, at 89.

119. Interestingly, in this case the questioner herself was a woman, thus demonstrating further that the presence of women alone is not sufficient to ensure a gender sensitive approach to truth telling. *See id.* at 88.

victim, resulting in the emergence of a particular kind of sexual stereotype in the transition. This stereotype ignores the range of roles that women play in times of repression and conflict, which should also underscore their abilities to contribute to political transformation in a variety of ways. There is increasing attention to the link between this form of sexual stereotyping and the increased vulnerability of women in post-conflict societies to sexual trafficking and sexual slavery.<sup>120</sup>

Moreover, the emphasis on narrowly defined sexual violation, particularly in a truth commission context, fails to capture the broader social narrative for women, a narrative which is un-failingly gendered. This narrative across societies and cultures includes entrenched discrimination and systematic violence combined with a struggle to assert and meaningfully enforce equal human rights protections for women.<sup>121</sup>

### 3. "Ordinary" and Routine Violence in the Truth Telling Context

At this point it is useful to recall that truth commissions are often held out as being designed to address not only individual crimes, but the context in which they were committed.<sup>122</sup> In this regard they are held out as offering an alternative to the narrow legalism of trials. We contend that, paradoxically, the practice of truth commissions has been to focus on the violation at the expense of the context, and that this failure to address context means that everyday patterns of abuse which women suffer are overlooked, with the experience of violence during the conflict represented as exceptional and in contrast to their day to day lives. Seen in this light, the practice of reducing gendered harms to an act of sexual violation negates the opportunity opened up by a truth process for examining broader societal attitudes towards women.

Dorothy Thomas and Ralph Regan identify and assess social motivation as crucial to determining the nature of the abuse and

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120. See UNITED NATIONS DEVELOPMENT PROGRAMME, GENDER APPROACHES IN CONFLICT AND POST-CONFLICT SITUATIONS 12-16 (2001), available at <http://www.undp.org/women/docs/gendermanualfinalBCPR.pdf>.

121. There is an interesting and relevant parallel here with the domestic treatment of violence against women in which women's experiences of domestic violence is disaggregated and compartmentalized in order to 'fit' within the domestic criminal justice system and processes.

122. See discussion *supra* Section B.

the remedy to be applied.<sup>123</sup> They argue that “recognizing gender specific abuse requires an understanding not only of the political character of the abuse but also of that element of motivation that is particularly related to gender.”<sup>124</sup> For example, recent development in international criminal law recognizing the use of rape as an element of genocide and as a crime against humanity is recognition that sexual crimes can not be isolated from the political context in which they occur.<sup>125</sup>

Considering the context in which sexual violation occurs is also important in order to appreciate some of the practical obstacles women may face in testifying before a truth commission. Here we identify prevalent social attitudes in many societies which view rape as inflicting shame on victims and, by extension, on their families and communities.<sup>126</sup> Such deeply entrenched social attitudes are not addressed by examining and condemning sexual violation, but rather demand a deeper examination of the social context in which the harm was committed. Sexual violence in authoritarian or conflicted societies is unfailingly a continuation of the everyday experience of women, something which may be taboo territory for discussion in everyday community life.<sup>127</sup> A genuine examination of sexual violence would require close study of domestic, private, and public violence experienced by women. This kind of scrutiny is avoided by most societies most of the time, particularly if such violence is not recognized as a crime, or fails to attract the kinds of social disapproval that other kinds of violence will ignite. Paradoxically, in such a context a truth process creates a forum in which women are asked to speak

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123. See Dorothy Q. Thomas & Ralph E. Regan, *Rape in War: Challenging the Tradition of Impunity*, SAIS REV. 82 (1994), reproduced for Human Rights Watch by permission of Johns Hopkins University Press, available at <http://www.hrw.org/women/docs/rapeinwar.htm>.

124. *Id.*

125. See, e.g., Prosecutor v. Kunarac et al., Case No. IT-96-23-T&IT-96-23/1T, Judgment (Feb. 22, 2001); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

126. See, e.g., Katrina Anderson, *Gender and Transitional Justice: Turning Reconciliation on its Head: Responding to Sexual Violence Under the Khmer Rouge*, 3 SEATTLE J. SOC. JUST. 785, 801 (2005); YUVAL-DAVIS, *supra* note 37, at 110.

127. See Sandra Bollen et al., *Violence Against Women in Metropolitan South Africa: A Study on Impact and Delivery*, MONOGRAPHS, Sept. 1999 (quoting statistics that indicate one in every six women in South Africa experiences a relationship involving domestic violence). See also UNITED NATIONS POPULATION FUND, *A PRACTICAL APPROACH TO GENDER-BASED VIOLENCE: A PROGRAMME GUIDE FOR HEALTH CARE PROVIDERS AND MANAGERS* (2001).

publicly about sexual violence. The disconnect is, of course, that it is a compartmentalized narrative, as the forum invariably creates an artificial boundary between violence defined as relational to transition and *everyday* violence experienced in the home or the community. The result is a disconnect between the experience of the conflict and the experiences of everyday life, which is inseparable for many victims.

