



**Law**

FLORIDA INTERNATIONAL UNIVERSITY

Greensboro and Beyond: Remediating the Structural Sexism in  
Truth and Reconciliation Processes and  
Determining the Potential Impact and Benefits of  
Truth Processes in the United States

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**CHAPTER 9**

**GREENSBORO AND BEYOND**

**Remediating the Structural Sexism  
in Truth and Reconciliation Processes  
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Peggy MAISEL

1. INTRODUCTION

Over the last 35 years approximately forty truth commissions have investigated human rights violations and abuses in a wide range of countries and communities.<sup>1</sup> They were established by those in a society who believed that finding the truth through an examination of the past was important to build social and political trust.<sup>2</sup> Their goals have generally been to uncover the truth and report findings and recommendations in order to strengthen or transition into democracy, reduce conflict and create a basis for long term reconciliation; bring about some form of transitional or restorative justice; and begin the process of change needed to avoid similar human rights violations in the

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\* A related article I wrote covering some of the same information appears at 20 *Cardozo J. Int'l & Comp. L.* 143 (2011).

<sup>1</sup> Compare *Greensboro Truth And Reconciliation Commission Final Report: Introduction*, ch. 1 at 2 (2006), available at [www.greensborotrc.org](http://www.greensborotrc.org) (last visited 11 September 2008) [hereinafter Greensboro TRC Report], with Carrie J. Niebur Eisnaugle, 'An International Truth Commission: Utilizing Restorative Justice as an Alternative to Retribution', 36 *Vand. J. Transnat'l L.* 209, 224 (2003) (noting in the twenty years following the Argentinean TRC, there have been over twenty TRCs around the world). See also, International Center for Transitional Justice, <http://ictj.org/en/tj/138.html> (last visited 9 November 2010).

<sup>2</sup> Fionnuala Ni Aolain and Catherine Turner, 'Gender, Truth & Transition', 16 *UCLA Women's L.J.* 229, 229–230 (2007).

future.<sup>3</sup> Each of these forty commissions provides different lessons on how investigating and testifying about past abuse can lead to healing and change.

I have participated in two of the more remarkable Truth and Reconciliation processes, the first as an observer, the other as an advisor. The former is perhaps the most widely known and discussed TRC process, the one which took place in South Africa from 1996 to 1998 that examined the entire apartheid era in that country. The other was the first TRC process in the United States that took place in Greensboro, North Carolina from 2004 to 2006. It was a much narrower and less publicized process that looked at one incident in that City's past in order to help bridge the class and racial divides existing there. In addition to my own observations, I also had the opportunity to interview some of the staff and witnesses involved in these processes. As a result, I was able to review and analyze such factors as how these two Truth Commissions were constructed, how their mandates were developed, what their fact finding processes did and did not include, and what was the overall impact of their final reports including the implementation of their recommendations.

I have undertaken this analysis first to add information about the Greensboro experience to the growing literature on the effectiveness of these processes, especially how they impact various groups and communities, especially women. In addition, I will consider the broader question of whether and how a TRC model can be valuable in addressing past violations of human rights in the United States.

In order to create a framework for this analysis, it is important to note the somewhat obvious point that Truth Commissions impact people to varying degrees, depending on the immediacy of their connection to the events being examined. Thus those most affected are the actual participants in the events, the survivors and perpetrators of the human rights violations or abuse that is being investigated. Second, there are the secondary survivors including family members of those who were hurt, and others who witnessed or knew about the abuse including those close to the survivors or perpetrators. Third, is the larger community of people who were alive at the time and knew about the events taking place where they lived or those now living in the city, town or country where the violations occurred. These community members may have been impacted directly by aspects of the abuse such as all the victims of apartheid in South Africa or racial discrimination in Greensboro, but at a minimum they are impacted by the silence or the lack of understanding of the history of what occurred. Finally, there are the people not directly involved in any way and not connected to someone involved who nevertheless learn about the process and engage with it in some way. (For some this may come well after the fact.) Such

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<sup>3</sup> Greensboro TRC Report, *supra* note 1, at 11.

engagement may come from attending public hearings or seeing them unfold on television; talking to those involved; watching a movie; or simply reading about the process in newspapers, magazines, a book, or the final report. It becomes significant when after learning the truth about what transpired elsewhere including the abuses that occurred and their underlying basis and motives, plus seeing the pain of the survivors, such observers can relate those events to ones in their community or country where they live in order to try and promote reconciliation there.

Given my experience as both an onsite observer and in one instance a minor participant in two Truth Commission processes plus my review of the growing list of articles and literature written about them, I have both witnessed the power this experience has on those immediately involved and thought about the impact on the broader community and world. As a result, I have little doubt about the positive impact such processes have on the first two and possibly the third groups of people described above; and there certainly is a strong argument that this impact alone justifies undertaking them. Nevertheless, given the expense in terms of time and resources, to say nothing of the difficulty in negotiating full participation, I believe it is necessary to assess the likelihood of achieving two key outcomes: first whether meaningful reconciliation will occur to an extent that future abuses are avoided; and second whether the investigation and taking of testimony, in an organized truth commission process designed to expose the truth behind an abuse, will help reach the goal of community change, particularly social and economic justice. It is the answer to these questions which should determine whether and how such processes should be undertaken given the costs and benefits involved.

In this article, the analysis will include the effect such commissions have on the particular types of abuse and violations suffered by women and the impact on women's lives. Indeed, one common critique of some of these processes has come from feminist scholars who have noted that they have ignored or minimized particular abuses suffered by women and failed to adequately include women's issues and perspectives among their findings. The first part of this chapter will review those critiques including an analysis of how they played out in the South African process. The purpose is to examine why the impact on women has been limited in so many TRC processes because of such factors as what is included in their mandates and who they define as victims. In so doing it will be demonstrated that their failure to focus on women turned what was supposed to be gender neutral into a male-dominated process. Where relevant, comparisons will be made to processes in other countries also.

The next section will extend the analysis of truth processes to the Greensboro Commission, often called the first US Truth Commission, to determine the

impact of this process on the groups described above and discuss whether the TRC process resulted in reconciliation and the prevention of future human rights abuses. I will also analyze from a feminist perspective whether the truth process positively impacted the goals of greater social and economic justice in the community. Included will be a review of the TRC's formation, mandate and definition of victims, fact finding process and recommendations.

The final section will look at whether and how truth commissions may be useful in other communities or more broadly in the U.S. where there have been violations of human rights. This section will also draw conclusions about the impact on various groups, including women, and whether such commissions can be an effective tool in the struggle to bring about greater social and economic justice in this country.

## 2. FEMINIST CRITIQUE OF HUMAN RIGHTS AND TRC PROCESSES

Feminists submit that legal systems generally are not gender neutral and in fact establish principles and processes that primarily reflect the male experience. The law is viewed as intensely patriarchal and its institutions as 'hierarchical, adversarial, exclusionary, and unlikely to respect the claims made by women'<sup>4</sup> having as their aim 'the abstract resolution of competing rights'.<sup>5</sup> The very methods employed by law 'are gendered to the disadvantage of women' especially the competitive adversarial processes where the competitors are assumed to be equal.<sup>6</sup> Going further, feminists argue that the system favors males as evidenced by its characteristics of 'rationality, objectivity, and abstraction, characteristics traditionally associated with men, [which are] defined in contrast to emotion, subjectivity, and contextualized thinking, the province of women'.<sup>7</sup> The reason is women's perspectives have been almost completely excluded in the development of legal doctrine.<sup>8</sup> The legal system instead makes implicit assumptions about them which interpret and enforce laws in ways that tend to discriminate against women<sup>9</sup> and make it difficult for their issues to be taken seriously.<sup>10</sup>

<sup>4</sup> Gayle Binion, 'Human Rights: A Feminist Perspective', 17 *Human Rts. Q.* 509, 513 (1995).

<sup>5</sup> Hilary Charlesworth, 'What are "Women's International Human Rights?"', in Rebecca J. Cook (ed.), *The Human Rights of Women: National and International Perspectives*, 58, 65 (1994).

<sup>6</sup> Nicola Lacey, *Feminist Legal Theory and the Rights of Women* at 14, presented at the Citizenship, Borders, and Gender: Mobility and Immobility Conference, May 2003, available at [www.yale.edu/wff/cbg/pdf/LaceyPaperFeministLegalTheory.pdf](http://www.yale.edu/wff/cbg/pdf/LaceyPaperFeministLegalTheory.pdf).

<sup>7</sup> Charlesworth, *supra* note 5, at 65.

<sup>8</sup> *Idem.* It may be argued that these different voices are heard in our courts today as the difference between a court of law and a court of equity.

<sup>9</sup> Thus even women's rights that are instituted may not be implemented.

<sup>10</sup> Lacey, *supra* note 6, at 14-15.

Feminists extend their argument to the discussion of transitional justice because transitional justice processes are developed from international human rights standards that themselves fail to consider the importance of gender. Indeed, they sometimes discriminate against women.<sup>11</sup> Since transitional justice processes borrow gender-biased legal principles, the informal processes such as truth commissions often also introduce factors that may work against the benefit of women.<sup>12</sup>

The distinction between private and public spheres of action, which forms an important premise of international human rights law, also works to ingrain gender bias into legal systems. The public sphere – the civil, legal, and political arena – is regarded as one of ‘rationality, order, and political authority’, the primary sphere of governmental action, and the ‘province of men’.<sup>13</sup> The private sphere – the familial and the domestic – is regarded as ‘subjective’, inappropriate for regulation and generally relegated to women.<sup>14</sup> It is also considered the sphere of individual autonomy and the forum where negative freedoms are enjoyed.<sup>15</sup> These distinctions also play a critical role in the transitional justice context because, as stated earlier, truth commissions generally guide themselves through standards established by international human rights organizations. Since these standards emphasize the civil and political rights of individuals harmed in the public sphere, the emphasis is on public violations, experienced mostly by men, while ignoring private violations, experienced mostly by women.<sup>16</sup> This emphasis also injects a gender bias inasmuch as it focuses on ‘what men fear will happen to them’ while ignoring ‘the harms from which women most need protection’.<sup>17</sup>

Feminists offer as a starting point in the development of human rights issues the ‘*actual human experience* and the implications of that experience’, including the diversity of that experience among women.<sup>18</sup> These critics insist that the current ‘circle of *inclusion* in the realm of human rights law is entirely too narrow’, and

<sup>11</sup> Aolain and Turner, *supra* note 2, at 233.

<sup>12</sup> *Idem*.

<sup>13</sup> Charlesworth, *supra* note 5, at 69.

<sup>14</sup> *Idem*; Lacey, *supra* note 6, at 8. Some feminists, such as Gayle Binion, point out that this is indeed a false dichotomy because there are many areas of supposedly ‘private’ family and domestic life which are the subject of regulations. For example, there are rules as to who may marry, at what age, and the rights and duties of those in marriage; rules governing divorce, child custody, and inheritance also intrude into the ‘private’ family domain. Binion, *supra* note 4, at 519.

<sup>15</sup> Negative freedom is defined as the freedom to be left alone, as opposed to a positive definition based on interests and values.

<sup>16</sup> Aolain and Turner, *supra* note 2, at 234–37.

<sup>17</sup> Charlesworth, *supra* note 5, at 71.

<sup>18</sup> Binion, *supra* note 4, at 512 (emphasis in original).

that it should include a much broader range of life experiences.<sup>19</sup> They note that traditional human rights have been divided between three so-called ‘generations’. The ‘first’ one recognizes political and civil rights, those in the public sphere.<sup>20</sup> More recently, there has been acknowledgement of both a ‘second’ tier that includes economic, social and cultural rights, and a ‘third’ which are those held by groups such as women, people of color, and gays and lesbians.<sup>21</sup> Feminists argue, however, that the focus of international human rights advocates and of international instruments that concern themselves with human rights remains only on first-generation civil and political rights.<sup>22</sup> As a result, the abuses suffered by women in the private sphere are delegitimized and ignored.<sup>23</sup> This condemnation of the current human rights framework<sup>24</sup> opposes both ‘the processes by which rights are defined, adjudicated, and enforced, as well as questions about the substance of what is thereby “protected”’.<sup>25</sup> This is especially so because calling something a human right ‘vest[s] it emotionally and morally with an especially high order of legitimacy’.<sup>26</sup> Additionally, ‘[r]ights become reified and offer one fixed meaning which people inevitably accept’.<sup>27</sup>

Historically, although the United Nations created the Commission on the Status of Women as early as 1946, the significance of women’s issues did not begin to emerge until the 1970s.<sup>28</sup> Prior to that time ‘women [were] almost entirely excluded from the important human rights forums where standards are defined, monitored, and implemented’<sup>29</sup> and their concerns rarely, if ever, made it into

<sup>19</sup> *Idem*, at 514.

<sup>20</sup> Some go so far as to assert that these are the only types of rights that can be termed international human rights.

<sup>21</sup> Charlesworth, *supra* note 5, at 58, 75.

<sup>22</sup> Amrita Basu, ‘Who Secures Women’s Capabilities in Martha Nussbaum’s Quest for Social Justice?’, 19 *Columb. J. Gender & L.* 201, 202 (2010).

<sup>23</sup> Some feminists argue that maintaining a focus on the acquisition of rights may actually not be beneficial for women. They argue that the language of rights is narrow and individualistic and over-simplifies intricate power relations, poorly reflecting the experiences and concerns of women. The power of women is further reduced when decision-making bodies balance competing rights; in fact, some rights such as those of freedom of religion actually sanction the oppression of women. Even those rights that do exist supposedly to benefit women are interpreted by courts in a typically male-centered manner. Charlesworth, *supra* note 5, at 61.

<sup>24</sup> Celina Romany, ‘State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law’, in Rebecca J. Cook (ed.), *The Human Rights of Women: National and International Perspectives*, 85, 85 (1994).

<sup>25</sup> Binion, *supra* note 4, at 513.

<sup>26</sup> Romany, *supra* note 24, at 85 (1994) (citing Richard Bilder, ‘Rethinking International Law: Some Basic Questions’, 1 *Wis. L. Rev.* 171 (1969)).

<sup>27</sup> Beth Goldblatt, *Violence, Gender and Human Rights – An Examination of South Africa’s Truth and Reconciliation Commission* (1997), available at [http://truth.www.wits.ac.za/doc\\_page.php?did=1272&li=coll](http://truth.www.wits.ac.za/doc_page.php?did=1272&li=coll).

<sup>28</sup> Elizabeth M. Bruch, ‘Lessons About Autonomy and Integration from International Human Rights, Law Journals, and the World of Golf’, 12 *Columbia J. Gender and L.* 565, 569 (2003).

<sup>29</sup> Charlesworth, *supra* note 5, at 63.

the mainstream human-rights law-making arena.<sup>30</sup> Yet even after equal treatment and non-discrimination of women was required, the fallacy remained that this alone would address all of the disadvantages suffered by women. The latter has not occurred according to many feminists because current international rights law, as embodied in international instruments<sup>31</sup> and the standard of nondiscrimination in the Human Rights Covenants limit themselves to placing women 'in the same position as men in the public sphere'.<sup>32</sup> Even the UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) is based on the same approach, prohibiting only discrimination that is 'confined to accepted human rights and fundamental freedoms',<sup>33</sup> which will limit its application to those rights which are in the public sphere. Such documents and laws therefore provide only limited recognition, if any, to women's private lives – the worlds of the domestic and the family – and also contribute to their inequality.<sup>34</sup>

This marginalization of women's rights by the 'mainstream' human rights organizations,<sup>35</sup> has led to the introduction of gender biases into truth and reconciliation processes. While claiming to be gender-neutral and to take into

<sup>30</sup> *Idem.*

<sup>31</sup> See e.g. Conventions on the Political Rights of Women of 1953; 31 March 1953, 193 U.N.T.S. 135; UN Convention on the Nationality of Married Women of 1957; 20 February 1957, 309 U.N.T.S. 65; UNESCO Convention on Discrimination in Education of 1960, 14 December 1960, 429 U.N.T.S. 93. The UN Commission on the Status of Women has also followed the same approach.

<sup>32</sup> Charlesworth, *supra* note 5, at 64. See also Lacey, *supra* note 6, who during her analysis of the different approaches to feminist legal theory and their applications to human rights law finds that this is the view that currently dominates feminist jurisprudence.

<sup>33</sup> *Idem.*

<sup>34</sup> *Idem.* A further argument is made that making the family a distinct and private sphere 'also ignores its powerful influence in socializing members, especially the next generation'. Binion, *supra* note 4, at 520. Despite this failure to recognize all the human rights violations suffered by women, many feminists resist attempts to remedy this deficiency by creating a separate category of 'women's human rights', i.e., a body of laws for the special cases of women. Jessica Neuwirth, founder of Equality Now, asserts that human rights have always implied a universal application to all *humans*, women included, and therefore they do not constitute a 'new wave or a new generation'. Marguerite Guzman Bouvard, *Women Reshaping Human Rights* 239, 246–247 (1996). For example, Article 3 of the Universal Declaration of Human Rights states that 'Everyone has the right to life, liberty and security of person' and applies directly to the security of women to be free from rape. Another general provision is in Article 7, which provides that 'all are equal before the law and entitled without discrimination to equal protection of the law' provides for the protection of women *through the law* from acts of domestic violence. The Declaration also contains provisions that apply specifically to women, such as Article 16 which gives everyone the right to choose their own marriage partner. *Idem.* Having noted this approach it should be stated that not all feminists embrace the 'universalism' upon which it is based; rather they are wary of the concept, especially if it is prescribed.

<sup>35</sup> Charlesworth, *supra* note 5, at 59. '[T]he price of the creation of separate international mechanisms and special measures dealing with women within the United Nations system has typically been the creation of a "women's ghetto" with "less power, fewer resources, and lower priority'. *Idem.*, at 66.

account the abuses suffered by the whole of society, truth and reconciliation commissions have generally narrowed their mandates and their definitions of rights to those in the civil and political arena, i.e. those mainly affecting men. Indeed, women are often silent or even absent figures at truth commission hearings. As a result, human rights violations suffered mainly by women in the private sphere are usually ignored or else viewed 'solely through a lens of sexual violence and related experiences'.<sup>36</sup> As Beth Goldblatt, researcher at the Gender Research Project, Centre for Applied Legal Studies at the University of the Witwatersrand, South Africa has written:

'Women need to challenge the meaning given to human rights by the TRC. The need to expand the meaning of rights is important not just to ensure a proper understanding of our past. It is also important because the TRC is seen as laying the basis for the human rights culture of the future. It becomes particularly important for women to show how traditional approaches to rights often render women invisible. The norm of the rights-holder is male and the context of women's experiences needs to be brought to the fore in any rights enquiry. In addition, the public/private divide of liberal theory keeps certain 'private' acts such as domestic violence out of the public sphere and thus excludes them from the language of rights. Poverty, illiteracy and very high levels of rape and domestic violence are extremely prevalent ... Any efforts to build a human rights culture must acknowledge this context and the gender dimensions of human rights'.<sup>37</sup>

By interpreting human rights abuses as violations of first generation rights, Truth Commissions also tend to focus on harms to individuals, rather than the 'systematic destruction of communities through the denial of socio-economic rights and poverty'.<sup>38</sup> This interpretation increases the likelihood of women's experiences being ignored since women are more often relegated to the private sphere of community and home. The result is that '[t]oo often when we do not undertake specific actions to draw attention to the issues that affect women, what happens is that men and the experiences of men become the yardstick by which judgements [*sic*] are made'.<sup>39</sup> Gender bias is therefore introduced into the process on questions such as how to allocate power and territory<sup>40</sup> and by the consistent exclusion of the socio-economic harms which affect women disproportionately.<sup>41</sup>

<sup>36</sup> Aolain and Turner, *supra* note 2, at 234.

<sup>37</sup> Goldblatt, *supra* note 27. See also Aolain and Turner, *supra* note 2, at 234.

<sup>38</sup> Goldblatt, *supra* note 27.

<sup>39</sup> The Report of the Truth and Reconciliation Commission, vol. 4 ch. 10 §3, available at [www.justice.gov.za/trc/report](http://www.justice.gov.za/trc/report) [hereinafter TRC Report] (citing Cheryl de la Rey as she addressed the South African Truth and Reconciliation Commission at its Cape Town special hearings on women).

<sup>40</sup> Aolain and Turner, *supra* note 2, at 238.

<sup>41</sup> *Idem*, at 239. This is also troubling because these socio-economic harms can cause direct physical harm to individuals and may be produced by the very types of violations which are considered as part of the mandate of the truth commissions.

The ultimate result is that by failing to address the consequences of human rights abuses on society at large, Truth Commissions are unable to achieve their primary purpose of promoting true reconciliation in society.

This is so regardless of which ‘generation’ of rights the focus is on. As stated earlier, first generation rights do not offer much to women since they are generally not the main actors in the public sphere.<sup>42</sup> While it may seem that a focus on second generation rights would likely better address women’s issues, this also offers little to women unless the society provides the resources necessary to allow individuals to make meaningful choices.<sup>43</sup> So far that has occurred rarely, if ever. Finally third generation rights have proved no more useful to improve the conditions of women since both the right to development and self-determination currently support male economic dominance,<sup>44</sup> since both focus on the development of men – in political life as well as in economic growth.<sup>45</sup>

In the end, the best approach may not be to focus on ‘legal’ rights. Instead, the best way to address the human rights of women may be to focus on the facts and ‘on the girls and women who are being bought and sold, beaten, raped, mutilated, killed ... [A]nybody with a conscience and a sense of decency will agree that this is wrong ...’<sup>46</sup> If Truth and Reconciliation Commissions are to be more effective in the building of new societies, they must address the wrongs committed to all the members of its society, both in the public and the private sphere of the home and the community. Without addressing the needs for justice from all the citizens in a community it is impossible to perform true ‘community-building’.

### 3. THE SOUTH AFRICAN TRC

Truth and reconciliation processes present an alternative to the more masculine model of retributive justice normally found in traditional legal systems since they are created to achieve restorative justice for the victims and hopefully greater social justice in the society at large. In effect they seek to promote healing

<sup>42</sup> Charlesworth, *supra* note 5, at 75.

<sup>43</sup> See Basu, *supra* note 22, at 202.

<sup>44</sup> Charlesworth, *supra* note 5, at 75.

<sup>45</sup> Economic development has largely focused on men and excluded women because women are viewed as ‘non-producers’ since the labor performed by women in child care, domestic work, and subsistence farming is not considered productive work. See Hilary Charlesworth, ‘The Public/Private Distinction and the Right to Development in International Law’, 12 *Austl. Y.B. Int’l L.* 190, 194–203 (1992) (discussing how current international legal norms privilege men in the area of economic development and fail to consider the reality of women). Self-determination takes place only in the public context of male political life; women are usually forced to conform to what are usually male-defined values. Charlesworth, *supra* note 5, at 75.

<sup>46</sup> Bouvard, *supra* note 34, at 248.

and reconciliation in a community instead of merely punishing the perpetrators of abuse. The less adversarial nature of truth commissions is also critical since, as feminists have long pointed out, it is the means or process, not just the outcomes that determines whether real change is to occur.<sup>47</sup> Unfortunately, as detailed in the prior section, truth commissions have almost universally failed to address the violations perpetrated against women even though their mandates purport to be all-inclusive and gender neutral.

The South African TRC process, while not perfect by any means, has been praised for its role in facilitating a peaceful transition from apartheid rule to democracy, revealing many of the gross human rights violations under apartheid, and for promoting at least some degree of reconciliation between victims and perpetrators.<sup>48</sup> However, it is also a prime example of how truth commissions do not specifically address the violence and other forms of oppression experienced by women and how a supposedly 'gender-neutral' approach can in fact be patriarchal or based on a male norm. This resulted from a narrow interpretation of both its mandate and what acts constituted gross violations of human rights.

### 3.1. BRIEF HISTORY OF THE DEVELOPMENT OF THE TRC

In 1986, Frederick van Zyl Slabbert and Alex Boraine, a Christian Minister and corporate executive, resigned from Parliament and established the Institute for a Democratic Alternative for South Africa (IDASA), a non-governmental organization dedicated to find 'an alternative to the politics of repression'<sup>49</sup> and to 'explore the means and methods to manage negotiation and the transition from apartheid to democracy'.<sup>50</sup> To fulfill this purpose, IDASA organized a conference in 1987 to examine the effect of democracy on South African society.

<sup>47</sup> See Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation', 12 *Int'l Legal Persp.* 73, 150–151 (Fall 2001/Spring 2002) (suggesting that the dialogue by victims in a TRC is an important part of the transformation process as only a TRC or court can outline the objectives and initiate the transformation process); Vasuki Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice', 15 *Colum. J. Of Gender & L.* 799, 803–804 (2006) (noting the discussion of the ICTJ Bellagio workshop participants regarding the testimony process of Truth Commissions and comparing the less accommodating nature of victims testimony in courts); Anne Orford, 'Commissioning the Truth', 15 *Colum. J. of Gender & L.* 851, 853 (2006) (exploring language and testimony of truth commissions as performances which achieve the reconstruction of a united nation).

<sup>48</sup> See Penelope Andrews, 'Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values', 15 *Mich. St. J. Of Int'l L.* 41, 49 (2006) [hereinafter Andrews, 'Learning'].

<sup>49</sup> 'How Did Idasa Start?', [www.idasa.org.za](http://www.idasa.org.za), last accessed 16 September 2010.

<sup>50</sup> Rashida Manjoo, 'The South African Truth and Reconciliation Commission – a Model for Gender Justice?', Draft, at 4 (November 2004), available at the United Nations Research

Although the discussion covered a broad range of issues, it did not include those pertaining specifically to women. Also in 1987, IDASA organized a meeting in Dakar, Senegal between white South Africans and representatives of the African National Congress<sup>51</sup> at which no women were present according to unconfirmed reports.<sup>52</sup> Another conference was held in 1989.

Political organizations were unbanned by the apartheid government in 1990 which led to negotiations with twenty-six different political parties and organizations to create a non-violent transition to democracy. Some women did participate but not in proportion to the gender and race demographics of South Africa. The end result of this process was the creation in 1993 of an interim constitution, which, although committing the nation to reconciliation and understanding, left it up to the soon-to-be-elected democratic Parliament to decide what process would be used to obtain the truth about human rights violations that had taken place during apartheid and under what circumstances amnesty would be granted to perpetrators of abuse.