We conclude from this that one of the negative outcomes of truth processes is that ordinary violence is discounted in the transitional phase. A consistent narrative that emerges from accountability mechanisms in the transitional phase is that of temporal divisibility. Part of the underlying rationale for a truth process is that it can help to mark a break from the past, isolate violent events as anomalous to normalcy, and by isolating these events allow society to deal with them and move on.<sup>128</sup> Close examination of testimonies by women in truth telling contexts reveals that while the formal mechanisms may typify an incident of physical violence or sexual abuse as a singular phenomenon this is often not the subjective experience.<sup>129</sup> According to Katrina Anderson, “[W]hen rape is accompanied by the murder of family members, imprisonment, food deprivation, or other gross human rights violations, it is absorbed into a much longer narrative of suffering[.]”<sup>130</sup> A “narrative disconnect” occurs when such stories are used to support the particular political narrative being sought without taking into account the victim’s perception of uninterrupted suffering.<sup>131</sup> For women there is often no clear demarcation between harm suffered during a conflict and that which occurs as part of everyday life. This analysis exposes the shortcomings of addressing sexual violence narrowly as experienced during a conflict or repressive period while neglecting to address broader questions of the role of women and gender in society in general.

#### PART IV. CONNECTING THE THEORY AND REALITY OF TRUTH PROCESSES FOR WOMEN

Having demonstrated some of the practical difficulties inherent in accountability processes, we now turn to examine some theoretical problems presented by the truth telling model. First,

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128. See generally HAYNER, *supra* note 4.

129. Anderson, *supra* note 126, at 802.

130. *Id.*

131. *Id.*

we examine the idea that victims and perpetrators can be easily identified and distinguished for the purposes of truth commissions. Second, we consider the impact that the public/private divide has on gender in the transitional phase. Finally, we look at the role of silence in truth telling, questioning the notion that experience, and therefore truth, can only be understood if articulated in given forms of language.

#### A. *Victims and Perpetrators*

The encounter in most truth processes is one between *victims* and *perpetrators*. Neither of those terms is straight-forward, and both require further interrogation. Victims are often defined in relation to acts experienced, though the status may also be conferred by reference to social group, ethnic origin or minority status.<sup>132</sup> A growing literature in transitional societies has identified a distinct hierarchy within victim status that emerges in many post-conflict or transitional situations.<sup>133</sup> This hierarchy elevates certain privileged victims, often those whose experiences parallel a particular political narrative of the conflict, or whose individual circumstances have strong symbolic resonance for larger national or ethno-political narratives.<sup>134</sup> Left out by such maneuverings are those whose victimhood may be complex or compromised and whose story may serve to complicate the narrative rather than giving it the linear coherence that broader political objectives may demand. A useful example is provided by individuals or groups across truth processes who have replicated state patterns of human rights abuse,<sup>135</sup> or have colluded with the state, particularly those who are formally members of the op-

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132. Note the fact that in many conflicts such groups tend to disproportionately experience the human rights violations as they are more vulnerable because of their minority or other status. There are exceptions to this; for example, in South Africa the majority population experienced the violations. See JENNIFER JACKSON PREECE, *MINORITY RIGHTS: BETWEEN DIVERSITY AND COMMUNITY* (2005) (on the status and challenges to minority rights). See also NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (2d ed. 2003) (providing an overview of victimhood related to group status).

133. See Christine Bell, *Dealing with the Past in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 1095 (2003).

134. See FIONNUALA NÍ AOLAÍN, *THE POLITICS OF FORCE, CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND* (2000) (specifically analyzing the conflict in Northern Ireland and the hierarchy of victim status during that conflict).

135. See Rachel Monaghan, 'An Imperfect Peace': Paramilitary 'Punishments' in Northern Ireland, 16 *TERRORISM & POL. VIOLENCE* 439 (2004) (discussing patterns of paramilitary control of their own communities).

pressed or outsider groupings. There is a general tendency to avoid a close examination of the motives or behaviors of such individuals in the context of truth processes.<sup>136</sup> This is, we surmise, because the truths told by such encounters are uncomfortable for both the state and non-state actors involved. When women's actions are part of that uncomfortable truth we assert that the tendency to avoid scrutiny is heightened. In such contexts, where women's behavior fails to comport to accepted social or cultural norms and where women fail to conform to the expectations of their social groups within the social boundaries set by a conflict or repressive political context, truth commissions are highly unlikely to probe and expose the narratives involved.<sup>137</sup>

By way of parallel analysis it is useful to consider in the context of the South African Truth and Reconciliation process the framing of the TRC as an encounter between victims and perpetrators, a framing which has been critiqued on several grounds.<sup>138</sup> A series of conversations at the University of Cape Town Public Discussions in 1997 and 1998 noted that "there exists an irony in the way 'victims' were defined. The definition meant that the vast majority of South Africans were excluded, turning them into spectators of the TRC."<sup>139</sup> Moreover, the emphasis on victim-perpetrator dichotomy in the Truth Commissions hearings encouraged a focus on black-white relations, leaving unexamined the acute conflicts between deeply fragmented Black communities.<sup>140</sup> Brandon Hamber and Steve Kibble have emphasized the particular need to focus not only on "vertical violence" (between black citizens and white security forces) but also on "horizontal violence" (among neighbors and communities).<sup>141</sup> They underscore the manner in which hierarchical privilege between whites,

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136. See, e.g., H. R. 734, 109th Cong. (2006) (reporting the collusion of British military and police forces in Northern Ireland with paramilitary organizations).

137. Monaghan, *supra* note 135, at 440 (referring to how teenage girls suspected of fraternizing with British soldiers were subject to punishment from within their own community).

138. See PROMOTION OF THE NATIONAL UNITY AND RECONCILIATION ACT, No. 111, July 26, 1995.

139. As cited in Nthabiseng Motsemme, *The Mute Always Speak: On Women's Silences at the Truth and Reconciliation Commission*, 52 CURRENT SOCIOLOGY 909 (2004).

140. Gunther Pakendorf, What if Truth is a Woman? Reflections on Antjie Krog's TRC Report "Country of My Skull" (1999) (unpublished, on file with authors).

141. See generally HAMBER & KIBBLE, *supra* note 54.

Indians, “coloureds,” and blacks was an important aspect of the apartheid project, which confirms the more nuanced forms of victimhood and the multiple categories of “victim” present in the apartheid era.<sup>142</sup> Their analysis highlights the need to focus on a nuanced and accurate representation of victims, working from the premise that the category of victim is never straightforward and involves many layers and experiences. Significantly, Hamber and Kibble specifically identify the extent to which this particular dynamic of victim and perpetrator narrows the interpretation of “victim” and fails to identify women as victims,<sup>143</sup> even though they bore equally (and in some contexts disproportionately) the oppression experienced through apartheid in its daily manifestations in homes, streets, and communities.<sup>144</sup> In our analysis we assert the importance of looking past narrow categories of acceptable or appropriate victimhood for women. Specifically we stress the importance of looking beyond stereotypical roles which women are required to assume as a result of the assumptions that permeate notions of appropriate victimhood.<sup>145</sup> The pitfalls of these roles are that women’s experiences may entirely fail to fit the expected stereotype and thus be ignored, or that in seeing only the stereotype, the truth telling process severely restricts the *truth* that emerges.

#### B. *Public and Private Distinctions in Transitional Contexts*

A second feature of transitional accountability is that there is a marked emphasis on public and not private acts for the purposes of recording, as well as constructing, a societal narrative.<sup>146</sup>

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142. *Id.*

143. *Id.*

144. *See also* Ross, *supra* note 2.

145. For example, Veena Das has conducted a highly relevant study of widows among urban Punjabi families, some of whom had been displaced after the Partition of India, and examines the subjectivity of women in the context of violence and subject formation. In this she notes that, “to be vulnerable is not the same as to be a victim, and those who are inclined to assume that social norms or expectations of widowhood are automatically translated into oppression need to pay attention to the gap between a norm and its actualization.” Veena Das, *The Act of Witnessing: Violence, Poisonous Knowledge, and Subjectivity*, in *VIOLENCE AND SUBJECTIVITY* 205, 209 (Veena Das, Arthur Kleinman, Mamphela Remphele, & Pamela Reynolds eds., 2000).

146. For an exploration of how this maps onto Northern Ireland, see ALLEN FELDMAN, *FORMATIONS OF VIOLENCE: THE NARRATIVE OF THE BODY AND POLITICAL TERROR IN NORTHERN IRELAND* 85-97 (1991) (commenting on the effects of violations experienced by women in Northern Ireland Feldman writes that it was in collective experiences involving daily violation of local traditions, community and



As has been alluded to elsewhere in this article, what generally matters is what occurred in and on the streets, public spaces, and formal institutional settings. Violations 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. Much of the existing literature examining the experience of trauma or violence for women in extreme situations suggests that traumas are not externally located but rather are most acutely felt in how "violation came to be incorporated into the meaning and feeling of structures in relationships between husbands and wives; between mothers and sons; and between women themselves."<sup>147</sup> What follows from this is another important conclusion that when violation is thus internally incorporated, it is neither time-specific nor singular in effect. Rather, its effects can far exceed the original moment of the violence itself.<sup>148</sup>

The existing literature documenting how women experience trauma also tells us that the sites of violation are not external and may not (for women) be experienced in the myriad of public or institutional spaces that have overwhelmingly defined the locales of violence for public male actors.<sup>149</sup> Rather, the spaces of violation are the private contiguous spaces that women consistently inhabit, out of public and legal sight and unnoticed by the legal

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familial and domestic integrity by the army and police rather than a fully worked out resistance ideology that contributed to ordinary women's politicization in the jurisdiction).

147. Motsemme, *supra* note 139, at 909. This is also evidenced in the Chilean Report with the testimony of one woman: "[t]hey took us both in the same truck. My in-laws thought I had turned him in. I couldn't go to their house for seventeen years. I remained by myself, hated by those who killed him and despised by those who loved him. What happened in this country if someone could believe that a woman in love is capable of turning in her husband?" CHILEAN REPORT, *supra* note 16, at 790.