In 1994, IDASA and Justice in Transition, a new organization established by Alex Boraine, sponsored a series of conferences that discussed and debated the creation of a truth and reconciliation commission. A committee composed of men only was appointed to draft the legislation that would create the commission with the advice of local and international experts, most of whom were also male. The final product was the Promotion of Truth and Reconciliation Act whose goal, according to the final report, was to develop a 'bridge-building process designed to help lead the nation away from a deeply divided past to a future founded on the recognition of human rights and democracy'.<sup>53</sup>

### 3.2. A 'GENDER-NEUTRAL' TRC

The South African TRC has rightly been praised for enhancing the peaceful transition to democracy in that country. Its remarkable accomplishments under the leadership of Arch Bishop Desmond Tutu have been detailed elsewhere;<sup>54</sup>

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Institute for Social Development Website, [www.unrisd.org/unrisd/website/document.nsf/0/F2177FF8C83E0BB4C125723400591907?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/0/F2177FF8C83E0BB4C125723400591907?OpenDocument).

<sup>51</sup> ANC. The ANC was at that time a banned liberation organization whose members were in exile.

<sup>52</sup> Manjoo, *supra* note 50, at 8.

<sup>53</sup> TRC Report, *supra* note 39, vol. 1 ch. 4 §2.

<sup>54</sup> See e.g. James L. Gibson, 'Overcoming Apartheid: Can Truth Reconcile a Divided Nation?', 31 *Politikon* 129 (2004); Paul Lansing and Julie C. King, 'South Africa's Truth And Reconciliation Commission: The Conflict Between Individual Justice And National Healing In The Post-Apartheid Age', 15 *Ariz. J. Int'l & Comp. Law* 753 (1998); Lorna McGregor, 'Individual Accountability in South Africa: Cultural Optimum or Political Facade?', 95 *Am. J. Int'l. L.* 32

and my own personal experience which includes attending hearings, following accounts in the media, and discussing its effect with participants, staff and Law School colleagues confirms that opinion. Nevertheless, like all institutions there are places where its performance was lacking. Chief among these according to critics is that while the Act creating it was supposed to be 'gender-blind',<sup>55</sup> the resulting process did not grant gender the necessary importance.<sup>56</sup> This was evidenced by the minor role women played in its creation; the fact that the types of abuses experienced primarily or solely by women were 'largely defined out by the terms of the bill',<sup>57</sup> and the treatment of female witnesses.

The appointment of Commissioners to serve on the TRC is the first example of how the process failed to be 'gender neutral'. They were appointed by the President and selected mostly from recommendations made by a Committee comprised of three women and six men. During the selection process, the Committee asked female but not male interviewees whether they thought that women should be appointed to the TRC while no one was asked if men should be.<sup>58</sup> Not surprisingly, appointments to the TRC and hiring of staff resulted in a 'gender imbalance, as well as the preferential placement, and hiring of men, in positions of authority'.<sup>59</sup> Even though seven of the 17 (41%) appointees to the TRC were female, this still reflected an inequity since women constituted 52% of the South African population.<sup>60</sup> Even greater bias was demonstrated in the way Commissioners were assigned. Thus, only two women were among the nine members of the Human Rights Violation Committee and the chair was male. This was the branch of the TRC that began the process, received by far the most publicity, and was therefore the only face of the Commission for several years. Similarly, the Amnesty Committee included one woman and two men, again headed by a man. In contrast, only one man and four women including the head were allocated to the Reparation and Rehabilitation Committee<sup>61</sup> which began its work near the end of the TRC's term, never received the resources it needed to provide even meager reparations to victims and was generally perceived as including 'the soft, caring and healing types' an obvious stereotyping of women.<sup>62</sup>

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(2001); Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective', 63 *Modern L. Rev.* 1 (2000); Bronwyn Leebaw, 'Legitimation or Judgment? South Africa's Restorative Approach to Transitional Justice', 36 *Polity* 23 (2003).

<sup>55</sup> *Idem.*

<sup>56</sup> Manjoo, *supra* note 50, at 11.

<sup>57</sup> *Idem.*, at 11 (citing Ilze Olckers, *Gender-Neutral Truth – A Reality Shamefully Distorted*, 31 *Agenda* 61, 61 (1996)).

<sup>58</sup> Manjoo, *supra* note 50, at 14.

<sup>59</sup> *Idem.*, at 15. There was also a racial imbalance; however, this will not be discussed since the focus of this chapter is on gender.

<sup>60</sup> *Idem.*

<sup>61</sup> *Idem.*

<sup>62</sup> *Idem.*

To similar effect, victims were defined by the Act in general terms as ‘persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, pecuniary loss or substantial impairment of human rights ...’<sup>63</sup> In its report, the Commissioners felt they were charged with investigating ‘gross violations of human rights’ defined as ‘the killing, abduction, torture or severe ill-treatment of any person.’<sup>64</sup> Although the term ‘severe ill-treatment’ could be interpreted to encompass all the violations of the rights of South Africans that had occurred during apartheid, the Commissioners knew they had ‘neither the lifespan nor the resources to implement a broadly constituted interpretation.’<sup>65</sup> They therefore interpreted their mandate narrowly to include only violations to individuals ‘that resulted in physical or mental harm or death and were incurred in the course of the political conflicts.’<sup>66</sup> By interpreting the Act as applying to individuals rather than communities<sup>67</sup> and by refusing to include in the definition of ‘severe ill treatment’ the daily human rights violations instigated through apartheid, the TRC excluded millions of people of color, including women who suffered, not as individuals, but collectively as daily ‘victims’ of apartheid.<sup>68</sup> In fact women were doubly harmed

<sup>63</sup> Promotion of National Unity and Reconciliation Act, No. 34 of 1995, ch. 1(1)(xix).

<sup>64</sup> See TRC Report, *supra* note 39, vol. 1 ch. 4 §§53–59. See also, Beth Goldblatt & Sheila Meintjies, *Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission* (1996) (on file with author), available at [www.doj.gov.za/trc/submit/gender.htm](http://www.doj.gov.za/trc/submit/gender.htm).

<sup>65</sup> TRC Report, *supra* note 39, vol. 1 ch. 4 §43.

<sup>66</sup> *Idem*, vol. 1 ch. 2 §19 (emphasis added).

<sup>67</sup> Goldblatt, *supra* note 27.

<sup>68</sup> It is difficult to illustrate the suffering that black women endured under apartheid. South African black women suffered two types of discrimination: one for being black, the other for being female. They lived in a patriarchal society in which they were legally considered perpetual minors incapable of owning property, entering contracts, controlling their own earnings, being guardians of their children, or inheriting from their husbands. Upon marriage, which a woman could not enter without permission of a guardian, all of her assets became the sole property of the husband. If she was widowed, a woman could not inherit her husband's estate, even the property which she brought with her to the marriage; the estate passed to the eldest son who then became his mother's guardian. This type of patriarchy was compounded by the racial restrictions of apartheid, which forced them to live in specific areas of the country, where they were expected, with their children, to subsist off the land – inarable land – while their husbands were migrant workers in the city, subject to such low wages that they often could not send money home to their families. The apartheid system forced families to live apart for months, sometimes years, at a time, creating strain on the women as they tried to raise and feed their children on their own, never knowing if the husband would come back home or find another woman. Although white women were also victims of discrimination, the effects of this discrimination were much less severe. For more information of the effect of apartheid on black women in South Africa, see Adrien Katherine Wing and Eunice P. De Carvalho, ‘Black South African Women: Toward Equal Rights’, 8 *Harv. Hum. Rts. J.* 57 (1995); ‘Effects of Apartheid on the Status of Women in South Africa, 1980’, Extracts from paper prepared by the Secretariat for the World Conference of the United Nations Decade for Women, Copenhagen, July 1980, available at [www.anc.org.za/ancdocs/history/women/effects.html](http://www.anc.org.za/ancdocs/history/women/effects.html); Elizabeth S. Schmidt, *Now You Have Touched The Women, African*

because the definitions also specifically excluded harms that resulted from sexism and gender inequality as opposed to political differences.<sup>69</sup>

Third, the TRC recognized that it was 'obliged' by the Act to treat all victims even-handedly and 'without discrimination of any kind'.<sup>70</sup> As it began its work, however, it became obvious that it had also failed to remain gender neutral with respect to the treatment of witnesses because women were either excluded or negatively represented.<sup>71</sup> For example, in the first five weeks of the TRC's public hearings, the overwhelming majority of testimonies related the experiences of men, whether the witness was male or female. A full 58% of witnesses were women during this period, but only 13% of human rights violations reported concerned violations against women.<sup>72</sup> Women's testimony about their own experiences comprised less than five per cent of testimonies because women were speaking instead about violations perpetrated against their sons, husbands,

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*Women's Resistance to the Pass Laws in South Africa 1950–1960*, available at [www.anc.org.za/ancdocs/history/misc/schmil23.html](http://www.anc.org.za/ancdocs/history/misc/schmil23.html).

<sup>69</sup> Goldblatt, *supra* note 27. During negotiations leading up to the dismantling of apartheid, the working group that was charged with deciding what acts would be considered political offenses used Norgaard principles to decide that rape could never constitute a political offense. TRC Report, *supra* note 39, vol. 1 ch. 4 §11. (Professor Carl Aage Norgaard, former President of the European Commission on Human Rights, developed criteria to be used in Namibia to define politically-motivated offences. These which became known as the Norgaard Principles *idem*, at note 2.). The TRC, however, included rape, sexual assault, abuse, and harassment in the list of acts that would be considered 'severe ill treatment' under the mandate. *Idem* at §119. Rape was considered severe ill treatment regardless of the circumstances in which it occurred. *Idem*, vol. 4, ch. 10 §53. Nonetheless, until special hearings only for women were instituted, women did not testify about being raped. See discussion *infra*.

<sup>70</sup> TRC Report, *supra* note 39, vol. 1 ch. 4 §60 (citing The Promotion of Truth and Reconciliation Act of 1995 §11(b)). The TRC was somewhat inconsistent in refusing to apply a broader definition so that it included the experiences of women. Although the decision was controversial, the TRC held a special hearing for and dedicated a special section of its report for those who were subject to compulsory military service – all of whom were white males. The TRC realized that 'conscripts could not as a rule be described as victims of gross violations of human rights as defined in the Act'. *Idem*, vol. 4 ch. 1 §11. Nonetheless, it felt that there was a need to 'know as much as possible about the truth from all perspectives so that [the TRC] can suggest ways in which a divided and traumatized nation may be healed and make recommendations on how to ensure that the mistakes of the past (made on all sides) are never repeated'. *Idem*, vol. 4 ch. 8 §1. The TRC could easily have used this same rationale to include in its interpretation of the Act the experiences of women, so that it could fully assist in the healing of the nation, especially since these *could* be described as gross violations of human rights. That it failed to see this is a clear indication that it was not, in fact, gender neutral but rather male-centered.

<sup>71</sup> Goldblatt, *supra* note 27.

<sup>72</sup> Fiona Ross, 'Existing in Secret Places: Women's Testimony in the First Five Weeks of Public Hearings of the TRC' (undated), [http://truth.wvl.wits.ac.za/doc\\_page.php?did=1376&li=coll](http://truth.wvl.wits.ac.za/doc_page.php?did=1376&li=coll). Women acknowledged that this percentage was in proportion to the number of women held in detention during apartheid, which ranged between 12% and 14%. See Goldblatt and Meintjies, *supra* note 64.

and brothers rather than violations against themselves.<sup>73</sup> Despite the reality that many of these women were themselves victims of gross violations, they only referred to their own violations in passing, if at all.<sup>74</sup>

Women were therefore perceived as 'secondary witnesses' by both the Commissioners and the media<sup>75</sup> despite the fact that women's groups repeatedly stressed that there were many reasons, cultural, social, and individual, that prevented these women from speaking out about their own experiences.<sup>76</sup> For example, South African culture discourages women from participating in public discourse over sexual issues<sup>77</sup> and holds that 'sexual abuse is shameful and cannot be divulged'.<sup>78</sup> Women's silence is considered 'representative of femininity, dignity, and respect for traditional African family values' and many men view women who bring a public accusation of their rapist as having 'lost their culture and traditions'.<sup>79</sup> Further, the stigma of having been sexually abused is strong even when the rape was committed by a member of the state defense forces or an opposition party. To speak of it publicly would diminish a witness' status in the community, bring public humiliation upon her,<sup>80</sup> recreate the trauma and loss of pride she experienced, force her to relive the pain and perhaps subject her to cross-examination.<sup>81</sup>

<sup>73</sup> *Idem*. Men, on the other hand, spoke mainly about themselves. Of all the testimonies presented before the TRC during this period, only 2.5% were testimonies of men about violations endured by women. Six per cent of the testimony comprised women's testimony about women.

<sup>74</sup> Goldblatt, *supra* note 27. The testimony of Dr. Elizabeth Floyd serves as one example of this. Dr. Floyd spoke of the experience of Neil Aggett, her partner, who was killed in detention; she did not specify during her testimony, however, that she herself was a political activist who was detained, and her only reference to her own experience was occasionally prefacing her statements with comments such as 'when I was released from detention'. Ross, *supra* note 72. Similarly, Sindisiwe Mkhonto, Nomonde Calata, Nombwyselo Mhlawuli, and Nyameka Goniwe, widows of the men known as the 'Cradock Four', testified only about the murders of their husbands who were assaulted and brutally killed in 1985, after which their bodies and the vehicle in which they were travelling were burned. In so doing they only briefly mentioned their own experience of being harassed and arrested. Goldblatt, *supra* note 27. The Commissioners themselves also failed to probe further about the women's own experiences which were treated as 'incidental'. Goldblatt and Meintjies *supra* note 64, at 15.

<sup>75</sup> Ross, *supra* note 72.

<sup>76</sup> *Idem*; Goldblatt, *supra* note 27. Even some Commissioners were concerned that 'women were not presenting their experiences of pain'. Ross, *supra* note 72.

<sup>77</sup> Lal Zimman, 'Book Review: Speaking Out: The Female Voice in Public Contexts', 1 *Gender and Language* 327, 331 (2007) (summarizing the chapter 'Sexuality, Discourse and the Public Sphere: Investigating Women's Voices on Sexuality in Black South African Communities' written by Puleng Hanong).

<sup>78</sup> Goldblatt and Meintjies, *supra* note 64, at 10.

<sup>79</sup> *Idem*.

<sup>80</sup> *Idem*, at 11.

<sup>81</sup> And for what purpose? To 'add to the historical understandings of levels of repression' – at the cost of their emotional trauma, at the cost of losing the respect of others due to the 'gender bias that people have about sexually abused women and the concept that women always ask

Even with respect to non-sexual violence against women, South African society as a whole 'diminishes women's role and women themselves then see their experiences as unimportant'.<sup>82</sup> They then decide not to speak out about their experiences because they see them as 'less severe than those of many other people';<sup>83</sup> their language was destroyed by the degree of horrors they experienced;<sup>84</sup> they desire to move on with their lives to protect their families, their dignity, or themselves; and/or they just want to forget.<sup>85</sup> Even when telling stories of the violations suffered by the men in their lives, women were in reality speaking of their experience, their loss. But no one was really listening, and no one sought to draw out of these women details about the horrors they experienced when all that was required was a few sensitive and well-placed questions. This type of silence, which is gendered, 'is a legitimate discourse on pain – if it is recognized'.<sup>86</sup> Failure to recognize it perpetuates the violence that created it.<sup>87</sup>

To be fair, primarily as a result of the pressure from women's groups, the TRC did make a belated attempt to remedy its failure to recognize the importance of gender differences. It began after the Center for Applied Legal Studies at the University of the Witwatersrand created a workshop to discuss the issue of gender.<sup>88</sup> The report included a number of recommendations designed to increase the participation of women. The overriding one which encompassed all

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for it anyway'. Even other women have viewed rape as sense of weakness. Goldblatt and Meintjies, *supra* note 64, at 30.

<sup>82</sup> *Idem*, at 15.

<sup>83</sup> TRC Report, *supra* note 39, vol. 4 ch. 10 §38, available at [www.justice.gov.za/trc/report](http://www.justice.gov.za/trc/report).

<sup>84</sup> Goldblatt and Meintjies, *supra* note 64, at 11. For example, Elaine Mohammed spoke of the psychological terror she felt in detention when rats would come into her cell and eat her soiled sanitary pads; her mind linked this with a friend's experience of having rats pushed into her vagina as a form of torture. She found this far more terrifying than being threatened or hit, was unable to talk about these terrors for a long time, and, stated, 'Some of them I still can't talk about'. TRC Report, *supra* note 39, vol. 4 ch. 10 §39.

<sup>85</sup> TRC Report, *supra* note 39, vol. 4 ch. 10 §39. Even when they choose to speak, women speak with a different voice. They are speaking their own experiences voiced in the narratives of what happened to their loved ones, their families, their homes, and their communities. Ross, *supra* note 72.

<sup>86</sup> *Idem*.

<sup>87</sup> *Idem*.

<sup>88</sup> See Goldblatt and Meintjies, *supra* note 64. At this workshop a number of interested people, including psychologists, lawyers, members of NGOs, representatives of the TRC and members of the Gauteng Legislature, discussed the issues and prepared a lengthy report which they submitted to the TRC. (Gauteng is a province that was created in 1994 after South Africa's first democratic elections from part of the Transvaal. It is the smallest province in South Africa, comprising only 1.4% of the land, but is the most populous, containing both Johannesburg and Pretoria.) The report detailed many of the abuses that had been experienced by women during apartheid and contained verbatim accounts from many women who were interviewed at length for the report. What it made obvious was that 'the differing constructions of gender shape their experience and treatment'. *Idem*, at 16.

the others was that the TRC 'actively reject its gender-neutral approach' and instead incorporate gender into its policy framework 'for without this framework gender issues, and women's voices in particular, will not be heard and accurately recorded'.<sup>89</sup>

The initial response to the report was favorable and after their own workshop<sup>90</sup> the Commissioners agreed to hold special women's hearings and realized that they needed to become more sensitive to cultural norms on gender issues, including training Commissioners on gender-related issues.<sup>91</sup> Hearings for women were eventually held in three different regions of South Africa.<sup>92</sup> Because women at these hearings were able to speak behind screens before all-women panels and a mostly female audience, a few who had declined to testify before the TRC came forward. Many still stayed away, however, because they were still afraid and ashamed to speak out about their experiences' a shame and a fear that some women could not overcome even in this safe environment. While some improvement was thereby achieved, criticism of the TRC's overall approach to gender issues continued because it did not reject its gender neutral approach, but instead treated women as a special group similar to children and youth which meant they received separate treatment and were not an integrated part of the nation.

The final chapter in the story of the South African TRC's treatment of gender issues concerns its Final Report which was released in October, 1998. The Report was controversial and almost all key political actors took issue with some aspect of it.<sup>93</sup> Ironically, this was considered by supporters of the TRC to be evidence

<sup>89</sup> *Idem*, at 32. The more specific recommendations were to have women to give their initial statements to women and then to appear at closed hearings specifically for women with possibly only women commissioners and spectators. It also recommended that group hearings be held where women could testify of their collective experiences.

<sup>90</sup> Among those attending the workshop included women's organizations and the media. Goldblatt, *supra* note 27.

<sup>91</sup> Press Release, Truth and Reconciliation Commission, 'Special Hearings for Women' (15 August 1996), available at [http://truth.wvl.wits.ac.za/doc\\_page.php?did=1244&li=coll](http://truth.wvl.wits.ac.za/doc_page.php?did=1244&li=coll). The TRC also agreed to encourage women to speak out, including allowing women to tell the stories of others, permitting groups of women to tell their stories collectively, and holding some hearings in camera or in the absence of men.

<sup>92</sup> Four had been proposed, but the hearing in the Eastern Cape was never held.

<sup>93</sup> The Commission's goal was to promote national unity and reconciliation and '[t]he TRC argued that reconciliation was only possible on a foundation of truth and acknowledgment'. Some critics felt that not much 'truth' was uncovered, thereby making the TRC an 'acknowledgment commission' which validated the stories of the victims rather than uncovering new truth. The critics continue that victims were put under tremendous pressure to 'forgive' since reconciliation was equated with forgiveness. This resulted in the invalidation of displays of 'negative' emotions such as anger, anguish, and resentment at the public hearings, which were dismissed potentially causing more harm to the victims 'by denying them the process of natural grieving and healing'. Perpetrators, on the other hand, were given

that it had been impartial and unbiased in its work. Focusing just on gender, however, beyond creating an environment where (some) women felt safe to speak about their abuses, feminists described how the TRC refused to redefine its mandate to include the wider violations that affected women and communities and failed to change its 'liberal, patriarchal, first generation conception' of rights.<sup>94</sup> It therefore failed to address issues of gender equality, giving no attention to the approximately twenty million women who were victims of apartheid.<sup>95</sup> As a result, the TRC failed to recommend changes to the laws and practices which have continued to keep South African women from gaining economic and social equality, totally excluding them from its final recommendations.<sup>96</sup> Most telling of the TRC's failure to address women's issues is that violence against women, both rape and domestic violence, has continued to rise after the end of the South African TRC process making this society one of the most dangerous for women in the world.<sup>97</sup>

### 3.3. COMPARISON TO OTHER TRC PROCESSES

Because the mandate which establishes a TRC defines the goals of the inquiry, it generally determines whether the experiences of women will be focused upon, or even considered, in the process. With one recent exception, what occurred in

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amnesty without a requirement of community service or of contributing to reparations. Traces of Truth, TRC Category 5 - Aftermath, [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=5](http://truth.wvl.wits.ac.za/cat_descr.php?cat=5) (last visited 9 November 2010).

The major expectation for the Commission was that it play a role in nation-building and unity, a very heavy burden that competed sharply with the need to deliver restorative justice to victims. What is clear is that eventually the need to nation-build overcame all others and shaped the work of the TRC. For example, the TRC focused on the harm caused by political perpetrators on individual victims, thereby removing attention from the harms caused by the structure of apartheid itself, focusing on individual violent acts rather than on the causes of the act and the less extreme daily manifestations of harm that were the result of apartheid. *Idem.*

<sup>94</sup> Goldblatt, *supra* note 27.

<sup>95</sup> See Andrews, 'Learning', *supra* note 48, at 50–51 (discussing the ways in which the South African TRC overlooked female victims of apartheid).

<sup>96</sup> Compare Andrews, 'Learning', *supra* note 48, at 52 (discussing failure of the South African TRC's final report to mention the system of violence and oppression against women in South Africa) and Goldblatt and Meintjies, *supra* note 64, with TRC Report, *supra* note 39, vol. 6, §5, ch. 7, 1–8, (there is no mention of women anywhere in the eight pages of the TRC's final recommendations).

<sup>97</sup> See Penelope E. Andrews, 'Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law', 8 *Temple Pol. & Civ. Rts. L. Rev.* 425, 430–33 (1999) (suggesting that all women in post-apartheid South Africa are at risk of suffering both public and private violence); Erika George, 'Instructions in Inequality: Development, Human Rights', 26 *Mich. J. Of Int'l L.* 1139, 1145–1146 (2005) (noting post-apartheid government inherited an economically and socially unequal society which has led to a violent society overall in which females suffer in greater amounts than males because of their gender.).

South Africa was similar to what happened elsewhere. In fact, the three days of testimony devoted to women's issues there was quite unusual.

The TRC in El Salvador which conducted its probe shortly before South Africa is just one example of this norm. Established in 1992, that Commission sought to address human rights violations committed by both the state forces and the armed opposition during the country's twelve year civil war. The peace agreement which created the Commission based its mandate on international human rights norms which limited its focus only to those matters which occurred between the government forces and the rebels, mainly during military battles.<sup>98</sup> Similar to the process in South Africa, this interpretation was seen as gender-neutral which in effect made the violations experienced by women, including sexual and sex-based violence, irrelevant to the investigation.<sup>99</sup> The focus on military harms meant that violations to second and third level rights<sup>100</sup> experienced by broad sections of society were also ignored.<sup>101</sup>

The one exception was Sierra Leone where the organizers of that Commission learned from the failures and criticisms of the one in South Africa.<sup>102</sup> In the first instance, the TRC staff and commissioners all received training on gender.<sup>103</sup> More importantly and in contrast to the South African and the Salvadoran TRCs, the Commissioners in Sierra Leone interpreted their mandate to require them to consider crimes of sexual violence against women.<sup>104</sup> The TRC also held

<sup>98</sup> The commission was established to investigate 'serious acts of violence' which took place in El Salvador between 1980 and 1991 'and whose impact on society urgently requires that the public should know the truth' El Salvador Peace Agreement, EL SAL., U.N. DOC. A/46/864-S/23501 (16 January 1992).

<sup>99</sup> See Aolain and Turner, *supra* note 2, at 240-41 (asserting that the narrow interpretation of the mandate commission resulted in harms suffered by women being excluded from the truth commission process); see also Thomas Buergenthal, 'The United Nations Truth Commission for El Salvador', 27 *Vand. J. of Transnat'l L.* 497, 500 (1994) (noting the main focus of the El Salvador TC per its mandate was to investigate only acts which had a broad impact on society as a whole, not necessarily those acts which were considered to be seriously violent).

<sup>100</sup> See definitions of these rights at note 20, *supra*.

<sup>101</sup> Aolain and Turner, *supra* note 2, at 252.

<sup>102</sup> See Katherine M. Franke, 'Gendered Subjects of Transitional Justice', 15 *Colum. J. Of Gender & L.* 813, 827 (2006) (discussing South African TRC as model for Sierra Leone). Sierra Leone's TRC was established in 1999 as part of a peace agreement following an 11-year civil war. It operated from November 2002 to October 2004.

<sup>103</sup> The World Bank, 'Gender, Justice, and Truth Commissions' at 17 (2006), available at <http://siteresources.worldbank.org/INT/LAWJUSTINST/Resources/GJTCLayoutrevised.pdf> [hereinafter 'Gender'].