148. 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). One woman at the Chilean Commission testified, "[m]y mother and father never even noticed when I came in the house or left. From the time I was eight, I felt alone. I felt I didn't exist for anyone. I don't blame them. Now that I have children if I had to see one of them tortured and then went to visit them before they were shot, I wouldn't be normal either." CHILEAN REPORT, *supra* note 16, at 786.

149. See, e.g., Das, *supra* note 145.

processes that frame the transition in many societies.<sup>150</sup> Moreover, shattering the security of the home space is not an isolated act, but one which for many women is a continuous presence, whose influence lingers literally and emotionally.<sup>151</sup> What becomes clear is that violations within people's homes are of substantially less importance, and often entirely invisible, to truth telling.<sup>152</sup> This insight is important in identifying the chasm of differences that may exist between a male version of what constitutes meaningful accountability and a woman's perception of the same process.

In its report, the Chilean National Commission on Truth and Reconciliation included a chapter entitled "Impact of the Most Serious Human Rights Violations on Families and Social Relations."<sup>153</sup> This chapter contains testimony from those who lost

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150. See RIDD & CALOWAY, *supra* note 52, at 93 ("In both Palestine and the North of Ireland, however, women's political involvement began with their attempts to protect their homes, families and communities rather than with a conscious attempt to move beyond the confines of the private sphere into the broader political arena.").

151. The report of the Chilean Commission highlights the prolonged uncertainty associated with the disappearance of a family member; "[o]n windy nights, my mother thought the creak in the door was him. She used to get up to let him in, and then she would weep." CHILEAN REPORT, *supra* note 16, at 783; see also Deepak Mehta & Roma Chatterji, *Boundaries, Names, Alterities: A Case Study of a "Communal Riot" in Dharavi, Bombay*, in REMAKING A WORLD: VIOLENCE, SOCIAL SUFFERING AND RECOVERY 201, 220-21 (Veena Das ed., 2001) (presenting a study of riots in a shanty town called Dharavi in Bombay, following the destruction of a significant mosque, Babri Masjid in Ayodhya, Uttar Pradesh, describes the violation of the home in the words of one victim as follows, "[o]n the twenty-fourth the police came to my house . . . . The "scene-shot" was like this: when I opened the door they asked me to show them where the men were hidden. I told them there was no one in this house. They wouldn't listen. They took my two clocks and a Citizen wall clock. When I protested they rifle-butted me in the stomach. Ever since my stomach has become hard . . . . One of them kicked the cupboard. Now it doesn't close. . . .").

152. The Report of the Chilean Truth Commission contains a chapter entitled "Impact of the Most Serious Human Rights Violations on Families and Social Relations." This chapter contains the testimony of those families whose relatives had been victims of human rights abuses during the time of the dictatorship. The families themselves, however, are not considered to be victims, but rather their experience was incidental to the human rights violations that caused it. See CHILEAN REPORT, *supra* note 16, at 777. An extensive literature on the experiences of Indian Sikhs following the assassination of Indira Gandhi (31 October 1984), specifically in New Delhi, has documented this experience of familial and private harms. As Amrit Srinivasan notes, "[t]he violation of the home, whether religiously or domestically defined, formed a common thread in the Sikhs' own perception of Operation Bluestar (a military operation) as an outrage of essentially the same order as the November killings (a populist action)." Srinivasan, *supra* note 148, at 311.

153. CHILEAN REPORT, *supra* note 16, at 777.

loved ones, included as direct quotations to allow the speakers' voices to express loss in their own specificity.<sup>154</sup> We hear women speak of guilt: "I sent word to my son to turn himself in, that nothing was going to happen. I feel I'm to blame"<sup>155</sup>; and of insecurity: "[f]irst I sold poultry. Then because I was alone they robbed my animals, and later took away my land because my husband had been arrested and disappeared."<sup>156</sup> We hear women speak of fear: "[w]e didn't eat, we didn't sleep, we were scared to death."<sup>157</sup> Finally, we hear women speak of stigmatization: "[t]his was like a plague. Our family and friends turned their backs on us."<sup>158</sup> These harms are not exclusively suffered by women, and the report also includes testimonies of men articulating their experiences of the effects of the regime on families and social relations. For example, one man testified to the commission about the anguish he suffered as a father after the torture of his son in his own home.<sup>159</sup> Notably, however the concept of victim for the purposes of the accountability mechanism does not extend to include families and the range of harms experienced by families as units.<sup>160</sup>

A key concern is that public violations are thrust to the forefront of the truth seeking inquiry and private space violations are largely ignored. Some preliminary examples of this public focus are useful to bear in mind here. Across truth telling processes, certain public space violations have a higher status than private space violations. For example, street confrontations such as the Soweto Riots in South Africa or the Civil Rights Protests of the 1960's in Northern Ireland have attained symbolic, even mystic, status, whereas violations in the home fail to have the same kind

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154. *Id.* at 777.

155. *Id.* at 787.

156. *Id.* at 793.

157. *Id.* at 788.

158. *Id.* at 798.

159. The man testified, "[m]y son was tortured in the study while I was sleeping. Why didn't my instinct as a father alert me?" *Id.* at 789.