<sup>104</sup> See Sierra Leone Truth And Reconciliation Act 2000 §7(2), available at [www.usip.org/library/tc/doc/charters/tc\\_sierra\\_leone\\_02102000.html](http://www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html); see also Sierra Leone Truth and Reconciliation Report vol 1. ch. 1 §7(2), available at <http://trcsierraleone.org/drwebsite/publish/v1c1.shtml> (last visited 12 September 2008) (providing the provisions of the mandate including the implementation of procedures during the Commission's operations included addressing victims of sexual abuse).

special hearings for women to talk about their experiences and express their expectations and needs. The seriousness with which the Commissioners of the Sierra Leone TRC considered the condition of women is reflected in the final report.<sup>105</sup> Thus, it devotes an entire chapter about women to such topics as: the role of women in Sierra Leone's society and history, the effect of conflict on women, and the reasons why women were victims of abuse and sexual violence.<sup>106</sup> Even more significantly, the final recommendations make suggestions about ways to protect women from future violence and abuse while providing greater educational and economic opportunities.<sup>107</sup>

Most truth commissions are established in transitional societies or communities where there has been abuse or injustice. The above examples demonstrate how commissions in those situations will fail to improve the lives of women if differences in gender are not explicitly considered in the framing of the mandate, the training of staff, the making of recommendations, and the expansion of resources, usually in the form of reparations.<sup>108</sup> To accomplish these tasks, it is therefore recommended that there be a dedicated budget or special investigators to look at the impact of the human rights abuses on women.<sup>109</sup> Only then is there likely to be true reconciliation for all victims of human rights abuses.

#### 4. GREENSBORO

The first Truth and Reconciliation Commission in the United States was established in Greensboro, North Carolina in 2004.<sup>110</sup> The Greensboro Truth and Reconciliation Commission<sup>111</sup> was created to bring about community healing and to open a dialog about the issues surrounding events that took place

<sup>105</sup> See generally Final Report Of The Truth And Reconciliation Commission (2004), available at <http://trcsierraleone.org/drwebsite/publish/index.shtml>.

<sup>106</sup> See Final Report of the Truth and Reconciliation Commission: Women & The Conflict, vol. 3b ch. 3 (2004), available at <http://trcsierraleone.org/drwebsite/publish/v3b-c3.shtml>.

<sup>107</sup> See Final Report of the Truth and Reconciliation Commission: Recommendations, vol. 2 ch. 3 (2004), available at <http://trcsierraleone.org/drwebsite/publish/v2c3.shtml>.

<sup>108</sup> At present little information is available on gender sensitive reparations. See generally Nesiah, *supra* note 47.

<sup>109</sup> Moreover, including an explicit gender perspective may increase the likelihood of funding. See 'Gender', *supra* note 108, at 28 (stating that the World Bank could help in the TC process by aiding in a TRC's proposed implementations to promote socioeconomic growth and the rule of law without exceeding its mandate or purpose).

<sup>110</sup> There were other truth recovery processes in the U.S. such as the Tulsa Race Riot Commission, the Rosewood Florida Commission, and the Wilmington Race Riot Commission. These were state-sponsored historical inquiries that inspired the Greensboro TRC process. The GTRC identified itself as the first truth-recovery effort in the U.S. informed by international experience and self-identified as a Truth and Reconciliation Commission modeled after, although quite different from, the government sponsored commission in South Africa.

<sup>111</sup> Hereinafter GTRC.

on November 3, 1979. On that day, five Communist Worker's Party demonstrators were killed and ten others wounded in the City's African American Morningside Homes public housing community at the beginning of a march against the Ku Klux Klan.<sup>112</sup> The shooting was captured on video tape but after two criminal trials in front of all-white juries there were no convictions. A civil case for wrongful death against the Greensboro Police Department and the KKK did result in civil damages for one of the survivors.

Unlike other TRCs, the GTRC was not an official state commission and was not government sponsored.<sup>113</sup> It began as a grass-roots movement spearheaded by citizens of Greensboro and survivors of the November 3 incident.<sup>114</sup> It received its legitimacy, not from its affiliation with the state, but from its independence and the support of the citizens of Greensboro.<sup>115</sup> In fact, the Greensboro City Council voted 6–3, with the three black members dissenting, to oppose the TRC process.<sup>116</sup> I was a member of the National Advisory Committee that helped, particularly in the beginning phases of the process, by meeting with the Local Task Force to write and approve the Commission mandate. The fact that the Greensboro TRC was not a government process is significant in ways that are discussed in the following sections but the Commission concluded it did not make a significant difference in its *results*. The fact that the *process*, however, was not officially sanctioned certainly made the Commission's task more difficult. For example, the Executive Director of the GTRC was subjected to wire surveillance by the police department, who were not in support of the process.<sup>117</sup>

From the start, women played a leadership role first in creating, then in running the process, both as commissioners and staff.<sup>118</sup> However, the Greensboro mandate did not explicitly consider the impact of the events it reviewed on women's lives in the community, nor did the recommendations separately address women's lives in Greensboro although they did address some of the economic inequalities that often impact most severely on women. As a result, the outcome in terms of its benefits for women appears to fall somewhere between the South African experience and the one in Sierra Leone.

<sup>112</sup> See generally Greensboro TRC Report: Introduction, *supra* note 1, ch. 1.

<sup>113</sup> Jill E. Williams, 'Legitimacy and Effectiveness of Grass Roots Truth and Reconciliation Commissions', 72 *Law & Contemp. Probs.* 143, 145 (2009).

<sup>114</sup> *Idem*, at 144.

<sup>115</sup> See Williams, *supra* note 113.

<sup>116</sup> See Greensboro Truth and Reconciliation Commission Final Report: Executive Summary at 25 (2006), available at [www.greensborotrc.org/exec\\_summary.pdf](http://www.greensborotrc.org/exec_summary.pdf) (last visited 12 September 2008) [hereinafter GTRC Executive Summary].

<sup>117</sup> *Idem*. The police chief resigned after it was publically revealed that there had been wire surveillance of the TRC Executive Director among others.

<sup>118</sup> See Greensboro TRC Report, *supra* note 1.

This part will analyze the Greensboro process from a feminist perspective and look at how the truth process contributed to greater social and economic justice in Greensboro thus benefitting women both directly and indirectly. It will begin by describing the GTRC's formation and mandate, including the mandate's definition of victims. Next it will include a discussion of the Commission's process, final report and recommendations plus a review of whether and how its recommendations were implemented. This will allow an analysis not only of its impact in Greensboro, but also in the final section, when and how truth commissions might be effectively instituted elsewhere in the U.S.

#### 4.1. ESTABLISHING THE GREENSBORO TRC

The Greensboro Commission's mandate required it to examine the 'context, causes, sequence and consequences'<sup>119</sup> and to make recommendations for community healing concerning the tragic events that took place in that City almost twenty-five years earlier on November 3, 1979. A Truth and Reconciliation Process does not develop spontaneously 20 years after the events it will examine. Before an organizing group decided to push for a TRC in Greensboro, there were a series of discussions held as part of the ongoing social justice work undertaken there by the local Beloved Community Center, the Peace and Justice Network, and the non-profit Greensboro Justice Fund, especially around the yearly commemorations of the event organized by survivors. As plans were being developed to commemorate the 20<sup>th</sup> anniversary of the November 3 deaths, a long series of discussions began that culminated in the 2003 signing of a written 'Declaration' by thirty-two Greensboro civic leaders stating their intent to work with all sectors of Greensboro and national and international leaders to create the Greensboro Truth and Community Reconciliation Project.<sup>120</sup> Some Greensboro residents challenged the need for a truth process investigating a twenty year old event.<sup>121</sup> Ultimately, the Greensboro City Council, in response to a petition signed by more than 5,000 Greensboro residents asking for a TRC to be established, voted in 2004 along racial lines to oppose the process.<sup>122</sup> The final report acknowledges this opposition but provides the following justification for proceeding:

Through this process, we have learned that the polarized ways residents remember the event of Nov. 3, 1979, reflect a deeper brokenness in Greensboro that can only be healed by a truth-seeking and truth-telling process. Along these lines, we affirm the

<sup>119</sup> Mandate of TRC, Mandate for the Greensboro Truth and Reconciliation Commission, available at [www.gtcrp.org/mandate.doc](http://www.gtcrp.org/mandate.doc) [hereinafter GTRC Mandate].

<sup>120</sup> For a history of the establishment of the Greensboro TRC, see Lisa Magarell and Joya Wesley, *Learning from Greensboro*, 48–9 (2008).

<sup>121</sup> *Idem*, at 21.

<sup>122</sup> *Idem*, at 24. Six white City Council members voted to oppose implementation of a TRC process with the three black members dissenting.

words of our Mandate that read: ‘The passage of time alone cannot bring closure, nor resolve feelings of guilt and lingering trauma, for those impacted by the events of November 3, 1979. Nor can there be any genuine healing for the city of Greensboro unless the truth surrounding these events is honestly confronted, the suffering fully acknowledged, accountability established, and forgiveness and reconciliation facilitated’.<sup>123</sup>

The Greensboro process was based largely on the South African model, but it also differed significantly from that one because its primary focus was on the ramifications of one particularly horrific incident rather than a broad era of widespread repression which occurred in South Africa. However, the Greensboro process did move from the incident itself to examine broader issues of race and class in the local community before and after the deaths in 1979, as a means to try to promote healing and reconciliation for the conflicts that still exist today.<sup>124</sup>

The organizers of the Greensboro TRC included a large Local Task Force with survivors of the events in 1979,<sup>125</sup> a National Advisory Committee,<sup>126</sup> and a staff member at the International Center for Transitional Justice (ICTJ).<sup>127</sup> Once they

<sup>123</sup> Greensboro TRC Report: Introduction, *supra* note 1, ch. 1, at 21.

<sup>124</sup> See Greensboro Executive Summary, *supra* note 116, at 312 In its final report, the GTRC found a pattern of resisting change and suppressing the efforts of those who seek it that continues in Greensboro. For example, revelations involving high-level misconduct including institutionalized racial profiling and admissions of police wire surveillance of private citizens including the GTRC’s executive director, prompted the Greensboro Police Chief to resign early in 2006. See *idem*, at 25.

<sup>125</sup> The Local Task Force was composed of more than eighty individuals from Greensboro who represented all race groups, different economic classes, and both genders. The survivors of the events of 3 November 1979 were among the members of both the local task force and the national advisory committee and were initiators of the process. Many of them, including those who were injured and their families and the widows and children of those who died, had kept in contact with each other for reunions and support. Some still live in Greensboro, such as Nelson and Joyce Johnson, who were core members of the local task force. See Greensboro TRC Report Sequence of Events ch. 7 at 201, available at [www.greensborotrc.org/1979\\_sequence.pdf](http://www.greensborotrc.org/1979_sequence.pdf).

<sup>126</sup> The National Advisory Committee included 43 members from throughout the US with various backgrounds and professions, some with expertise, and all with interest in the process of truth commissions. Among its members were Dr. Peter Storey, former prison chaplain to Nelson Mandela and member of the panel that selected the South African TRC; Dr. Vincent Harding, a close associate of Martin Luther King, Jr. and first director of the King Center; Beni Ivey, director of the Center for Democratic Renewal; and Cynthia Nance, law professor at the University of Arkansas. Magarell and Wesley, *supra* note 120, at 5. My name was proposed for the National Advisory Committee by Dr. Marty Nathan, the widow of Michael Ronald Nathan, killed on November 3 1979, because of my experience with the TRC process in South Africa, my position as a law professor, and my concern about social justice in the U.S. Dr. Nathan, who is a medical doctor, established the Greensboro Justice Fund from the damage award of the successful civil trial in 1988 that found members of the Greensboro Police Department jointly liable with Klan and Nazi members for the wrongful death of her husband. I did not join the National Advisory Committee until its third meeting in 2003.

<sup>127</sup> Lisa Magarrell of the ICTJ whose job is to consult with truth and reconciliation processes around the world provided expert guidance from the beginning to those in Greensboro. Her

reached the conclusion that an exploration of what happened in November, 1979 could lead to healing racial and class divides in modern day Greensboro, work began writing the Commission's mandate. The latter, which took two years to complete, includes both the goals to be achieved and steps to be followed in creating the Greensboro TRC. One criticism of the Greensboro process was that it was initiated by, among others, some of the individuals who organized the anti-Klan rally in November 1979. This is not a unique situation since around the world it has generally been the people most affected by human rights violations, in addition to their supporters, who have sought and initiated the truth-seeking process.<sup>128</sup> In South Africa, for example, it was members of the African National Congress, the primary opposition to the apartheid government, who motivated the truth and reconciliation process.<sup>129</sup> To offset this apparent bias, it is particularly important that outsiders in the community and beyond are also involved to help insure the independence of the Commission process and therefore its legitimacy in discovering and publicizing the truth.<sup>130</sup>

#### 4.2. THE GREENSBORO MANDATE

As noted earlier, the mandate for a truth commission establishes its goals and purpose as well as the framework for the Commission's investigation, recommendations, and final report. Since the Commissioners normally have not been chosen while the mandate is being developed, it is important to leave them some flexibility to amend the scope of the mandate as they proceed with their

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expertise helped at every step of the process by finding advisors, both inside the US and internationally, advising on the initial stages of writing a mandate, determining a process for selecting independent Commissioners, and helping the GTRC, once established, decide how to proceed in its investigation, public hearings, community dialogue and final report. See GTRC Executive Summary, *supra* note 116, at 49.

<sup>128</sup> See Eisnagle, *supra* note 1, at 224 (noting that the TRC idea in South Africa was first developed by religious leaders, NGOs, and human rights activists); Nesiiah, *supra* note 47, at 804. The Japan Women's International War Crime Tribunal on WW II comfort women was considered a successful testimony process for women and created due to a grassroots victim support and advocacy effort.