160. For recent European Court of Human Rights jurisprudence on this matter, see *Cakici v. Turkey* (23657/94) ¶¶ 94-99, 8 July, 1999, where the Court excluded the possibility that the act of a disappearance would prima facie create an Article 3 violation for family members. Any finding of a violation of the rights of the family, and the mother in particular, under Article 3 would depend on the subsequent treatment of the family member themselves by the security forces rather than following from the loss or ill treatment of a loved one. *See also Kurt v. Turkey* (24276/94) ¶¶ 130-134, 25 May 1998. These forms of family harms were found to have been a feature of the Chilean Dictatorship. *See CHILEAN REPORT, supra* note 16, at 143, 795-97.

of resonance, regardless of the jurisdiction in which they occur. This commentary is not to suggest that accountability for street violence is not necessary or that the effects of mass public violence on communitarian identities (male and female) should be dismissed. The absence of similar social and political attention to home based violations, often the most consistently experienced form of community and family violations which occur in conflicted or authoritarian societies, however, evidences a profound lack of understanding for events which are absolutely devastating for women.<sup>161</sup> Research has demonstrated that the status of the home as the center of family life, and the resulting social reality of the lived lives of women within the home, means that home violation is considered by women and children to be the most humiliating and destabilizing aspect of a rupture with the state.<sup>162</sup> Contemporary research by Colm Campbell and Ita Connolly indicates that in Northern Ireland, house searches and the manner of their conduct was critical to political radicalization in Nationalist communities.<sup>163</sup> Specifically, their research with individuals (primarily men) who were previously members of violent paramilitary organizations demonstrated that the humiliation of parents, particularly the mother, through violent intrusion into the home, had a significant impact on later behavior, resulting in greater political radicalization and willingness to commit violent action against the state.<sup>164</sup>

In South Africa it is also clear that the use of terror tactics by the police and army to violate the homes of “problematic township residents” constituted deliberate and premeditated state policy.<sup>165</sup> Research consistently notes that the “entrance of violation into the home means that political action is everywhere

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161. Women have even used the same language of human rights to articulate their experience of harm. As one woman testified to the Chilean Commission; “Luis’ disappearance has meant the destruction of our home, of our common plans. It is hard to describe the torment and psychological torture involved in not knowing what happened.” CHILEAN REPORT, *supra* note 16, at 781.

162. The anger resulting from this type of treatment is evidenced in testimony to the Chilean Truth Commission: “[t]he first time they raided our house, they took us out – my mother was pregnant – and put us up against a wall and pretended it was a firing squad. After that outrageous treatment, they grabbed my six-year-old brother and threatened to beat him if he didn’t tell where the weapons were.” *Id.* at 796.

163. Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 MOD. L. REV. 935, 947 (2006).

164. *Id.*

165. See generally DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998).

and no one can ever relax.”<sup>166</sup> Thus the violation of the home and familial space can constitute a insightful act, generating ongoing insecurity at the deepest levels of human and social need, a fact which is recognized by the perpetrator.<sup>167</sup> As Ross notes in her study of women’s testimonies to the South African TRC, women’s stories were firmly located in a specific time and place most often associated with their domestic roles.<sup>168</sup> Violations in these spaces are deeply bound up with a violation of the space where women usually exercise the most control and mark a fundamental disruption of all which has been ordered and predictable.<sup>169</sup> The loss of security in the family and home is a metaphor for the wider societal chaos but is often missed as such by truth telling processes. Violation in these spaces is understood both by the perpetrators and the female victims to make women feel particularly inadequate for their failure or powerlessness to protect loved ones, thereby disrupting the moral and community order in a fundamental way.<sup>170</sup>

This pattern affirms that the age old public/private distinction which feminist theorists have so long sought to dismantle

166. See Veena Das, *Our Work to Cry: Your Work to Listen*, in *MIRRORS OF VIOLENCE: COMMUNITIES, RIOTS AND SURVIVORS IN SOUTH ASIA* 305, 311 (Veena Das ed., 1990); Metha & Chatterji, *supra* note 151; Ross, *supra* note 2; Motsemme, *supra* note 139.

167. See Fionnuala Ní Aoláin, *Sex-Based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law*, 12 *YALE J.L. & FEMINISM* 43 (2000) (describing how in the context of sex based violence experienced by women during the Holocaust, perpetrators understand exactly the harms that they are inflicting, as did the victim, only the law fails to name appropriately) [hereinafter Ní Aoláin, *Holocaust*]. See also FELDMAN, *supra* note 146. From this work it is evident that violation of the home and familial space was a key tactic for state security forces in Northern Ireland and which was later adopted by paramilitaries in what was known as “doorstepping” (murder of police officers as they answered the doors to their homes). *Id.* at 133-35. Quoting one former prisoner, Feldman describes the rationale for this type of murder. He writes, “[y]ou see they can cope with the violence on the streets in the Republican areas. They expect it there. . .but when you hit the house. . .they can’t cope with it there.” *Id.* at 76.