<sup>129</sup> See Tama Koss, 'South Africa's Truth and Reconciliation Commission: A Model for the Future', 14 *Fla. J. Of Int'l L.* 517, 521-523 (2002) (noting the opposition to apartheid by the ANC and the ANC's call for a Truth Commission after the Commission of Inquiry completed its work in 1992); Olivia Lin, 'Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context', 12 *J. Of Int'l & Comp. L.* 41, 46-56 (2005) (describing the processes of the ANC's opposition during apartheid and post-apartheid).

<sup>130</sup> As the GTRC final report notes, any claims of bias do not automatically extend to the Commissioners themselves since they are chosen after the mandate is written: "Truth Commissions are victim-oriented – able to offer an outlet for people affected to tell their stories and to be heard in a new setting with new possibilities for understanding. But we [*i.e.*, the Commissioners] are not victim-biased: we operate independently of the influence of the victims and their supporters'. Greensboro TRC Report: Introduction, *supra* note 1 ch. 1, at 15.

work in the event that it was framed too narrowly or too broadly.<sup>131</sup> In Greensboro, the mandate begins by describing the context that led to the creation of the Commission, principally the damage to the ‘fabric of relationships’ in that community caused by the events in November, 1979.<sup>132</sup> It then sets out the goals for the process as the healing and reconciliation of the community through discovering and disseminating the truth of what happened and its consequences. It was hoped that this information would facilitate changes in social consciousness and in the institutions that were consciously or unconsciously complicit in these events, thus aiding in the prevention of similar events in the future.<sup>133</sup>

Establishing the mandate is a critical time for considering the human rights violations from a feminist perspective because it directs the focus of the investigation and the ultimate recommendations. The Greensboro mandate differed from the South African mandate, for instance, because the task was to investigate the specific events of one day, November 3, 1979, as well as considering what led up to and resulted from that event. In contrast, the South

<sup>131</sup> This is what happened to some extent in South Africa, where as previously noted three days of hearings were added to the TRC schedule to accommodate demands by women’s groups and academics to hear from women about the impact of apartheid, the violence against women, broken families, and the poverty and huge economic disparities faced by women. Unfortunately, as noted earlier, the addition of these three days of testimony, while valuable in giving a voice to women’s struggles, neither altered the narrower mandate of the truth commission nor resulted in broad recommendations or reparations for the black women who suffered so extensively under apartheid. See Andrews, *Learning*, *supra* note 48, at 50–52 (noting limitation of who were ‘official victims’ of apartheid as defined by the mandate for the South African TRC and thus the negative outcome this had on women); Adrien K. Wing, ‘A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women’, 60 *Albany L. Rev.* 943, 955 (1997) (noting that black women continued to be the most oppressed group in South Africa after the end of apartheid); Ashley J. Moore, ‘Endangered Species: Examining South Africa’s National Rape Crisis And Its Legislative Attempt to Protect Its Most Vulnerable Citizens’, 38 *Vanderbilt J. of Transnat’l L.* 1469, 1472 (2005) (describing the legal structure of apartheid which consigned black women to a subordinate class in society).

<sup>132</sup> The precise language is: ‘There comes a time in the life of every community when it must look humbly and seriously into its past in order to provide the best possible foundation for moving into a future based on healing and hope. Many residents of Greensboro believe that for this city, the time is now ... In light of the shooting death of 5 people and the wounding of 10 others in Greensboro, North Carolina on November 3, 1979, and In light of the subsequent acquittal of defendants in both state and federal criminal trials, despite the fact that the shootings were videotaped and widely viewed, and In light of the further investigations, passage of time and other factors which allowed a jury in a later civil trial to find certain parties liable for damages in the death of one of the victims, and In light of the confusion, pain, and fear experienced by residents of the city and the damage to the fabric of relationships in the community caused by these incidents and their aftermath, The Greensboro Truth and Reconciliation Project, including the signers of its Declaration, calls for the examination of the context, causes, sequence and consequences of the events of November 3, 1979.’ Greensboro TRC Report: Introduction, *supra* note 1, ch. 1, at 16.

<sup>133</sup> *Idem*; GTRC Mandate, *supra* note 119.

African TRC had the task of investigating the broad era of apartheid. However, even in Greensboro it would have been wise at the mandate setting stage to explicitly ask questions about how women in Greensboro, particularly those living in poor communities such as Morningside Homes where the events of November 3 occurred, were treated by various institutions both public and private. Explicitly recognizing that institutions such as the police, the justice system, employers, or the family often treat women differently from men would have been helpful in examining what happened in the Greensboro community.

The mandate also established the procedures for the process. It called for the GTRC to consist of seven Commissioners who were to be persons of recognized integrity and principle, with the majority being current residents of the Greensboro area but at least two from outside the area.<sup>134</sup> The selection process was established in 2003 and led to fourteen different groups each appointing a representative to a selection panel who worked independently of the project initiators. The selection panel received 67 nominations and from that group chose seven Commissioners of the GTRC.

As in South Africa, the mandate did not include specific mention of women or ask the GTRC to make recommendations about the impact of November 3, 1979 on the lives of individual women or women living in Greensboro today. Nor were any women's organizations asked to appoint a representative to the selection panel,<sup>135</sup> a decision that might explain why the mandate did not include a more feminist voice. On the other hand, women were very involved in the process as evidenced by the fact that five of the seven GTRC Commissioners chosen were women.<sup>136</sup>

#### 4.3. THE COMMISSION PROCESS

In making its recommendations, the GTRC focused not only on the people killed and wounded on November 3, 1979<sup>137</sup> but also on 'a much larger pool of victims

<sup>134</sup> *Idem.*

<sup>135</sup> The groups that did appoint members of the selection panel included local universities (Bennett College, Greensboro College, Greensboro Technical Community College, Guilford College, North Carolina Agricultural and Technical State University, and the University of North Carolina at Greensboro); the mayor of Greensboro; the Guilford Country Democratic and Republican Parties; the Christian, Muslim, and Jewish communities; and others. Selection Process for the Greensboro Truth and Reconciliation Commission, available at [www.greensborotrc.org/selection\\_process.php](http://www.greensborotrc.org/selection_process.php).

<sup>136</sup> See The Commissioners, [www.greensborotrc.org/commissioners.php](http://www.greensborotrc.org/commissioners.php) (last visited 3 August 2012).

<sup>137</sup> Nevertheless, at each public hearing there were five roses placed on five empty chairs in the hearing room and recognition that five people had died on November 3.

who they felt should also be recognized in their individuality and worth'.<sup>138</sup> This was in line with the Commission's mandate and reflected the fact that twenty-five years had passed since the events themselves. Surviving family members and other demonstrators who suffered grievous personal loss that day were one focus of the Commission to the extent that the final report called for the police department and others involved to apologize to the victims, the City to issue a proclamation that 'lifts up the importance of that date' in its history, and local religious leaders to facilitate a healing workshop or retreat for the children of those directly involved in the events of November 3.<sup>139</sup>

The bulk of the Commission's attention was directed to a broader set of 'victims', particularly the low-income and African American residents of Greensboro, especially those who lived in Morningside Homes and who were made to feel they were being punished for living in that neighborhood on November 3. Members of these two groups plus outside experts testified about repeated police mistreatment, the City government's refusal to desegregate public facilities, and more general harms that resulted from racism and poverty.<sup>140</sup> As a result, the process also documented the widespread racial and economic harms suffered throughout the City that led up to that tragedy and continued afterwards. What was absent from this approach was a focus on women as a group.

Part of the mandate was to put the events of November 3, 1979 in a larger context to help explain why they occurred and what happened as a result. The Commission held three public hearings and in addition received testimony from numerous other witnesses outside the formal sessions. The first hearing focused on the period from the 1950's through the 1970's both in North Carolina and elsewhere in the South that led up to the events of November 3, 1979. Speakers described the history of labor organizing, the struggle against racism and poverty, and the history of the KKK and anticommunists.<sup>141</sup> The second hearing reviewed the actual events on November 3 while the third focused on the legacy afterwards with speakers talking about racial bias in the justice and education systems and the need for a police force responsive to all neighborhoods.<sup>142</sup>

One of the more unusual aspects of the GTRC was that it was formed by a grassroots effort with no legal authority or mandate from a legislative body or

<sup>138</sup> Magarell and Wesley, *supra* note 120, at 214.

<sup>139</sup> Greensboro TRC Report: Recommendations, *supra* note 1, at 200. Another recommendation relating primarily to survivors and the victim's families was that a monument to commemorate the event be built.

<sup>140</sup> Magarell and Wesley, *supra* note 120, at 215.

<sup>141</sup> *Idem*, at 209.

<sup>142</sup> *Idem*, at 217.

executive decree.<sup>143</sup> As such, it lacked subpoena power to compel testimony and fill gaps in information that most, but not all, international truth commissions had including its model in South Africa. The GTRC final report notes, however that 'a subpoena is no guarantee that complete or truthful information will be produced. Moreover, we believe that the voluntary offering of statements by many parties who were openly suspicious or hostile to our process is more meaningful than forcing statement givers to the table'.<sup>144</sup>

There have been other privately sponsored truth processes that have functioned, like Greensboro, in the same manner as official commissions but which arose out of a lack of trust in or response from government.<sup>145</sup> Perhaps surprisingly, whether a truth commission is governmental or not does not seem crucial in determining the impact of its process. What seems most important is that the Commission itself be independent so that the community owns and trusts its process, people feel all sides of a story are heard, the truth is fully investigated, and the conclusions lead to some form of action.<sup>146</sup> In my opinion, even without subpoena power, the GTRC maintained its independence and succeeded in eliciting statements from people with many viewpoints, including testimony from two KKK members involved in the events of November 3, 1979.

As discussed earlier, South Africa was a model for the Greensboro process in part because of the admiration, trust, and affinity that many of the organizers of the Local Task Force felt for the South African struggle for racial equality. The Task Force also embraced the concept of reconciliation and was housed at the Beloved Community Center in the African American community that had a strong religious foundation and belief in truth and forgiveness. Archbishop Tutu of South Africa supported the process by meeting with the local community and Task Force during its formation, as did the Reverend Bongani Finca, a minister

<sup>143</sup> See Greensboro TRC Report: Introduction, *supra* note 1, ch. 1, at 10. Examples of government mandated truth commissions include Argentina, Chile, El Salvador, Guatemala, Peru, East Timor, Ghana, Sierra Leone, and Morocco.

<sup>144</sup> *Idem*, at 28. The GTRC also lacked the power to grant amnesty to anyone admitting to the commission of a crime which was central to the South African TRC process. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available at [www.justice.gov.za/legislation/acts/1995-034.pdf](http://www.justice.gov.za/legislation/acts/1995-034.pdf).

<sup>145</sup> See Greensboro TRC Report: Introduction, *supra* note 1, ch. 1, at 11. The GTRC report gives the example of the Ardoyne community of Northern Ireland where almost 100 people died in North Belfast and victims families were dissatisfied with official inquiries.

<sup>146</sup> See e.g. Reconciliation Australia, [www.reconciliation.org.au/](http://www.reconciliation.org.au/) (last visited 17 November 2008). Reconciliation Australia serves as an example of a truth commission that investigated an abusive policy. This Commission examined the removal of aboriginal children from their homes to be brought up in the Anglo culture. In Sydney Australia in May 2000, 250,000 people walked across the Sydney Harbor Bridge to support the truth and reconciliation process on a National Sorry Day. Reconciliation Timeline, [www.reconciliation.org.au/home/reconciliation-resources/significant-events--anniversaries/reconciliation-timeline](http://www.reconciliation.org.au/home/reconciliation-resources/significant-events--anniversaries/reconciliation-timeline).

and former South African truth commissioner who gave advice, moral support, and affirmation of the importance of a truth process to the healing of a community. Each public hearing began after a service of prayer and reconciliation for those who wanted to attend.

Finally as to process, the GTRC noted in its conclusions that an individual's perception of the weight of evidence is likely to differ based on that person's life experience.<sup>147</sup> The Commissioners recognized that they too were influenced by their own life experiences, an insight shared by members of other TRC's.<sup>148</sup>

This phenomenon makes it even more surprising that women's concerns were not focused upon separately given how many Commissioners were women. There is no way to know exactly why this occurred but some speculation is possible. First, race and economic justice were the focus of the Communist Worker's Party and the local groups who organized both the march on November 3 1979 and later the GTRC process. It makes sense therefore that these issues would dominate the process from the beginning, especially the writing of the mandate.

The 1970's were also a time when concern about gender inequality was just beginning to take root in this country so there may not have been women's groups and a strong feminist consciousness. Even in the 1990's and later when consciousness on women's issues had been significantly raised, they would not be separately included in truth commission processes unless they were focused upon during the planning stages including the delivery of training on gender for staff and prospective commissioners. A comparison between the experiences in South Africa and Sierra Leone demonstrates this point clearly.

Women's issues were not completely ignored in Greensboro since the recommendations did include the need for the institution of a living wage for all City and county employees, and such an advance would almost certainly affect women more than men since women earn less on average than men and single mothers are more likely to be exploited as cheap labor.<sup>149</sup> Nevertheless, the failure to address such concerns as violence against women, reproductive rights, sexual harassment and wage inequality in the workplace represents a lost opportunity to bring attention to and make specific recommendations designed

<sup>147</sup> See GTRC Executive Summary, *supra* note 116, at 301.