168. Ross, *supra* note 2, at 42-43.

169. One woman testified to the Chilean Commission: “[a]fter they took him away I went ten days without sleeping, watching over my two babies. I was sure they were going to take them away from me as well. The greatest damage we have suffered is never to have felt secure.” *CHILEAN REPORT*, *supra* note 16, at 794.

170. Many people testified to the Chilean Commission about the sense that familiar reference points had changed. The boundaries of the legal order were shifting and the vulnerability and disbelief felt in such circumstances are revealed in the report: “[t]hey arrested them because they didn’t have their identification cards. They were minors and weren’t politically active. After all, they were practically illiterate. And they shot them to death.” *Id.* at 793.

continues to have a pervasive and substantive effect on the structure and focus of truth processes.<sup>171</sup> It tells us that despite the rhetoric about transitional justice and truth commissions as transformative structures for a society, they are often narrowly constructed mechanisms for change.<sup>172</sup>

More specifically, truth commissions are events which predominantly seek to fold the experiences of the prior regime or conflict into a narrative that, from a gender perspective, has a consistent patriarchal under-current. Thus, we understand that while the legal and political language of transitional justice may seem revolutionary, the formal communication may conceal a strong strain of conservative and traditional thinking as regards the proper place for women in the new order. There is a genuine paradox to be addressed in this context, namely that in many transitional societies, in tension with the demands for transformation in the public sphere is an equally compelling pull to reassert order and normality on social and familial (private) spheres. Not infrequently, this translates into a retrenchment of patriarchal family forms and the reassignment of highly circumscribed gender roles for women.<sup>173</sup> In short, we must remain aware that as a result of defining harms in particular ways, the particular narrative being constructed by the truth process is generally one that excludes the home, the family, and the relationship between these entities and the state itself from the ethno-national project whose legitimization may be serviced by the truth telling process.<sup>174</sup>

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171. See Carole Pateman, *Feminist Critiques of the Private/Public Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281 (S.I. Benn & G.F. Gaus eds., 1983) ("The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle, it is ultimately, what the feminist movement is about.") See also Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 *CHI.-KENT L. REV.* 847 (2000).

172. Thanks to Martha Fineman for opening up these ideas.

173. See Liz Kelly, *Wars Against Women: Sexual Violence, Sexual Politics and the Militarised State*, in *STATES OF CONFLICT: GENDER, VIOLENCE AND RESISTANCE* 45, 62 (Susie Jacobs, Ruth Jacobson & Jen Marchbank eds., 2000) ("Any 'peace' involves a reworking of power relations, not just between nations or parts of nations but between men and women.").

174. See also Judy El-Bushra, *Transforming Conflict: Some Thoughts on a Gendered Understanding of Conflict Processes*, in *STATES OF CONFLICT: GENDER, VIOLENCE AND RESISTANCE* 66 (Susie Jacobs, Ruth Jacobson & Jen Marchbank eds., 2000).

### C. *Silence and Truth*

The most powerful images of transitional justice have often come from the truth telling processes that have sought to capture and tell the story of a society's previous experiences through words that up until then were unspeakable or unacknowledged.<sup>175</sup> These processes, most cogently illustrated by the South African Truth and Reconciliation Commission, have strong cathartic resonance as well as serving the need for some kind of legal accountability for wrongs committed. A clear assumption built into truth telling processes is that the spoken word is an essential element of its work. More specifically, truth commissions have come to be known for their capacity to elicit the experiences of a society in ways that are different from (and deeper than) other legal and non-legal processes. But this assumption requires some interrogation. The evidence from truth commissions highlighted in this article and elsewhere tells us that truth commissions have their own, often unseen, constraints on narrative. They are not without rules and formalities functioning to give higher status to some forms of expression and experience over others, and they may have an internal inflexibility just as constraining as the formally articulated rules of the court rooms and tribunals to which they are offered as a counterpoint. Moreover, their informality often operates as a cloak for hidden bias that might be more obvious in a formalized due process setting.

These issues arise most obviously when we examine how women, when they have spoken in such fora, have framed their narratives. There are two separate matters to be addressed. First, we examine of the modes of articulation and the constraints upon them in truth telling processes. Second, we investigate whether there is a substantial difference between articulation by women and men at such fora.

The responses to these issues are complex for two reasons. First, the form and powers of truth commissions vary so substantially that a general comparison between them is difficult.<sup>176</sup> Nonetheless, some commonalities exist and can be identified. Second, as we have previously acknowledged, the experiences of women are varied both within particular transitional societies and across transitional societies. With those caveats in mind we focus on one noteworthy commonality that merits particular at-

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175. See ROSS, *supra* note 2; ASMAL, *supra* note 69, at 12.

176. See generally HAYNER, *supra* note 4.

tention. This common feature of women's testimony (or common to the lack of formal testimony) is a persistent inability to articulate – a “block” on the expressive or verbal word. Another variation of this commonality is the articulation of expressive forms that do not map onto the formula of speech – usually verbalized pain. Both these modes of expression are completely at odds with the form of articulation generally given an elevated status in truth telling contexts.