<sup>148</sup> See Buergenthal, *supra* note 99, at 524–25, 543.

<sup>149</sup> The section of the report where this recommendation is made is entitled 'Citizen Transformation/Engagement Section'. It makes reference to issues of poverty, oppression, labor, race, capital, privilege, and justice. Greensboro TRC Report, *supra* note 1, at 206. It is both significant and revealing that gender was not added to this list.

to alleviate gender inequalities in Greensboro, particularly those experienced by black women.<sup>150</sup>

#### 4.4. THE FINAL REPORT, RECOMMENDATIONS, AND IMPACT IN GREENSBORO

Given that the GTRC issued its report in 2006 after two years of work, it is still too early to fully assess what it accomplished. Different writers have laid out criteria for evaluating the work of truth commissions but the key question appears to be whether a Commission accomplished the goals set forth in its mandate.<sup>151</sup> In Greensboro this meant that the Commission had to: uncover the truth about the events of November 3 and what led up to them; investigate the impact those events have had since 1979; and promote meaningful reconciliation in Greensboro so that future human rights abuses will be avoided. In assessing the GTRC's performance in reaching these goals, I believe it was successful in several respects. It did clarify what happened on November 3, 1979 and gave voice not only to the immediate victims of the attack but, more importantly, to many other survivors of those events which has spurred greater organizing in the low-income community. It also documented the ongoing racial divides in the City,<sup>152</sup> and it helped change the climate enough in Greensboro that in 2006 the serving police commissioner was forced to resign after investigation and the City elected its first African American mayor in 2007. However, many of its recommendations for institutional change have not yet been implemented so its final impact on the City of Greensboro is less clear. Each of these areas will be expanded upon below.

<sup>150</sup> The GTRC found that the events of November 3 were about race and class. *Idem*, at 22. As discussed earlier, I believe the process and recommendations would have benefitted by also looking through a gender lens. For example, the report found that the organizations involved in the November 3 events were ones of top-down leadership, a style which is normally much less representative of women and their point of view. In fact, according to the final report, the decision to go ahead with the march ignored some of the voices of the residents of Morningside Homes who did not want the 'Death to the Klan' rally in their community. Moreover, it was the men on both sides who made the most provocative statements leading up to the clash on November 3, and the violence was undertaken by men only on the Klan's side and primarily by men among the marchers. This parallels the typical 'conduct of violence and war [which] is predominantly male ...'. Fionnuala Ni Aolain, 'Political Violence and Gender During Times of Transition', 15 *Colum. J. of Gender & L.* 829, 839 (2006).

<sup>151</sup> See P.B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002); Magarell and Wesley, *supra* note 120.

<sup>152</sup> For example, it completed a survey in 2004 which revealed that 70 percent of the African Americans and 49 percent of white people in the city who were aware of the events of November 3 believe they were still feeling its effects. Magarell and Wesley, *supra* note 120, at 218.

In its entirety, the two-year process included extensively researching all of the known sources about what led to and what happened on November 3; holding three day-long public hearings; collecting statements from all interested groups and parties including going door to door to get 145 statements from community members;<sup>153</sup> and writing of the Final Report. The latter, which was officially received by forty-seven official and community groups, succeeded in not only uncovering many facts about November 3, 1979 that had previously not been revealed in two criminal trials, but also in creating a public record about the ongoing racial tensions in the community and their causes. After providing substantial support by attending the hearings and working on the process, a reenergized low income community has continued to try to implement some of the Commission's recommendations including developing and distributing a curriculum that can be used both in the schools and with other groups that teach about the events of 1979, the racial and economic divisions in Greensboro, and ways to bring about greater understanding and change. All this work seems to have contributed to reduced tensions in the City.

With regard to accountability and institutional reform, the Final Report included many recommendations that have largely been ignored by local authorities. There has been partial success, however, concerning the investigation of possible racial bias in the justice and police departments.<sup>154</sup> In 2005, while the Commission was investigating this issue, stories appeared in the press about allegations of high-level misconduct in the Greensboro Police Department including racial profiling and the alleged harassment of a black officer. Then, in January 2006 when the Commission was preparing its report, the findings of an internal investigation were leaked to a local newspaper that disclosed a double standard concerning the discipline of white and black officers; that one or several meetings of the Local Task Force that created the Commission were recorded by an undercover member of the GPD; and that several Greensboro citizens were the subject of clandestine police surveillance including GTRC's Executive Director, Jill Williams, and Nelson Johnson, the most prominent leader in the low-income community and a participant in the 1979 march. As a result, the police chief was forced to resign.<sup>155</sup> One local leader was of the opinion that the internal investigation would not have been undertaken but for the one being conducted by the GTRC, and it seems clear that the Commission's efforts 'burst

<sup>153</sup> In addition to community members, these included a judge, several prosecutors and attorneys involved in the trials, current or former police officers, and current or former members of the Klan or Nazi party. *Idem*, at 84–5.

<sup>154</sup> One of the recommendations related to the police that has not been acted upon was that a community justice center be established in Greensboro and incorporated into the criminal justice system to allow for a restorative justice approach. Greensboro TRC Report: Recommendations, *supra* note 1, at 204–05.

<sup>155</sup> Magarell and Wesley, *supra* note 120, at 219.

the bubble of belief in police good faith that many in the community held dear'.<sup>156</sup>

Another way the GTRC's truth seeking process has likely had impact relates to its findings about the performance of the justice system after the tragedy on November 3<sup>rd</sup>. Thus, after it gathered information on the federal and local criminal trials in 1979 that resulted in acquittals of those who did the shooting by all white juries, the Commission concluded that 'when the justice system fails to find people responsible when wrongs were committed, it sends a damaging signal that some crimes will not be punished'.<sup>157</sup> The Commission went on to say that 'the majority of us believe that the system is not just randomly imperfect; rather, it tends to be disproportionately imperfect against people of color and poor people'.<sup>158</sup>

Similarly, after stating that reconciliation is not a goal but a process,<sup>159</sup> the Commission recommended that the Greensboro Police Department and the city apologize for their failure to protect the public and improve the living conditions of its most disadvantaged citizens.<sup>160</sup> While this has not formally happened,<sup>161</sup> just the fact that this investigation, including the taking of testimony, was reported and debated in both local and national media and other local forums cannot help but have an ameliorative effect on the goal of bringing about community change, particularly social and economic justice.

In fact, there is now some ground for optimism as to whether the City will consider the Final Report, a precursor to it issuing a formal apology. This action was out of the question in early 2007 when the mayor revealed that he and four other white city council members had decided to ignore a July 2006 agreement for him to draft a formal response to the report. This changed in November of 2007 when one of the black councilors who was angered by this decision, Yvonne Johnson, was elected mayor. Unlike her predecessor, Mayor Johnson said in 2008 that many city councilors were reading the Report and were open to considering its recommendations.<sup>162</sup>

<sup>156</sup> *Idem*, at 220.

<sup>157</sup> GTRC Executive Summary, *supra* note 116, at 16.

<sup>158</sup> *Idem*.

<sup>159</sup> 'For reconciliation to be effective, structural injustices present prior to a conflict must be addressed'. Magarell and Wesley, *supra* note 120 at 226.

<sup>160</sup> For example there was extensive testimony on the way city government had failed to desegregate public facilities and pay attention to low-income neighborhoods.

<sup>161</sup> On 16 June 2009, the Greensboro City Council finally came just short of an apology, expressing 'regret' over the events of 3 November 1979 and pledging 'to help the city heal'. Amanda Lehmert, 'Council Expresses Regret over '79 Shootings', *News & Record* 17 June 2009, available at [www.news-record.com/content/2009/06/16/article/council\\_expresses\\_regret\\_over\\_79\\_shootings](http://www.news-record.com/content/2009/06/16/article/council_expresses_regret_over_79_shootings) (last visited 12 September 2010).

<sup>162</sup> Magarell and Wesley, *supra* note 120, at 227.

Finally the GTRC increased participation in a process of truth seeking and created a new narrative about the events of November 3. In that way it helped to reveal injustice, break through denial, and possibly achieve greater acknowledgment of the underlying structures that create divisions. The Greensboro Commission process therefore has already accomplished some of its key goals even if not from a gender perspective.

## 5. BEYOND GREENSBORO

Truth commissions have generally been established in emerging democracies that want to make peace with their troubled histories by uncovering the facts of what happened, providing justice to victims, and restoring and rebuilding communities.<sup>163</sup> The GTRC differs from this pattern in two important respects. First it demonstrates that truth commissions can be useful in addressing human rights violations that occur in a mature democratic country such as the United States. Moreover, it shows that a truth commission can be helpful when it examines a single event or transitional justice in one city. In those instances it can serve as an 'entry point for larger shifts in policy and attitudes and as a way to achieve justice that is long overdue'.<sup>164</sup>

To be effective truth commissions need a clearly defined focus whether it consists of specific types of violence or a pattern of acts that require clarification.<sup>165</sup> In South Africa, the focal point was the violation of human rights committed by the apartheid government and its secret operatives, and to a much lesser extent, by the opposition. Greensboro, on the other hand, focused on one violent incident and the events leading up to and surrounding it. The commonality in these and other truth commissions is that they responded to a pressing need to recognize the injustices that went before and to rebuild relationships between the state and its citizens.<sup>166</sup>

A truth commission's level of success depends in large part on how prepared the impacted community is to enter into the process.<sup>167</sup> This requires first that the violent conflict, war, or repressive practices that led to the human rights violations must have come to an end. Equally as important, the victims and

<sup>163</sup> Jean Ferguson, 'Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation', 4 *Crim. L. Brief* 3, 10 (Summer 2009).

<sup>164</sup> Magarell and Wesley, *supra* note 120, at 235 (2008).

<sup>165</sup> *Idem*, at 242. In some cases, both local and national components can be addressed if there are both local and national components to the issues being addressed by the TRC. *Idem*, at 243.

<sup>166</sup> *Idem*, at 233.

<sup>167</sup> These criteria are outlined by Lisa Magarell and Joya Wesley, *supra* note 120, at 235.

witnesses must be interested in uncovering the truth. Finally, and perhaps most importantly, the community must have the ‘political will to allow and, hopefully, encourage or actively support a serious inquiry into past abuses’.<sup>168</sup> If, for example, one or more of the key constituencies believes that no problem exists or that it does not affect them, or that a truth commission will be ineffective in addressing the problem, community-building and reconciliation becomes very difficult. Beyond victims and perpetrators, those key constituencies generally include social service groups, political leaders, judges and lawyers, and government agencies. The experience in Greensboro demonstrates the importance of building community consensus that includes the political leaders since their lack of support or even cooperation prevented that Commission from fully investigating the local government’s role in the events on November 3 and their aftermath. Moreover, community and government support is needed to provide both the human and financial resources required by a truth commission.

An effort to combine these factors is currently underway in Mississippi. There a grassroots movement has created the Mississippi Truth Project (MTP) in order to uncover the truth about racially motivated crimes and injustices committed in that State between 1945 and 1975. In a pattern somewhat similar to Greensboro, this effort was begun by the Mississippi Coalition for Racial Justice, a group that consists of the leadership from diverse faith and social communities and organizations. In an attempt to build the level of community consensus needed to support a truth commission, the Coalition held meetings and discussions throughout the State for three years beginning in 2005 with civil rights veterans, scholars, non-profit organizations, and community members. In April 2008, this effort culminated in the establishment of the MTP.<sup>169</sup>

Even though the work of composing a mandate and seating a commission is currently underway, the Project continues to reach out to individuals and community groups in order to increase support. Thus it began to engage the media in early 2009 in order to further educate the community about its efforts. It also has established a series of small group retreats called ‘The Welcome Table’, which are offered to Mississippians ‘who are dedicated to fostering positive change in their community’.<sup>170</sup> In this way those leading the Welcome Table sessions hope to build a ‘cadre of citizens’ who will help implement the MTP’s recommendations well beyond the completion of its work.<sup>171</sup> This innovative approach extends also to the development and dissemination of a new curriculum that teaches civil and human rights history in all Mississippi K-12

<sup>168</sup> *Idem*, at 235.

<sup>169</sup> The Mississippi Truth Project, [www.mississippitruuth.org](http://www.mississippitruuth.org) (last visited 1 November 2010).

<sup>170</sup> The Welcome Table, [www.mississippitruuth.org/pages/welcome-table.htm](http://www.mississippitruuth.org/pages/welcome-table.htm) (last visited 1 November 2010).

<sup>171</sup> *Idem*.

classrooms.<sup>172</sup> The objective is to educate a generation of Mississippians who already value inclusion and justice and who want to work to achieve those ideals.<sup>173</sup>

It is clear that the organizers of the MTP learned from the experience in Greensboro. Perhaps most importantly they understood they needed to build the political support necessary for the Project so they reached out to public officials to attend the meetings held throughout the State. This seemed to work as evidenced by the legislative support given to developing the new curriculum. The Mississippi organizers also understood the need to motivate potential witnesses and victims to participate in the truth process which was one of the goals of its education efforts, particularly the Welcome Table sessions. One innovation they added to the process was to reach out to the community for oral histories rather than simple statements which should enhance the truth finding effort. Finally, there were at least two other lessons learned from Greensboro and elsewhere. The first was to seek the involvement of academics and researchers to document and interpret patterns of discrimination. Second, like Greensboro's decision to focus mainly on a past event, the MTP organizers made the strategic decision to limit its inquiry to the period between 1945 and 1975. Although it can be argued that there is still ongoing racial injustice in Mississippi, this choice likely reduced resistance because current officials would not be investigated, and also allowed the Project to meet the requirement for truth commissions listed earlier that they only investigate repressive practices that occurred in the past.