Previous work of one author concerning the experiences of Holocaust victims and drawing on extensive research undertaken on Holocaust narratives paid particular attention to the inability of victims to “do justice to the wholeness of the experience and its fit with the present of survival.”<sup>177</sup> In particular, this body of literature stresses the extent to which the expression of violation may be simultaneously fragmented and disrupted and the struggles in which victims engage to embrace or reject therapeutic closure and redemption.<sup>178</sup> Preliminary empirical work, assessing the experiences of women at truth commissions including the comparative empirical analysis presented here shows some of the same features.

Motsemme reports on the Truth and Reconciliation Committee's experiences with women's silences in formal public hearings intended to give voice to their pain.<sup>179</sup> Instead of articulation, what was heard was silence. She argues that such silences should not be dismissed but rather understood as “part of a range of ‘language of pain and grief’ [which] narrates often hidden but troubled elements of their recent past.”<sup>180</sup> It is also important to understand the highly Westernized notions of agency represented by the act of speaking,<sup>181</sup> which may not map onto the dominant modes of expression in non-Western societies.

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177. See Ní Aoláin, *Holocaust*, *supra* note 167, at 48. See also LAWRENCE L. LANGER, *HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY* (1991); Nora Strejilevich, *Testimony: Beyond the Language of Truth*, 28 *HUM. RTS. Q.* 701 (2006).

178. *Id.*

179. Motsemme, *supra* note 139, at 910.

180. *Id.* For a discussion of Lara Newton's play “Tshepang: The Third Testament” which explores the rape of very young girls in South Africa, and in which the victim stays entirely silent throughout the play, see Carol M. Kaplan, *Gender and Justice in Africa: Voices Rising: An Essay on Gender, Justice and Theater in South Africa*, 3 *SEATTLE J. SOC. JUST.* 711 (2005).

181. See IRIS MARION YOUNG, *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* (1990); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* (2000) (addressing, *inter alia*, the elevation of certain forms of political speech in public life).



Motsemme usefully documents the extent to which women's contributions at the South African Truth and Reconciliation Commission hearings were defined by "pre-linguistic states of crying, whimpering, and inarticulate screeching, which all form part of bodily expressions that are framed outside language."<sup>182</sup>

The silence of women is a key component of both a gendered theory of articulation and of the differences between men and women in describing their individual experiences of pain and violation. In the Haitian context, Michel Rolph Trouillet argues that,

Silences enter the process of historical production at four crucial moments: the moment of fact creation (the making of *sources*), the moment of fact assembly (the making of *archives*), the moment of fact retrieval (the making of *narratives*), and the moment of retrospective significance (the making of *history* in the final instance).<sup>183</sup>

Thus, public and consistent silences are a persistent feature of women's testimonial presentations in truth telling contexts. We should understand that those silences are not to be read as non-statements about women's experiences. The problem is one of how we mark the significance of communication (in law as well as in narrative forms) and what weight those listening give to both verbal expression and silence. Thus, scholars such as Veena Das have argued that the failure to understand silence as expression is both a denial of the pain experienced and an act which perpetuates the violence experienced.<sup>184</sup> Das has also argued that silence can be a powerful choice for women, an act of agency that is conscious and not passive, and should not be understood to narrowly define the woman's choice of expression as a further act of victimization.<sup>185</sup> Much, therefore, depends on the sophistication of the listeners, which in the case of truth processes includes the men and women chosen to mold individual narratives into a collective expression to mark a divide between past and present. Thus as Ross reminds us, we need to be careful because

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182. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

183. MICHEL-ROLPH TROUILLET, *SILENCING THE PAST* 26 (1995) *quoted in* ROSS, *supra* note 2, at 49.

184. Veena Das, *Language and Body: Transactions in the Construction of Pain*, 125 *DAEDALUS* 67, 88 (1996), *cited in* ROSS, *supra* note 2, at 49; Das, *supra* note 166; SCARRY, *supra* note 182.

185. See Veena Das, *The Anthropology of Violence and the Speech of Victims*, *ANTHROPOLOGY TODAY*, Aug., 1997, at 11; Veena Das, *Sufferings, Theodices Disciplinary Practices, Appropriations*, 154 *INT. SOC. SCI. J.* 563 (1997).

“diverse ways of telling have different qualities, and silences are not neutral or homogenous or uniform in their effects.”<sup>186</sup>

There is a counter-point to views on the value of silence in the public space,<sup>187</sup> namely that some victims may be better served personally and psychoanalytically by their private silence, than in public revelation of their victimization.<sup>188</sup> The reasons for this are complex and highly personal, but include the costs of public revelation (further violence, exclusion, and heightened public profile), the voyeurism of public telling, its subsequent manipulation by media and often the truth telling process itself for wider political and social goals, and the essentialist reproduction of the narrative itself which reduces the experience of the storyteller. All these are risks. We would also assert that there are particular costs to women of telling their stories of sexual violation in societies where sexual violence is an unchallenged part of *normal* everyday violence. That cost of telling tales is to mark women out in ways that make them ineligible or excluded from the social benefits that accrue to perceived purity.