A comparison of the Greensboro and Mississippi experiences – even though the latter is still underway – demonstrates that the truth commission process can address a wide array of abuses and human rights violations in a mature democracy such as the United States. The impetus seems to come from a distrust of mainstream systems. For example, I believe truth commissions could be used successfully to address the failure of the state to protect all of its citizens; explore violence of a specific nature and the impact of that violence on the local community; or remedy the failure of the justice system to bring responsible parties to account. More specifically this could apply to police officers' failure to equally protect certain neighborhoods in a community or to racially profile; a city council's long term failure to provide adequate services to particular neighborhoods; or the actions of private individuals and groups, often with the tacit or express complicity of state authority, such as a series of lynchings committed by white supremacists.

<sup>172</sup> Teaching Civil Rights History in Mississippi, [www.mississippitruth.org/pages/CR-education.htm](http://www.mississippitruth.org/pages/CR-education.htm) (last visited 1 November 2010).

<sup>173</sup> Coming Full Circle, [www.mississippitruth.org/pages/full-circle.htm](http://www.mississippitruth.org/pages/full-circle.htm) (last visited 1 November 2010).

More to the point of this chapter, truth commissions could also focus on human rights violations experienced primarily by women. As an example, I would like to examine the possibility of a truth commission addressing the problem of domestic violence.

## A TRUTH COMMISSION ON DOMESTIC VIOLENCE

Establishing a truth commission on domestic violence presents a series of problems beyond those encountered by past examples. One is that unlike other human rights violations that take place in the public sphere and are therefore more visible to the community, domestic violence normally takes place in the privacy of the home. Similarly, at least the *initial* perpetrators are not a finite and identifiable group such as the police or a City Council. They are individuals spread out through all groups and all classes in society.<sup>174</sup> A third major obstacle is that for a variety of reasons including shame, the threat of retaliation and the desire to 'keep her man', women often refuse to come forward to complain about treatment. And since domestic violence is ongoing, it does not seem to fit the standard truth commission model of investigating past events only.

All of these obstacles are serious but not insurmountable. The process can begin with research and data collection as with other efforts. By now knowledge of the key statistics are relatively widespread such as that there are an estimated 960,000 incidents of violence against a current or former spouse, boyfriend, or girlfriend every year in the United States, approximately 85% of which are directed towards women.<sup>175</sup> Indeed one in four women has or will experience domestic violence in her lifetime.<sup>176</sup> What will be hard is to educate those who classify domestic violence simply as 'a serious social evil',<sup>177</sup> to consider it a

<sup>174</sup> For a discussion of other potential perpetrators of the harm, see the discussion accompanying notes 182–186 *infra*.

<sup>175</sup> Callie Marie Rennison, U.S. Dep't of Just., NCJ 197838, *Bureau of Justice Statistics Crime Data Brief: Intimate Partner Violence, 1993–2001*, at 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>.

<sup>176</sup> Domestic Violence Resource Center, Domestic Violence Statistics, [www.dvrc-or.org/domestic/violence/resources/C61](http://www.dvrc-or.org/domestic/violence/resources/C61) (last visited Oct. 31, 2010) (citing The Centers for Disease Control and Prevention and The National Institute of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence*, July 2000). As dire as these statistics sound, women in poverty are at even higher risk of violence from their partners. Reports indicate that 20–30 percent of women who are receiving cash assistance from welfare rolls are in violent relationships and two-thirds have experienced intimate violence at some point of their adult lives. Patricia Cole and Sarah M. Buel, 'Safety and Financial Security for Battered Women: Necessary Steps for Transitioning From Welfare to Work', 7 *Geo. J. Poverty Law & Pol'y* 307, 312 (2000).

<sup>177</sup> Bonita C. Meyersfield, 'Reconceptualizing Domestic Violence in International Law', 67 *Alb. L. Rev.* 371, 383 (2003) (citing Domestic Violence Act No. 116 of 1998, pmbl., (S. Afr.)).

violation of human rights.<sup>178</sup> The general belief that domestic violence is ‘conduct between intimates’<sup>179</sup> and a ‘lover’s quarrel’<sup>180</sup> that should be relegated to the private sphere must be countered with thorough education on how such violence ravages the very foundation of human rights through the infliction of pain, humiliation, and fear primarily to women.<sup>181</sup> The community must be made aware of how domestic violence ‘assaults life, dignity, and personal integrity ... and transgresses basic norms of peaceful coexistence’, violating the woman’s rights as a human.<sup>182</sup>

With regard to the problem of getting women to testify, clearly outreach efforts at least as creative as those in Mississippi will be necessary. As stated above, victims of domestic violence, even those who have extricated themselves out of violent relationships, will often be afraid and even ashamed to speak of their experiences, especially without any assurance of safety or, more importantly, that their words will be useful to putting an end to the problem. One useful step to overcome this obstacle would be to institute a method of providing anonymity to witnesses similar to the methods used in the women’s hearing in South Africa.

Then there are the other witnesses who know something about the abuse such as public authorities, which includes law enforcement officers, prosecutors, and judges, but also doctors, social workers, the media, religious institutions, neighbors, and the members of the immediate family of both the woman and her batterer. Members of these groups may feel guilt for their failure to assist women

<sup>178</sup> This is the position of mainstream human rights organizations that refuse to consider domestic violence as a human rights issue. The most common reason given to refuse to include domestic violence as a part of international human rights law is that such acts of violence are ‘isolated incidents of harm by individuals against individuals, with no state or structural component’. *Idem*, at 398.

<sup>179</sup> *Idem*, at 384. The irony of the reluctance of international human rights organizations to raise domestic violence to the level of a human rights violation is that at least the most severe forms of domestic violence conform to the definitions of official torture in international conventions, being composed of the same physical and psychological elements. One such definition of torture is: ‘The intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.’ Rome Statute of the Int’l Crim. Court, Article 7(2)(e), 17 July 1998, 37 I.L.M. 999, available at [www.un.org/law/icc](http://www.un.org/law/icc) (last visited 31 October 2010). The parallel with domestic violence is readily apparent and, were it not confined to the ‘private’ sphere of the familial and the domestic, the sphere relegated to women, there would be a great outcry for human rights organizations everywhere to fight these violations.

<sup>180</sup> Meyersfield, *supra* note 177, at 382–83.

<sup>181</sup> Romany, *supra* note 24, at 85. A similar plea has been made by others. See Dorothy Q. Thomas and Michele E. Beasley, ‘Domestic Violence as a Human Rights Issue’, 58 *Alb. L. Rev.* 1119, 1120 (1995) see DV as attacking ‘the inherent dignity and worth of all members of the human family, the inalienable right to freedom from fear and want, and the equal rights of men and women’.

<sup>182</sup> Meyersfield, *supra* note 177, at 393 (internal quotations omitted).

who have experienced violence at the hands of their partners and for turning a blind eye to the problem. These witnesses must also be made confident that exposing their inaction will serve a purpose in creating an environment where domestic violence can be eradicated and where true reconciliation and effective 'community building' can take place.

Related to the above problem is the common belief that only the person inflicting the violence is a perpetrator. This viewpoint does not see that state actors are implicated in an act of domestic violence when they acquiesce to or ratify it. Examples would be police officers, prosecutors, and judges who fail to adequately respond when a woman has been brutally beaten by her partner. Such failures make the state an accomplice and therefore partially responsible for the act itself.<sup>183</sup> One common failure is the policy and custom of engaging in disparate responses to domestic violence as compared to other assault cases.<sup>184</sup> Indeed, it can be established that violence against women is so widespread precisely because the state responds discriminatorily to crimes of violence based on the gender of the victim.<sup>185</sup> Consequently, the community must come to understand and support the proposition that even though domestic violence occurs in the

<sup>183</sup> Romany, *supra* note 24, at 100.

<sup>184</sup> *Idem*, at 100–01. This rationale was utilized in some US cases to find municipalities liable for their inaction. See, e.g., *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978); *Watson v. City of Kansas*, 857 F.2d 690 (10<sup>th</sup> Cir. 1998). There is also international precedent holding a state responsible for acts not carried out explicitly by agents of the government if by its actions or inactions it fails to prevent the violation and to punish those responsible. A state has a duty to make a good faith effort to investigate and prosecute violators of rights and to compensate victims for their injuries. This requires that states perform due diligence by establishing 'reasonable measures of prevention that a well administered government could be expected to exercise under similar circumstances'. See Romany, *supra* note 24, at 101–3 (discussing *Velásquez Rodríguez v. Honduras*, 28 I.L.M. 294 (1989), decided by the Inter-American Court of Human Rights). Liability ensues when a state fails to 'take reasonable steps to prevent or respond to an abuse' due to a 'failure to exercise due diligence and to provide equal protection in preventing and punishing such abuses by private individuals'. Amnesty Int'l, *Broken Bodies, Shattered Minds: Torture and Ill-Treatment of Women* 6, AI Index ACT 40/001/2001, 8 March 2001, available at <http://web.amnesty.org/library/index/engact400012001>. In the case of domestic violence, such a standard would find states responsible for the acts of individuals when they fail to 'protect their female citizens' rights to physical integrity and, in extreme cases, to life' which sends the message to abusers that their attacks 'are justified and will not be punished;' to avoid being complicit, states must take 'active measures to protect, prosecute and punish private actors who commit abuses'. Meyersfield, *supra* note 177, at 410 (citing Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences 9–10, UN ESCOR, 52d Sess., U.N. Doc. E/CN.4/1996/53 (1996)).

<sup>185</sup> See e.g. Charlesworth, *supra* note 5, at 72 (describing Women's Rights Project of Americas Watch documentation of three types of violence against women in Brazil, wife-murder, battery, and rape that are subject to discriminatory non-prosecution and even overtly accepted in some cases). See also Romany, *supra* note 24, at 103–4 (discussing how law enforcement in Brazil rarely investigate wife murders fully, how police and prosecutors charge wife-murderers with lesser crimes, and how the criminal justice system sanctions defenses that reduce the punishment or absolve the perpetrator).

‘invisible’ private sphere of the home ‘when women’s human rights are infringed by private actors in the context of male violence against women, such acts are attributable to the state’.<sup>186</sup>

Effective truth commissions also require that there be an end to the conflict that is the subject of its investigation. Some might argue that such a point has not been achieved in the area of domestic violence, and that perhaps it cannot be achieved. However, this objection can be overcome, as it was in Mississippi, by centering the commission’s investigation on a time-limited period in the past, or as in Greensboro around one event of domestic violence that has rocked the community and that has come to an end, perhaps one that has ended tragically.<sup>187</sup> Such an event can also serve as a focal point for the truth commission to investigate how the system and the community as a whole failed to prevent the violence and assist the woman. Since these failures exist in virtually every case of domestic violence, the findings of the truth commission and its recommendations will generally be applicable in all cases of domestic violence and can be implemented by local government and community agencies.

As described in the above discussion, successfully holding a truth commission on domestic violence would be an enormous and complex task. It can be undertaken only if all of the key actors in the community are willing to support and participate in such an effort. Arriving at such a position will require overcoming considerable ignorance, gender bias, fear and shame. Nevertheless this can be achieved with proper planning and education plus the provision of enough time and resources. What cannot be denied is that recognizing and addressing human rights violations that pertain primarily to women’s experiences is long overdue.

## 6. CONCLUSION

Truth commissions are ‘a useful model’ and ‘heartily recommended’ for the purpose of reconciling communities ‘around tragic, unjust events in their own histories’.<sup>188</sup> This makes the truth and reconciliation process useful for dealing with the chaos of dramatic political change and the challenge of addressing the aftermath of massive human rights abuses in societies that are in transition.

<sup>186</sup> Romany, *supra* note 24, at 98.

<sup>187</sup> Those that have ‘ended’ would include the most awful when the woman was murdered, but they could also include situations where the couple is separated or divorced or the perpetrator is in jail. Anonymity may still need to be provided to any witness who feels there might be a risk involved.

<sup>188</sup> Magarell and Wesley, *supra* note 120, at 241 (citing Greensboro TRC Report, *supra* note 1, at 390).

What the Greensboro and Mississippi experiences demonstrate is that truth commissions are also a useful tool for reconciling communities that have experienced human rights abuses in mature democracies and on a smaller scale. In that context, truth commissions can be an effective way to assist a community in moving 'toward a deeper understanding of past injustice and long term social change'.<sup>189</sup> Unfortunately, truth commissions to date, with the lone exception of the Sierra Leone TRC, have assumed that distinctions of gender are not a meaningful part of the transitional justice discussion. The result is a process where women and the violations endured by women are invisible. As long as truth commissions continue to focus on the violations committed only in the public sphere, they will continue to fail women and as a result they will fail to fully reconcile and rebuild their communities.

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<sup>189</sup> *Idem*, at 229.