A number of academic commentators and professional participants in the narrative process have responded to these concerns. While not dismissing the realities listed above, Cathal McLaughlin, an artistic researcher who records testimonies from political conflicts, has articulated the view (echoing that of the psychoanalyst Dori Laub who works with Holocaust testimonies<sup>189</sup>) that as victims tell their stories “they begin to find a narrative and uncover connections that were lost, important elements in the healing of wounds caused by trauma.”<sup>190</sup> Laub in particular, attests to the general psychological value of telling the story, asserting that “what ultimately matters is the experience of giving testimony, of living through testimony, of reclaiming [the speaker’s] position as a witness.”<sup>191</sup>

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186. Ross, *supra* note 2, at 50.

187. Obviously, based on the presumption that silence is not equated to non-harm, non-experience but rather is understood to represent that experience.

188. For example, in the context of Holocaust testimonies see Lenore J. Weitzman & Dalia Ofer, *The Role of Gender in the Holocaust*, in *WOMEN IN THE HOLOCAUST 2* (Lenore J. Weitzman & Dalia Ofer eds., 1998).

189. SHOSHANA FELDMAN & DORI LAUB, *TESTIMONY: CRISIS OF WITNESSING IN LITERATURE, PSYCHOANALYSIS AND HISTORY* (1992).

190. Cathal McLaughlin, *Telling Our Story, Recording Audio Visual Testimonies from Political Conflict*, for Keeping it Real Conference, University College Dublin (April 2002) (on file with authors).

191. FELDMAN & LAUB, *supra* note 189, at 85.

Some, such as the literary critic Shoshana Felman, speaking to the specifics of Holocaust testimony, also affirm wider social value. She states, "[t]o testify is not only to narrate, but to commit oneself, and the narrative to others . . . to take responsibility for the truth, which goes beyond the personal, in having general validity."<sup>192</sup> This ties to Dipesh Chakrabarty's theory, based on testimonies from the partition of India, that trauma narrative is usually a narrative of communities and not just an individual matter.<sup>193</sup>

It is also worth noting that the question of narrative authenticity is raised by the very nature – the staged, prepared aspect – of public testimony. Arguably, it debases the currency of narrative that a performance aspect is introduced by virtue of the fact that an audience listens. While acknowledging the performance element of the testimony, McLaughlin argues cogently that the presence of this element does not mean the narrative loses its authenticity.<sup>194</sup> He confirms the value of the authentic recall itself, as separate from the absolute accuracy (or not) of what is remembered, verbalized, and connected.<sup>195</sup> Hard and fast conclusions are difficult to make here and are often unique to the specific society in which the process takes place, and even more so to the singular experience and constitution of the woman speaking about her experiences. What is evident is that multiple modalities of expression exist as a real life feature of the narratives being told and lack a matching legal significance in the processes which contain them.

#### PART V. CONCLUSION

In concluding this critique of truth commissions, we acknowledge that the scope and role of any truth process has substantial variables both within and across societies. Identifying a gender deficit raises substantial questions as to how the reality of total narrative, with or without meaningful accountability, fits with the justifications for any truth process as it comes out of a political reform process or at the end of a societal conflict.

Critical appraisal of truth telling allows for a more nuanced exploration of the general function of such processes, and allows

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192. *Id.* at 204.

193. See G. PANDY, *MEMORY, HISTORY AND THE QUESTION OF VIOLENCE* (1999).

194. See McLaughlin, *supra* note 190.

195. *Id.*

for a substantial degree of skepticism about the all-encompassing mandate of their operation.<sup>196</sup> In particular, this critique focuses attention on this dilemma: if the aim of a truth commission is to bring about a break from the past and deliver national reconciliation, how are harms which are competing in terms of the narrative being produced to be prioritized? Should the national and political goals be elevated at the expense of the social? Must it come down to a choice between the two? And is it possible that truth commissions, as currently conceived, given the practical definitional constraints under which they operate, allied with the persistent resort to quasi legal structures, are not the best means of addressing harms experienced by women? This raises unresolved and open questions as to what a different model of truth telling, with a meaningful integration of gender sensitivity, would look like.

From a gender perspective, overlooking or excluding myriad harms, such as those experienced by women in repressive and conflicted societies, risks allowing such harms to continue unacknowledged and unaddressed. Because the reports which truth commissions produce have substantial influence on the shape and consensus that underpins new political dispensations in many societies, the exclusion of gender has substantial effects on the exclusion and marginalization of gendered harms and gender equality in the new political reality. Such influence warns us to pay attention to truth commissions, not only as a forum for dealing with the past, but as a forum which shapes and defines societal futures. If we fail to do so, we may come to a point of profound disillusionment cogently articulated by one woman in her testimony to the Chilean Truth Commission: "I wish they could give us a country just for us, because we no longer feel comfortable with people who have had a normal life. They look at us women as if we were crazy, because we still cry after such a long time. They can't understand . . . ."<sup>197</sup>

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196. It also advances the work of remedying such deficits both procedurally and substantively. As regards procedural reforms to truth processes with the potential to change outcomes favorably for women see *Truth Commissions and Gender*, *supra* note 14, at 13-38.

197. CHILEAN REPORT, *supra* note 16, at 799.